An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-276

Filed: 18 October 2016

Mecklenburg County, No. 13 CRS 230122

STATE OF NORTH CAROLINA

v.

JEREMY ROSSCO BISHOP, Defendant.

Appeal by defendant from judgment entered 10 December 2015 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General L. Michael Dodd, for the State.

Marilyn G. Ozer for defendant-appellant.

ZACHARY, Judge.

Where there was ample evidence that defendant committed premeditated and deliberate first-degree murder, and there was no evidence from which the jury could rationally find defendant guilty of a lesser-included offense, the trial court did not err in denying defendant's request to instruct the jury on lesser-included offenses of that charge. Where defendant failed to show that, absent counsel's alleged error, the jury

would probably have reached a different verdict, defendant has failed to show ineffective assistance of counsel.

I. Factual and Procedural Background

In the early morning hours of 4 July 2013, Jeremy Bishop (defendant) purchased gas for his two-door, gray Ford Ranger pickup truck. The truck had white magnetic advertising signs on both doors. As defendant left the gas station's parking lot, two men on foot, the victim Che Matoorah (Matoorah) and Tony Blasco (Blasco), crossed in front of defendant's truck. According to Blasco, the truck almost struck Matoorah and him. As a result, defendant and the two pedestrians exchanged "hostile" words.

After the verbal exchange with defendant, Matoorah and Blasco proceeded to the gas station's convenience store, where they planned to buy cigarettes. Because of the late hour, convenience store patrons were required to make their purchases at a service window, so Matoorah and Blasco joined a line that stretched back to the parking lot. Meanwhile, defendant exited the parking lot, turned his truck around, and returned to the gas station. Defendant then parked his truck beside Matoorah and Blasco. A black truck also entered the gas station and parked in a space nearby. Matoorah, who was unarmed, approached the front driver's side window of defendant's truck with his hands behind his back. No more than two feet separated defendant and Matoorah as they spoke to each other. Although Blasco stood only six

to eight feet away, he could not hear the men's conversation. Suddenly, defendant aimed a small-caliber pistol out the window and shot Matoorah once in the left front shoulder. When Matoorah turned away, defendant fired a second shot, which hit Matoorah in the back of the neck at the top of his spinal cord. As Matoorah lay on the ground, the black truck's driver yelled to defendant, "Come on let's go, let's get out of here." Defendant backed up his truck and left the scene.

Soon thereafter, Matoorah underwent surgery at Carolinas Medical Center (CMC). Once the investigating officers reviewed video footage from the convenience store's security camera and checked the store's gas receipts, they identified defendant as a suspect. After Blasco spoke with investigators at the shooting scene, he went to CMC, where an officer presented him with a photographic lineup of possible suspects in the shooting. Blasco recognized defendant in the photo array and identified him as the man who shot Matorrah. Consequently, a warrant was issued for defendant's arrest, charging him with assault with a deadly weapon inflicting serious injury with intent to kill. Shortly after 2:00 a.m. on 5 July 2013, defendant was arrested during a traffic stop when an officer recognized defendant and served the warrant on him. At the time of his arrest, the magnetic advertising signs had been removed from defendant's truck. Matoorah died from his injuries on 24 July 2013.

Defendant was eventually indicted for the first-degree murder of Matoorah, and his trial commenced on 30 November 2015 in Mecklenburg County Criminal

Superior Court. Defendant moved to suppress the photographic lineup used by police to identify him. The trial court denied this motion. At trial, the State presented the testimony of several witnesses, including Blasco. The entire scenario at the convenience store was captured by the security camera video, which was introduced by the State without objection. At the close of the State's evidence, defendant moved to dismiss the murder charge, but the trial court denied the motion. Defendant declined to present evidence and renewed his motion to dismiss. Once again, the motion was denied.

The State moved that the jury be instructed only on the charge of first-degree murder. In response, defendant requested that the jury be instructed on first-degree murder, second-degree murder, voluntary manslaughter, and assault with a deadly weapon inflicting serious injury. The trial court denied defendant's request, and instructed the jury only on the charge of first-degree murder. After the jury found defendant guilty of first-degree murder, the trial court sentenced him to life imprisonment without the possibility of parole. Defendant appeals.

II. Lesser-Included Offenses

In his first argument, defendant contends that the trial court erred in denying his request to instruct the jury on the lesser-included offenses of first-degree murder based upon premeditation and deliberation. Defendant primarily argues that

because certain evidence negated the elements of premeditation and deliberation, the jury should have been instructed on second-degree murder. We disagree.

A. Standard of Review

The trial court is required to instruct the jury on a lesser-included offense "only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). We review *de novo* challenges to the trial court's decision on whether to instruct the jury on a lesser-included offense. *State v. Debiase*, 211 N.C. App. 497, 503-04, 711 S.E.2d 436, 441, *disc. review denied*, 365 N.C. 335, 717 S.E.2d 399 (2011). In conducting this review, we consider the evidence in the light most favorable to defendant. *Id.* at 504, 711 S.E.2d at 441. Even so, the trial court's refusal to instruct the jury on second-degree murder as a lesser-included offense of first-degree murder is proper " '[i]f the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense[.]' " *State v. Locklear*, 363 N.C. 438, 454-55, 681 S.E.2d 293, 306 (2009) (quoting *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986)).

B. Analysis

During the charge conference at trial, the State proposed that the trial court use North Carolina Pattern Jury Instruction 206.13, which defines and describes first-degree murder with the use of a deadly weapon not involving self-defense, to instruct the jury on the substantive charge. N.C.P.I. Crim. 206.13 (2014). The State noted that this instruction covers all lesser-included offenses, but requested that "there should be no lesser[-]included offenses instructed on." In response, defendant requested that the jury be instructed "on first-degree murder, second-degree murder, voluntary manslaughter, assault with a deadly weapon inflicting serious injury, and not guilty." After considering the parties' arguments, as well as the pertinent case law, the trial court ruled that "the evidence presented is sufficient as to each element of first-degree murder, and the evidence cited by the defense, which was elicited on cross-examination of the witnesses, is insufficient to negate the State's case on the elements of first-degree murder." The trial court therefore denied defendant's request to instruct the jury on lesser-included offenses.

"In order to convict a defendant of premeditated, first-degree murder, the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill [a human being] formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (citations omitted), *cert. denied*, 552 U.S. 1271, 170 L. Ed. 2d 377 (2008); *see also* N.C. Gen. Stat. § 14-17 (2015). "Premeditation means that the act was thought out beforehand for some

length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Bullock*, 326 N.C. 253, 257, 388 S.E.2d 81, 83 (1990) (citation omitted). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* (citation omitted). "[T]he term 'cool state of blood' does not mean an absence of passion and emotion. One may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time." *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991) (citations and some quotation marks omitted). Put another way,

> [a]n unlawful killing is deliberate and premeditated if done as part of a fixed design to kill, notwithstanding the fact that the defendant was angry or emotional at the time, unless such anger or emotion was strong enough to disturb the defendant's ability to reason. The requirement of a "cool state of blood" does not require that the defendant be calm or tranquil. The phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason.

State v. Hunt, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991) (citations omitted).

In that "premeditation and deliberation are processes of the mind[,]" they generally "are not subject to proof by direct evidence[.]" *Vause*, 328 N.C. at 238, 400 S.E.2d at 62. Rather, they "must be proved, if at all, by circumstantial evidence." *Id.*

> Among [the] circumstances from which premeditation and deliberation may be inferred are (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Id. (citation omitted).

On appeal, the gravamen of defendant's argument is that an instruction on second-degree murder was required because the State presented evidence that tended to negate the first-degree murder elements of premeditation and deliberation. Specifically, defendant notes that the evidence showed that, as defendant parked his truck, Matoorah approached defendant with his hands behind his back, which defendant contends could have permitted the jurors to believe that defendant felt threatened. Defendant also argues that the "hostile" words exchanged between Matoorah, Blasco, and defendant could have been sufficient to negate deliberation by inducing passion. According to defendant, this reading of the evidence suggests an ongoing hostility, rather than one that terminated when Matoorah and Blasco walked toward the convenience store, and it created an issue for the jury to consider as to whether the ongoing hostility induced sufficient passion in defendant to warrant reduction of the charge from first- to second-degree murder.

We find defendant's description of events to be inaccurately condensed. Defendant frames the sequence of events as though Matoorah and Blasco exchanged words with him, and then suddenly there was a shooting. In doing so, defendant emphasizes that the entire scenario, which was captured on video, occurred in less than three minutes. What defendant fails to acknowledge, however, is that there was an important time lapse between the "hostile" verbal exchange and the gun shots. Indeed, defendant returned to the gas station from which he had previously departed, parked his truck, drew his pistol, and shot Matoorah twice, once in the back. There was clearly a sufficient amount of time for defendant to act with premeditation and deliberation, it being axiomatic that "[n]o fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree." *State v. Walters*, 275 N.C. 615, 623, 170 S.E.2d 484, 490 (1969) (citation and quotation marks omitted). As recognized by our Supreme Court, "it is sufficient if these processes occur prior to, and not simultaneously with, the killing." *Id.* (citation omitted).

Our review of the record reveals that the State offered substantial evidence to support the jury's finding of premeditation and deliberation in the murder of Matoorah. By contrast, the evidence fails to show that any of Matoorah's actions rendered defendant incapable of deliberate thought or the ability to reason. Even when viewed in the light most favorable to defendant, no evidence presented at trial

suggests that defendant's actions were anything other than part of a fixed design to kill.

Circumstances surrounding a defendant's conduct before, during, and after a murder may indicate premeditation and deliberation. Those circumstances include:

> (1) entering the site of the murder with a weapon, which indicates the defendant anticipated a confrontation and was prepared to use deadly force to resolve it; (2) firing multiple shots, because some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger; (3) pausing between shots; and (4) attempting to cover up involvement in the crime.

State v. Taylor, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008) (citations and quotation marks omitted), *cert. denied*, 558 U.S. 851, 175 L. Ed. 2d 84 (2009).

Here, instead of reacting immediately to the "hostile" exchange, defendant left the gas station and then chose to return. Defendant carried a loaded pistol to the scene of the shooting, and he used it to resolve what could barely be called a confrontation. After briefly speaking with Matoorah, defendant fired two shots from a close range. The second shot hit the back of Matoorah's neck as he pulled away and attempted to escape from defendant. "[W]hen numerous wounds are inflicted, the defendant has the opportunity to premeditate and deliberate from one shot to the next." *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). This is true even when a gun "is capable of being fired rapidly[.]" *Id.* It is also significant that both shots were fired in the vicinity of

Matoorah's neck. *See id.* (noting that our Supreme Court has "repeatedly held that the nature and number of the victims' wounds are circumstances from which premeditation and deliberation can be inferred"). Defendant acted dispassionately after the shooting when he paused, briefly pointed his gun in Blasco's direction, and departed the scene. Moreover, at the time of his arrest, defendant had removed the advertising signs from his truck, which could support a finding that defendant was trying to conceal his actions.

All told, defendant's arguments, taken at face value, suggest at best that the jury might have found that defendant felt threatened by Matoorah's conduct and words. No evidence, however, supported a theory that defendant acted either in a fit of passion or as the result of legal provocation. Absent from the record is any evidence that negates premeditation and deliberation. Accordingly, defendant was not entitled to an instruction on second-degree murder or any other lesser-included offense, and his argument to the contrary is without merit.

We note further that a portion of defendant's argument on appeal concerns constitutional error. Specifically, defendant contends that his right to due process of law was violated by the trial court's alleged error in failing to instruct the jury as requested on lesser-included offenses. However, defendant did not raise this argument at trial. Our courts have consistently held that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on

appeal." *State v. Rawlings*, 236 N.C. App. 437, 443, 762 S.E.2d 909, 914, *review denied,* 367 N.C. 803, 766 S.E.2d 627 (2014) (quoting *State v. Tirado,* 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)); *see also State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999) (holding that an appellate court "is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court") (citation omitted). Because defendant failed to present his constitutional argument to the trial court, the issue has not been preserved for appellate review and we will not address it.

III. Ineffective Assistance of Counsel

In his second argument, defendant contends that he received ineffective assistance of counsel. We disagree.

A. Standard of Review

It is manifest that:

> ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing."

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citation omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005).

To prevail on a claim of ineffective assistance of counsel, a

> defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

B. Analysis

After the trial court determined that the jury would be instructed only on the charge of first-degree murder, counsel made their closing arguments. On appeal, defendant contends that defense counsel implicitly admitted defendant's guilt during closing argument, which defendant now maintains constituted ineffective assistance of counsel.[1]

Specifically, in closing, defense counsel said, "I contend to you that what ended up happening resulted from some kind of fear, provocation, whatever, a reaction, a decision, maybe regret it now. But it wasn't like my accusers say it was, it wasn't like that." Prior to this statement, defense counsel's arguments had been focused on

[1] We note that defendant does not make an argument pursuant to *State v. Harbison*, 315 N.C. 175, 179-80, 337 S.E.2d 504, 507-08 (1985) (holding that a *per se* claim of ineffective assistance of counsel is established where the evidence shows that the defendant's counsel admitted guilt to any charge without the defendant's informed consent).

discrediting the State's evidence and suggesting that defendant was not the shooter. Defendant maintains that this statement implied that defendant was the shooter, and was acting out of fear or provocation. Because the jury was only instructed on first-degree murder or not guilty, defendant contends that this implication, which was more suited to a second-degree murder instruction, constituted ineffective assistance of counsel.

Assuming, *arguendo*, that this statement constituted ineffective assistance, defendant has the burden on appeal of establishing that he was prejudiced by it, in that absent this statement, the jury probably would have reached a different outcome. Defendant contends that this statement, which implied that he was the shooter, took away his only defense and thus prejudiced him. However, that is not the case; a reaction out of fear or in self-defense serves to negate the premeditation and deliberation elements of first-degree murder. Defendant's contention that his only defense was to insist that he was not the shooter is baseless; any defense that challenges the elements of first-degree murder is a valid defense. Particularly relevant here is the fact that defense counsel never conceded that defendant shot Matoorah; rather, counsel prefaced the portion of his argument that is now being challenged with the following statement: "If you're convinced . . . this is the guy, let's make sure we put everything together to show this is the guy. But . . . you still need to prove the guy is guilty of . . . [premediated and deliberate] first-degree murder."

Furthermore, "[d]ecisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed" on appeal. *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). We refuse to hold that defense counsel's decision to propose a two-pronged defense, first that defendant was not the shooter, and second that he lacked premeditation or deliberation, was *per se* ineffective assistance. Nor has defendant demonstrated that, absent this particular argument, the jury would probably have reached a different verdict. Accordingly, we hold that defendant has not demonstrated ineffective assistance of counsel.

IV. Conclusion

Because no evidence negated the elements of premeditated and deliberate first-degree murder, the trial court properly refused to instruct the jury on lesser-included offenses. In addition, by failing to assert his due process argument at the trial level, defendant has waived this argument on appeal. Finally, even assuming defense counsel's performance was deficient, defendant has failed to establish prejudice and, as such, he cannot establish an ineffective assistance of counsel claim.

NO ERROR.

Judges ELMORE and ENOCHS concur.

Report per Rule 30(e).