IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1268

Filed: 17 December 2019

Pitt County, No. 17 CRS 55157

STATE OF NORTH CAROLINA

v.

JAMES EDWARD SMITH

Appeal by defendant from judgment entered 16 February 2018 by Judge J. Carlton Cole in Pitt County Superior Court. Heard in the Court of Appeals 8 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra M. Hightower, for the State.

W. Michael Spivey for defendant-appellant.

ZACHARY, Judge.

Defendant James Edward Smith appeals from a judgment entered upon a jury's verdict finding him guilty of solicitation to commit first-degree murder. Upon careful review, we conclude Defendant received a fair trial, free from error.

Background

On 20 July 2017, Defendant revealed to Clayton Edwards—an individual who Defendant had recently met through a mutual connection—that he wanted his wife to be killed, and he offered to pay Edwards to kill her. Defendant told Edwards to "basically kill her in cold blood, walk up and shoot her," and provided him with details

of where the killing should take place. These requests continued over the next three days.

Edwards contacted Pitt County Crime Stoppers and informed them that he "had information on someone who wanted someone killed." In conjunction with the Greenville Police Department, Edwards scheduled a meeting with Defendant for 23 July 2017, during which Edwards would wear audio and video recording devices. At the meeting, the two men spoke "more in depth about what [Defendant] wanted [Edwards] to do."

Later that day, a Greenville police officer served Defendant with an arrest warrant for solicitation to commit first-degree murder. Two weeks later, the Pitt County grand jury returned an indictment formally charging him with the same offense. Defendant's case came on for trial before the Honorable J. Carlton Cole in Pitt County Superior Court on 12 February 2018. After a four-day trial, the jury found Defendant guilty of solicitation to commit first-degree murder, a Class C felony. The trial court sentenced defendant, a prior record level I offender, to a presumptive term of 73 to 100 months in the custody of the North Carolina Division of Adult Correction. Defendant gave notice of appeal in open court.

Discussion

Defendant's brief states the issue presented as follows: "The trial court erred by sentencing [Defendant] for a Class C felony where the jury convicted [him] for

solicitation to commit second-degree murder but did not determine the nature of the element of malice." To properly analyze Defendant's appeal, we first review the crimes of solicitation and murder.

A. Solicitation

Our Supreme Court has "defined the crime of solicitation as counseling, enticing or inducing another to commit a crime." *State v. Kemmerlin*, 356 N.C. 446, 475, 573 S.E.2d 870, 890 (2002) (citation and quotation marks omitted). Solicitation is a specific-intent crime, *State v. Davis*, 110 N.C. App. 272, 275, 429 S.E.2d 403, 404, *disc. review denied*, 334 N.C. 436, 433 S.E.2d 180 (1993), and the offense is complete upon the request. *See generally* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.1, at 264 (3d ed. 2018) ("For the crime of solicitation to be completed, it is only necessary that the actor, with intent that another person commit a crime, have enticed, advised, incited, ordered or otherwise encouraged that person to commit a crime."). Thus, the crime is committed "even though the solicitation is of no effect and the crime solicited is never committed." *State v. Furr*, 292 N.C. 711, 720, 235 S.E.2d 193, 199, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977).

Solicitation to commit a felony is punished as follows:

> Unless a different classification is expressly stated, a person who solicits another person to commit a felony is guilty of a felony that is two classes lower than the felony the person solicited the other person to commit, except that a solicitation to commit a Class A or Class B1 felony is a Class C felony, a solicitation to commit a Class B2 felony is

> a Class D felony, a solicitation to commit a Class H felony is a Class 1 misdemeanor, and a solicitation to commit a Class I felony is a Class 2 misdemeanor.

N.C. Gen. Stat. § 14-2.6(a).

B. Murder

North Carolina recognizes first-degree murder and second-degree murder. *State v. Watson,* 338 N.C. 168, 176, 449 S.E.2d 694, 699 (1994), *cert. denied,* 514 U.S. 1071, 131 L. Ed. 2d 569 (1995).

> The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation. The elements of second-degree murder, on the other hand, are: (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation.

State v. Coble, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citations omitted).

First-degree murder is a specific-intent crime because it includes as an essential element the intent to kill, whereas second-degree murder is a general-intent crime because it lacks the essential element of an intent to kill. *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994) (noting that general-intent crimes "only require the doing of some act"), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). However, malice is an element of both first- and second-degree murder, and may be established in at least three ways:

> (1) actual malice, meaning hatred, ill-will or spite; (2) an inherently dangerous act done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief; or (3)

> that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

State v. Arrington, 371 N.C. 518, 523, 819 S.E.2d 329, 332 (2018) (quotation marks omitted).

Prior to 2012, all second-degree murders in North Carolina were classified as Class B2 felonies. *See* N.C. Gen. Stat. § 14-17 (2011). However, in 2012, the General Assembly amended N.C. Gen. Stat. § 14-17 by adding subsection (b), thereby elevating most second-degree murders to Class B1 felonies, save for two statutory exceptions. *See* 2012 N.C. Sess. Laws 781, 782, ch. 165, § 1. Subsection (b) provides that:

> (b) A murder other than described in subsection (a) [first-degree murder defined] or (a1) [presumption of first-degree murder where prior conviction for an act of domestic violence against the victim] of this section or in G.S. 14-23.2 [murder of an unborn child] shall be deemed second degree murder. Any person who commits second degree murder shall be punished as a Class B1 felon, except that a person who commits second degree murder shall be punished as a Class B2 felon in either of the following circumstances:
>
> > (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.
> >
> > (2) The murder is one that was proximately caused by the unlawful distribution of [certain controlled

> substances], and the ingestion of such substance caused the death of the user.

N.C. Gen. Stat. § 14-17(b) (2017).

Our Supreme Court has observed that the text of N.C. Gen. Stat. § 14-17 shows the legislature's intent "to elevate second-degree murder to a B1 offense, except in the two limited factual scenarios" addressed in subsection (b). *Arrington*, 371 N.C. at 523-24, 819 S.E.2d at 333. With this amendment, "the legislature assigned culpability to convicted offenders depending upon the nature of their conduct at the time of the homicide resulting in their second-degree murder convictions and the intent with which they acted at that time." *Id.* at 522-23, 819 S.E.2d at 332. In doing so, "the legislature distinguishe[d] between second-degree murders that involve an intent to harm (actual malice or the intent to take a life without justification) versus the less culpable ones that involve recklessness (an inherently dangerous act or omission) or a drug overdose." *Id.* at 524, 819 S.E.2d at 333.

C. Analysis

The parties are in disagreement over the issue before us. Defendant asserts that the trial court erred in sentencing him. The State counters that this is actually an unpreserved challenge to the jury instructions. We agree with the State.

Defendant's argument is this: that although the jury was instructed on solicitation to commit the felony of common-law (or second-degree) murder, the trial court failed to instruct the jury "to make any special finding about the nature of the

malice supporting its finding that [Defendant] solicited second-degree murder." Absent any special findings, Defendant contends that he should have been convicted of soliciting a Class B2 felony. He would accordingly have us conclude that he should have been sentenced for a Class D felony, and that we should review his sentence *de novo*.

Defendant creatively sidesteps the fact that he was not charged with murder, but with solicitation to commit murder. The jury was not required to find any of the elements of murder. As previously explained, one may be guilty of solicitation regardless of whether the solicited crime—murder, in this case—actually occurs. *See Furr*, 292 N.C. at 720, 235 S.E.2d at 199. The crime was in the asking. Thus, Defendant's appeal begins and ends with the jury instruction on the offense of solicitation, and not with his subsequent sentencing.

Here, the trial court properly instructed the jury on the offense of solicitation to commit murder:

> The Defendant has been charged with solicitation to commit murder. For you to find the Defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that the Defendant solicited, that is, urged or tried to persuade another person to murder the victim. Murder is the unlawful killing of another with malice.
>
> And second, that the Defendant intended that the person he solicited—solicited murder—that the Defendant intended that the person he solicited murder the victim.

Defendant failed to object to these instructions at trial. Our appellate rules make clear that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C.R. App. P. 10(a)(1). Unpreserved issues related to jury instructions in criminal cases may nevertheless be reviewed where "the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). "However, since Defendant's brief failed to specifically and distinctly allege that the jury instruction amounted to plain error, he is not entitled to appellate review under this rule either." *State v. Christian*, 150 N.C. App. 77, 84, 562 S.E.2d 568, 573, *disc. review denied*, 356 N.C. 168, 568 S.E.2d 618 (2002). Therefore, he has waived appellate review.

Conclusion

In that Defendant's entire appeal was predicated on an unpreserved issue and he failed to request plain error review, his conviction and subsequent sentence shall remain undisturbed.

NO ERROR.

Judges DILLON and BERGER concur.