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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-339

Filed: 18 June 2019

Catawba County, No. 14 CRS 54163

STATE OF NORTH CAROLINA

v.

KEVIN JAMAL HAQQ

Appeal by Defendant from judgment entered 22 February 2017 by Judge Daniel A. Kuehnert in Superior Court, Catawba County. Heard in the Court of Appeals 12 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General I. Faison Hicks, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for Defendant.

McGEE, Chief Judge.

Kevin Jamal Haqq (“Defendant”) was convicted of second-degree murder for the stabbing death of Jason Margarita (“Margarita”). On appeal, Defendant contends the trial court should have granted his motion to dismiss the charge of second-degree murder because the State failed to prove that Defendant did not act in imperfect self-defense. We disagree and find no error. First, Defendant failed to preserve this issue

for appellate review. Second, the State presented witness testimony, Defendant's own statements to the police, and physical evidence that, viewed in the light most favorable to the State, was sufficient to survive Defendant's motion to dismiss.¹ In fact, the evidence was sufficient to allow a reasonable juror to infer that Defendant became the aggressor prior to stabbing Margarita. Even assuming, *arguendo*, that Defendant properly moved to dismiss the charge of second-degree murder, the motion was properly denied because there was sufficient evidence presented to prove the elements of the crime, and the jury could reasonably determine from the evidence that Defendant had not acted in imperfect self-defense. *See Kirby*, 206 N.C. App. at 456, 697 S.E.2d at 503.

I. Factual and Procedural Background

A. *The Death of Margarita*

Defendant and Margarita were at a gathering at the house of Defendant's cousin in the early afternoon of 23 July 2014, where they were drinking and smoking marijuana. Brei Danielle Ledford ("Ledford"), a friend of both Defendant and Margarita, was also at this gathering. Ledford and Margarita left the gathering before Defendant, and ended up at another friend's house, where they continued to

¹ "In considering a motion to dismiss, the trial court must consider all evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that can be drawn from the evidence. Also, in determining if the evidence in question is substantial, the State must only establish that a reasonable mind might find the evidence adequate to support a conclusion." *State v. Kirby*, 206 N.C. App. 446, 452–53, 697 S.E.2d 496, 501 (2010) (citations omitted).

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socialize. Between 1:00 a.m. and 2:00 a.m. on 24 July 2014, Defendant began calling friends and acquaintances seeking a ride back to his house, which he shared with his parents, his brother, and his sister-in-law. Ledford testified she was still with Margarita between 1:00 a.m. and 2:00 a.m. on 24 July 2014 when Defendant called her asking for a ride home from his cousin's house. Ledford testified she declined to give Defendant a ride. Defendant then called Margarita, who stepped outside and talked with Defendant for about twenty minutes. Margarita "then came back and said he was leaving to give [Defendant] a ride[,]" for which Defendant had agreed to pay Margarita "gas money." Margarita picked up Defendant in Margarita's Acura (the "car") and drove him to Defendant's house.

At approximately 2:00 a.m. on 24 July 2014, Defendant's brother called 911 to report that Margarita was seriously injured inside the car, and emergency services were dispatched to Defendant's house. Deputy Michael Allred ("Deputy Allred"), of the Catawba County Sheriff's Office, was the initial first-responder on the scene. He observed the car, still running, with its rear end in a ditch. He observed Margarita unresponsive in the driver's seat of the car, surrounded by a large amount of blood. Defendant's sister-in-law was applying pressure to Margarita's chest with a towel, and Deputy Allred advised her to continue applying pressure to Margarita's wound. Margarita went into cardiac arrest while still on the scene. EMTs attempted resuscitation as Margarita was being transported to Catawba Valley Medical Center

(“the hospital”). Resuscitation attempts were continued at the hospital, but Margarita ultimately died of a single stab wound that had punctured his heart.

B. Evidence from the Scene

Deputy Allred testified that several minutes later, after he “responded back to the com center with the situation, [he] looked over towards [Defendant’s] house and [Defendant] came walking around from the back of the house.” Deputy Allred testified Defendant was “limping,” and when he told Defendant to show his hands, Defendant raised his hands and then fell to the ground on his driveway, stating he had been hit by a car and that his abdomen hurt. Deputy Allred searched Defendant for weapons, but found none. He did not notice any visible injuries on Defendant, and he told Defendant to remain on the ground until additional police and paramedics arrived.

Catawba County Emergency Medical Services Paramedic Michael Poovey (“Poovey”) assessed Defendant at the scene. Defendant told Poovey that he had been “struck from the front of a car, and at some point hung onto the driver’s door as it continued until stopping. He did not elect to detail the collision.” Defendant complained of “left lower extremity pain, and mid-line lumbar pain, and right lower quadrant abdominal pain.” Poovey’s “head to toe assessment” of Defendant, after Defendant’s clothing had been removed from the areas of Defendant’s body he complained were hurting, did not reveal any “[d]eformities, discoloration,” “[c]uts,

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scrapes, bruises, swelling, [or] lacerations” other than that Defendant’s “[l]eft rear of forearm show[ed a] small amount of dirt, and one approximate dime sized area of superficial skin disruption hardly visible.” Poovey did not observe any abnormalities during his assessment of Defendant’s neck and spine. Defendant’s chest and breathing were normal. Although Defendant complained of “tenderness” in the “right lower quadrant” of his abdomen, there was nothing that appeared abnormal to Poovey during his visual inspection, and Defendant’s abdomen felt normal upon palpation, or manual assessment.

Defendant’s arms and legs “were normal” and Defendant “move[d] all extremities well.” Defendant’s “left finger” was tender, but Poovey did not observe any outward signs of injury—including bruises, abrasions, or punctures. Examination of Defendant’s head revealed “[n]o pain or injury to the head. No deformity, abrasions, or punctures, or bruising, or tenderness, or lacerations or swelling[.]” “Basically, [Defendant’s] head was found to be normal. The membranes were cyanotic, which means they were pink. They weren’t blueish in tint, which is a lack of oxygen. It usually tells you that story.” Poovey found “[n]o external bleeding.” Poovey testified Defendant was “cooperative” and “coherent.” Poovey’s assessment that Defendant’s injuries, if any, were minimal was confirmed after Defendant was transported to the hospital—arriving just before 3:00 a.m. Defendant was initially assessed by Candra Green (“Green”), a registered nurse. Green testified:

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I did the full trauma assessment on [Defendant]. He didn't have any wounds other than the abrasion on his left elbow. He had told me that he had gotten hit on his left side by the car. That his arm had got stuck in the car, or the window, and he was drug like five or six feet. But he told me that after this had happened that he was able to get up and walk around. And I noticed that he had a bracelet on his left arm that I noticed that had blood on it, but the only wound that he had was an abrasion to his left elbow, which he didn't have blood anywhere else, not even on his arm.

Green repeated that Defendant had “no wounds on his arm, but he did have blood on that bracelet.”

Captain Brian Kelly (“Captain Kelly”) of the Catawba County Sheriff’s Office went to the hospital at approximately 3:30 a.m. on 24 July 2014 to investigate the stabbing. Captain Kelly took photographs of Margarita’s body—including photos of a puncture wound in Margarita’s chest and photos of his right hand, which had a small cut on one of his fingers; Captain Kelly also photographed Defendant—including Defendant’s left elbow, which “had some dirt on it[,]” and the bracelet Defendant was wearing.

Lieutenant Nathan Fisher (“Lieutenant Fisher”) of the Criminal Investigations Division of the Catawba County Sheriff’s Office investigated the scene after Margarita and Defendant had been transported to the hospital. Lieutenant Fisher testified concerning the car: “There was a lot of blood in the driver’s seat area. Red stains and spatter about the side of the seat, the left side primarily, and the floor, and the interior of the driver’s door area.” Lieutenant Fisher noticed a folding knife

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on the floor of the car. It was “open and it was lying there beside the seat, right beside the seat there as you would open the door.” Margarita’s father testified Margarita had a cell phone, and that Margarita had it with him when he left his house on 23 July 2014. Defendant’s statements to police and Ledford’s testimony indicate Defendant called Margarita’s cell phone, which Margarita answered, and that Margarita likely kept his cell phone with him when he drove to pick up Defendant. However, although officers searched for Margarita’s cell phone on Margarita, in the car, in Defendant’s house, and in the yard and woods surrounding Defendant’s house, they could not locate it.

Lieutenant Fisher, Deputy Allred, and other officers noticed “tire tracks through the dew on the grass” that led in a straight line away from Defendant’s house to where the car was located in the ditch. Lieutenant Fisher noticed “foot impressions in the dew from the end of the tire tracks that led towards a storage building in the backyard [(“the shed”).” Lieutenant Fisher followed the footprints “down through the yard” and found a white-handled kitchen knife in the grass. EMS had removed Defendant’s shoes, socks, belt, and pants prior to transporting him to the hospital, and Lieutenant Fisher located them in the driveway. “[T]he pants exhibited the area of red stain consistent with blood on the right front pocket.”

The kitchen knife had a blade just under five inches—approximately twelve centimeters—long and, when collected, “there was an oily residue that coated the

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entire blade of the knife. It was also mixed with a reddish stain.” The folding knife recovered from Margarita’s car had a blade just over three inches—approximately seven and a half centimeters—long. Margarita’s father testified that he did not recognize either of the knives as belonging to Margarita. The two knives and Defendant’s jeans were taken into evidence and processed.

C. Forensic Evidence

Dr. Patrick Eugene Lantz (“Dr. Lantz”), a Forsyth County Medical Examiner and regional forensic pathologist for the State of North Carolina, performed the autopsy on Margarita. Dr. Lantz testified a single stab wound that pierced Margarita’s heart was the cause of death. The entry point of the wound was “on the left chest in between the fifth and sixth ribs on the left.” Dr. Lantz approximated the depth of the wound at “somewhere between four and a half, four and three-quarter inches from the skin’s surface” or “[a]round twelve centimeters[.]” The direction of the wound was “from the front to the back, and going from the left side . . . to the right side.” Dr. Lantz also observed “a small abrasion, and a bruise[.]” on the lower portion of the right side of Margarita’s neck, and “a small little scrape or incised wound near the fingertip” of his “right third finger[.]” Dr. Lantz opined that the wound on Margarita’s finger “could be . . . a defense wound, where someone tries to block” a knife blow, but he could not say that was the actual cause of the injury.

The North Carolina State Crime Lab tested the two knives and a cutting from Defendant's jeans, and the tests indicated a likelihood that the substances visible on these items included blood. Forensic DNA analyst Amanda Overman ("Overman") recovered DNA from the blades of both knives and the cutting from Defendant's jeans, which she compared to DNA samples taken from Margarita and Defendant. The DNA samples recovered from both the knives and Defendant's jeans matched Margarita. Defendant's DNA was not a match to any of the tested samples.

D. Defendant's Statements to Investigators

In addition to the above evidence presented at trial, the State also introduced two recorded interviews with Defendant that occurred on 24 July 2014.² The first interview was conducted and recorded by Captain Kelly while Defendant was still at the hospital. The second interview was conducted in an interview room at the sheriff's office, and was recorded by audio-video equipment.³ In these statements, Defendant's recitation of the events leading to Margarita's death continuously changed as investigators confronted Defendant with evidence that contradicted his narrative. Defendant argues in his brief that he was consistent in these statements

² Both Defendant and the State attempt to argue the contents of the 911 call Defendant's brother made as his wife was attempting to assist Margarita. However, though the 911 call was played to the jury, the trial court specifically instructed the jury that the call was "admitted for the limited purpose to explain why law enforcement officers responded to the scene in the early morning of Thursday July 24th, 2014 and for no other purpose."

³ We have listened to these interviews, and our presentation of Defendant's statements include statements Defendant admits having made as well as statements we transcribed from the taped interviews themselves.

in claiming that he believed Margarita had a weapon, and that Margarita was the first to initiate an altercation on 24 July 2014. We will discuss Defendant's statements in detail in the analysis portion of this opinion. However, even taking Defendant's statements concerning the initiation of the altercation as true, when we consider all the evidence—including Defendant's statements—in the light most favorable to the State, *Kirby*, 206 N.C. App. at 452–53, 697 S.E.2d at 501, substantial evidence presented at trial would support a reasonable inference that Defendant fatally stabbed Margarita through the open car window as Margarita was attempting to drive away from Defendant after Defendant threatened Margarita with the kitchen knife.⁴

E. *Arrest and Conviction*

Defendant was arrested and indicted for murder pursuant to N.C. Gen. Stat. § 15-144. “An indictment for homicide under N.C.G.S. § 15-144 charges not only murder in the first degree but all lesser degrees of homicide, i.e., murder in the second degree, voluntary manslaughter, and involuntary manslaughter.” *State v. Camacho*, 337 N.C. 224, 232, 446 S.E.2d 8, 12 (1994) (citations omitted). Which of these charges will be presented to the jury depends in part on prosecutorial discretion and in part on the evidence presented at trial. *See Id.* at 232–33, 446 S.E.2d at 12–13; N.C. Gen.

⁴ The evidence could support multiple different theories concerning what occurred, but the State only needed to present “substantial evidence of each essential element of the charged offense and that defendant was the perpetrator.” *State v. Presson*, 229 N.C. App. 325, 327, 747 S.E.2d 651, 654 (2013) (citation omitted).

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Stat. § 15-170 (2017). In the present case, the State decided to proceed on the charge of first-degree murder at the 13 February 2017 session of Superior Court, Catawba County, based upon a theory of premeditation and deliberation. Defendant claimed that he had acted in self-defense. At the close of State's evidence, Defendant moved to dismiss the charge of first-degree murder—arguing that the State's evidence was insufficient to prove the elements of intent to kill, malice, premeditation, and deliberation. Defendant renewed this motion after informing the trial court that he would not be presenting any evidence, and Defendant's motion was again denied. The jury was instructed on first-degree murder and all lesser-included offenses—second-degree murder, voluntary manslaughter, and involuntary manslaughter. The jury was also instructed on both perfect and imperfect self-defense. The jury, by verdict entered 22 February 2017, found Defendant not guilty of first-degree murder, but guilty of second-degree murder. In light of the guilty verdict for second-degree murder, the jury entered no verdicts on the lesser included offenses of voluntary and involuntary manslaughter. Defendant appeals.

II. Analysis

A. *Imperfect Self-Defense*

In Defendant's first argument, he contends that "the trial court erred by failing to dismiss the charge of [second-degree] murder against [Defendant] where the

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State's own evidence showed he, at most, used excessive force in repelling an unprovoked attack, which amounted only to manslaughter." We disagree.

1. Preservation

Defendant failed to preserve this argument for appellate review. Defendant was charged with first-degree murder—and the lesser included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter. *Camacho*, 337 N.C. at 232, 446 S.E.2d at 12. Defendant did not make a general motion to dismiss, and his arguments to the trial court were limited to challenging certain elements of first-degree murder. At the close of the State's evidence, the trial court asked Defendant if he had any motions, and Defendant's counsel responded:

Your Honor, yes, . . . we come here before you with [] [D]efendant having been charged with first-degree murder—well, first-degree murder is what the actual charge is, not second-degree, or felony murder.

First-degree murder is, Judge, clearly defined. I'm asking the [c]ourt to take—give this grave consideration of this case. I understand the seriousness of it, but the law is the law. And however, it is explained, Your Honor as the gatekeeper, must determine if the evidence is sufficient at this point to go forward on the issue of first-degree murder.

Obviously, the standard is, Judge, is you have to look at this case in the light most favorable to the State at this point in the trial. I understand that perhaps tomorrow, we haven't made the decision yet whether we're going to put on evidence. I anticipate not doing that perhaps. But at this point, Judge, in looking at this case in the light most favorable to the State, the elements and what the State has to prove is that first-degree murder is the unlawful killing

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of a human being with malice, and with premeditation, and deliberation, Your Honor.

Defendant argued that, in making its determination, the trial court had to consider Defendant's recorded statements to police, "the testimony of the witnesses in this case, and you've also heard [Defendant's] position." Defendant continued:

You have to take all of that, Judge, into consideration in deciding whether or not the State should be allowed to go to the jury at this point on the issue of first-degree murder.

First-degree murder, Judge, is defined in the jury instructions, pattern jury instructions, it says: For you to find [] [D]efendant guilty of first-degree murder the State must prove six things. And Judge, I think we only really need to address a few of those.

First, that [] [D]efendant intentionally, and with malice killed the victim with a deadly weapon. I don't even think the State, Judge, can even really get beyond that. Even taking it in the light most favorable to the State. And I'm going to point out the weaknesses and the strengths in that argument.

Defendant argued the State failed to present substantial evidence to prove Defendant had the intent to kill Margarita, which is necessary to prove first-degree murder.

Defendant then argued concerning the element of malice:

I would contend to you, Judge, that nothing in this case indicates any hatred, or ill will, nothing previous between the parties that would indicate that [Defendant] was mad. . . . [Captain Kelly] did everything in his power, even if it's just investigatory work, to solicit from [] [D]efendant that he intended to commit this offense. And Judge, you heard the entire video, and you listened to them a couple of times. And I don't see how the State could even remotely

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argue that [Defendant] ever acted with hatred, as is defined by malice, or ill will, or spite. It just doesn't appear to be anywhere in this trial.

Finally, Defendant argued there was not sufficient evidence to support the premeditation and deliberation elements of first-degree murder.

Defendant did not make any arguments concerning the State's burden of proving proximate cause and absence of self-defense in order to prove first-degree murder, and Defendant did not argue that the evidence failed to support any of the lesser included offenses of first-degree murder—second-degree murder, voluntary manslaughter, and involuntary manslaughter. Defendant concluded his argument by stating:

I get another opportunity as you know, to reargue this at the close of all the evidence. Right now, I'm just looking at it in the light most favorable. And I say, Judge, even at this point in the light most favorable to the State, they just simply can't make out those elements [of first-degree murder].

After consulting Defendant, Defendant's attorney informed the trial court that Defendant would not put on any evidence, and the following colloquy occurred:

[DEFENDANT'S ATTORNEY]: []I need to renew my motion at the close . . .

THE COURT: Yes, I'm sorry.

[DEFENDANT'S ATTORNEY]: . . .of all the evidence. And I would like to ask the [c]ourt to revisit, obviously the [c]ourt was having, and certainly understand, Judge, in looking at this case in the light most favorable to the State,

I understand that the [c]ourt has denied that motion. But Judge, we go to a different standard at this point. At this point, you know if the [c]ourt was having some trouble, some concerns about it, you know at the close of State's evidence, I'd ask you to find at this point, Judge—you know you have—the standard changes at this point. The standard is can a reasonable jury find [] [D]efendant guilty of first-degree murder? And I think the burden certainly is a lot less lower, what we have to prove at this point. And if the [c]ourt, as I said, was having difficulty in deciding whether to submit at the close of the State's evidence, Judge, I think at this point it's not to be looked at in the light most favorable to the State. It's a different standard now.⁵ And for that reason, I'd ask you to consider everything that I've already said. I'm not going to go through it all again, but I would ask you to consider at the close of all the evidence dismissing the charge of first-degree murder based upon my previous arguments.

THE COURT: All right, thank you. State?

[THE STATE]: Nothing, Your Honor. I would just ask you to consider again the arguments I've relayed to the [c]ourt last night.

THE COURT: All right. The [c]ourt will deny the motion. Is there any other motion?

[DEFENDANT'S ATTORNEY]: No, sir. No, sir.

As indicated above, Defendant made no general motion to dismiss. Instead, Defendant argued that the trial court should dismiss the charge of *first-degree* murder because the State had failed to meet its burden of presenting substantial

⁵ It is unclear what Defendant means by this assertion. We review Defendant's motion to dismiss by the same standard no matter when he makes it. *State v. Scott*, 356 N.C. 591, 595–97, 573 S.E.2d 866, 868–69 (2002).

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evidence in support of the elements of Defendant’s intent to kill Margarita, of Defendant’s malice toward Margarita, or that Defendant killed Margarita after premeditation and deliberation. Defendant made no argument to the trial court that it should dismiss the charge of second-degree murder, or the other lesser included offenses—simply arguing “this case ought not to go to the jury on first-degree.” We note that Defendant mentioned second-degree murder as if he were about to argue for dismissal of that charge, but he then resumed his argument with respect to first-degree murder, and never returned his focus to second-degree murder. Even after the trial court raised the issue of second-degree murder and told Defendant that he could make his argument concerning second-degree murder the following morning, Defendant did not make any argument concerning second-degree murder, and simply focused on his argument that the first-degree murder charge should be dismissed.

In addition, to the extent that Defendant argued that the State failed to present sufficient evidence of malice—which is an element of second-degree murder as well as first-degree murder—Defendant’s malice argument at trial was limited to contending “that nothing in this case indicates any hatred, or ill will, nothing previous between [Defendant and Margarita] that would indicate that [Defendant] was mad.” “I don’t see how the State could even remotely argue that [Defendant] ever acted with hatred, as is defined by malice, or ill will, or spite. It just doesn’t

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appear to be anywhere in this trial.”⁶ In response, the State argued:

Specifically let me address malice first, You Honor. I don't think there is any question that a deadly weapon was used in this crime. The white handle knife is a deadly weapon. The foldup knife is a deadly weapon. The State can rely on the instructions the [c]ourt will give under first-degree murder in that did the State prove beyond a reasonable doubt that [] [D]efendant intentionally killed the victim with a deadly weapon, or intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused the victim's death. I don't think that's in question, Your Honor. The autopsy of Dr. Lantz stabbing—he died of a stab wound to the chest.

You may infer first, that the killing was unlawful, and second that it was done with malice, but you are not compelled to do so. You may consider this along with all other facts, and circumstances in determining whether the killing was unlawful, and whether it was done with malice.

Defendant did not respond to the State, and made no argument to the trial court that the jury could *not* infer malice from the use of a deadly weapon. Further, Defendant does not argue on appeal that the State failed to introduce substantial evidence of malice at trial, so Defendant has abandoned any such argument. N.C. R. App. P. 28(a) and 28(b)(6).

Now, for the first time on appeal, Defendant argues “the trial court erred by failing to dismiss the charge of [second-degree] murder against [Defendant] where the State's own evidence showed he, at most, used excessive force in repelling an

⁶ Defendant did recite the jury instruction definition of malice, but his arguments were limited to the “express hatred, ill-will or spite” theory of malice. *State v. Lail*, 251 N.C. App. 463, 469, 795 S.E.2d 401, 407 (2016) (citations and quotation marks omitted).

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unprovoked attack, which amounted only to manslaughter.” Although Defendant requested and was granted an instruction on both self-defense and imperfect self-defense, Defendant did not argue either perfect or imperfect self-defense as part of his motion to dismiss. In fact, Defendant never used the words “self-defense” or “manslaughter” in his arguments in support of his motion to dismiss.

As this Court has held:

[Because] [D]efendant presents a different theory to support his motion to dismiss than that he presented at trial, this assignment of error is waived. *See Shelly*, 181 N.C. App. at 206, 638 S.E.2d at 524 (defendant argued lack of premeditation and deliberation at the trial level, but argued a *corpus delicti* theory on appeal).

State v. Euceda-Valle, 182 N.C. App. 268, 272, 641 S.E.2d 858, 862 (2007); *see also State v. Walker*, 252 N.C. App. 409, 410–13, 798 S.E.2d 529, 530–32, *disc. review denied*, 369 N.C. 755, 799 S.E.2d 619 (2017) (appeal dismissed because the defendant argued insufficiency of evidence to support certain elements of the crime charged at trial, but argued insufficiency of evidence to support element of intent for first time on appeal, and failed to make a general motion to dismiss the charges); *State v. Boyd*, 162 N.C. App. 159, 161–62, 595 S.E.2d 697, 698–99 (2004).

In the present case Defendant failed to make a general motion to dismiss any of the charges against him; instead making a specific argument that there was insufficient evidence to support certain elements of first-degree murder. Although not expressly stated, Defendant seemed to be trying to persuade the trial court to

dismiss the charge of first-degree murder, and thereby limit the jury to consideration of second-degree murder and the other lesser included offenses. Defendant has failed to preserve his argument for appellate review, and we dismiss it. *Walker*, 252 N.C. App. at 410–13, 798 S.E.2d at 530–32.

2. Merits

Assuming, *arguendo*, Defendant has preserved his argument for appellate review, it still fails. Relevant to the present appeal: “When reviewing a sufficiency of the evidence claim, this Court considers whether the evidence, taken in the light most favorable to the state and allowing every reasonable inference to be drawn therefrom, constitutes ‘substantial evidence of each element of the crime charged.’” *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008) (citation omitted).

Defendant’s argument on appeal is that Defendant’s “account of responding to a threat, which was not contradicted by the physical evidence, allows only one conclusion: [Defendant] acted in imperfect self-defense when he stabbed Margarita.”

The elements of self-defense have been set forth by this Court:

There are four elements required to establish the existence of perfect self-defense during a killing:

- (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
- (2) defendant’s belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a

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person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e. did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

Imperfect self-defense is established if the first two elements are present at the time of the killing, but the defendant was the aggressor or used excessive force.

State v. Presson, 229 N.C. App. 325, 328–29, 747 S.E.2d 651, 654–55 (2013) (citations omitted). Defendant’s argument is that he never wavered from his assertion that Margarita was the initial aggressor, and that Defendant was simply “reacting to a violent assault by Margarita[.]” Defendant contends that, because he is the only surviving eyewitness and the physical evidence does not contradict his statements that Margarita started the altercation by trying to attack Defendant with a knife, the trial court was bound by these statements. Defendant argues that, because these statements to the police should have been accepted by the trial court as true, the evidence established, as a matter of law, that Defendant acted in imperfect self-defense. Therefore, the trial court should have also dismissed the charge of second-degree murder. Defendant cites *State v. Johnson*, which held:

When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in

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evidence, the State is bound by these statements. While the intentional killing of another with a deadly weapon raises the presumption that the killing was unlawful and done with malice, this rule of law does not mean that the burden of showing an unlawful killing does not rest with the State. When the State's evidence and that of the defendant are to the same effect and tend only to exculpate the defendant, motion for nonsuit should be allowed.

State v. Johnson, 261 N.C. 727, 730, 136 S.E.2d 84, 86 (1964) (citation omitted).

However, unlike in *Johnson*, in the present case the evidence includes facts and circumstances that contradict Defendant's exculpatory statements. Initially, Defendant gave multiple and changing statements concerning the events preceding Margarita's death, demonstrating that Defendant had been untruthful many times during his interviews with the investigators. It was the province of the jury to decide Defendant's credibility and how much weight, if any, to give to the contents of Defendant's contradictory statements. Based upon Defendant's statements, which are set forth in detail below, there were multiple scenarios the jury could have reasonably decided to believe, including scenarios where Defendant, acting as the aggressor, used a knife to intentionally stab Margarita. We must evaluate the evidence in the light most favorable to the State. *Presson*, 229 N.C. App. at 327–28, 747 S.E.2d at 654.

i. Defendant's Statements at the Hospital

Captain Kelly first began questioning Defendant at approximately 6:00 a.m. on 24 July 2014, while Defendant was at the hospital. Defendant stated that

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Margarita gave him a ride home, and requested payment once they arrived at Defendant's house. When Defendant told Margarita that he did not have the money to pay him, Margarita became angry, pulled out a "hunting knife," and swung the knife at Defendant as if he were trying to cut Defendant.⁷ Defendant then clarified that he had gone into his house first to ask his mother for money to pay Margarita, but his mother either did not have the money, or declined to give it to Defendant, and it was when Defendant came back outside and told Margarita he could not pay that Margarita "pulled" the hunting knife. Defendant stated that, when this confrontation occurred, Margarita was sitting in the driver's seat of the car with the driver's door open and Defendant was standing close to the rear door on the driver's side, with the open driver's door between him and Margarita. The driver's door window was down, and Margarita reached through the open window as he attempted to attack Defendant with the hunting knife. At some point Margarita closed the door, started the car, put it in gear, and pressed the accelerator—it is not clear from Defendant's statement if he indicated whether Margarita initially drove forward or backward.

Defendant stated that he was struck in the stomach by the moving vehicle, then he jumped on the hood of the car and reached into the open driver's window in an attempt to take the knife away from Margarita as Margarita "floored" the car in

⁷ The jury could have reasonably inferred that the "hunting knife" Defendant refers to was likely the "folding knife" recovered from Margarita's car.

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reverse.⁸ As the car was speeding in reverse, Defendant's arm got stuck in the window and he was dragged some distance until his body collided with a mailbox and/or a limb, which dislodged him from the moving car. The car ended up reversing into a ditch, which left the front end of the car protruding from the ditch. When asked how his arm became stuck in the window, Defendant stated that he believed Margarita rolled up the window while Defendant was reaching inside. Defendant then told Captain Kelly that Margarita was a drug dealer, postulated that Margarita likely accidentally stabbed himself in the heart when the car drove into the ditch, and stated that the cut on Margarita's finger also likely resulted from Margarita driving into the ditch. In this first explanation by Defendant, Defendant did not have the kitchen knife—or any other knife—and the altercation began at the car.

After Captain Kelly informed Defendant that evidence showed Defendant had been near the shed in his back yard while Margarita was at Defendant's house, Defendant changed his story and said that, when Margarita pulled into the driveway, he drove the car all the way back to the shed. Captain Kelly told Defendant that, because it was wet, they could tell that Margarita parked in the driveway next to another car, and not back by the shed. Captain Kelly further informed Defendant that footprints in the wet grass showed someone had walked from Margarita's car to the shed. Defendant then changed his story and stated that, when they first arrived

⁸ The sequence of events as presented by Defendant is difficult to follow—and changes. Defendant also stated that he had jumped onto the hood prior to being hit by the moving car.

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at Defendant's house, Margarita parked, and he and Margarita walked back to the area near the shed to smoke marijuana together. Subsequently, Defendant went inside his house in a failed attempt to get money from his mother, and it was after this that Margarita, who must have returned to the car, tried to attack Defendant with a knife through the open car window.

Captain Kelly then told Defendant that investigation of the scene suggested an altercation had occurred near the shed. Defendant changed his story again and stated that, when he came back outside to tell Margarita he could not pay him, Margarita was still standing near the shed, and the fight initiated there. Defendant said that after a struggle near the shed not involving any weapons, Margarita went to the car and retrieved the hunting knife. Defendant had followed Margarita, and that is when Margarita attempted to "hurt" Defendant with the knife. After an interruption in the interview so some diagnostic tests could be conducted on Defendant, he repeated his most recent version of his story, and indicated again that he had lost consciousness after being knocked off the moving car, and that when he "woke up" Margarita's car was in the ditch.

Captain Kelly told Defendant the evidence at the crime scene showed that someone "got cut" at the shed. Defendant's story changed again, and he stated that Margarita had two knives with him that night—one on his person and another under the driver's seat of the car. According to Defendant's new story, Margarita had first

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drawn a knife during the initial altercation near the shed. When Margarita started swinging the first knife at Defendant, Defendant managed to knock it out of Margarita's hand, which is how Defendant got the small cut on his finger. Having lost one knife, Margarita ran back to the car with Defendant following him. Margarita then grabbed the second knife from under the car seat and tried to attack Defendant. Defendant stated Margarita had not been cut prior to this time, and that Defendant had not touched any knife except when he knocked Margarita's first knife out of his hand. Defendant again stated that Margarita sustained his fatal wound "to my knowledge, when he hit the ditch."

Captain Kelly told Defendant that, if his story were true, police should have found a knife near the shed. Defendant stated the knife Margarita pulled at the shed was a "long one," and the one from the car was a "short one." Defendant then repeated his most recent story. Captain Kelly told Defendant no knife was found in the area near the shed, and the evidence indicated that perhaps Defendant knocked the knife out of Margarita's hand, then picked up the knife, and the fight continued, and that Defendant stabbed Margarita during that fight.⁹

Defendant continued to deny ever having picked up a knife, telling Captain Kelly that, if his fingerprints were recovered from a knife, it was only because he had knocked it out of Margarita's hand. Captain Kelly then asked who the "aggressor"

⁹ Testimony of the officers showed the kitchen knife was recovered near the shed, and the folding knife was recovered from Margarita's car.

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would be if Margarita was running to the car and Defendant chased after him. Captain Kelly stated it looked like Margarita was hurt when he was heading back to the car, and that he was already bleeding. Captain Kelly asked Defendant if he saw any blood on Margarita while Margarita was sitting in the car. Defendant first denied seeing any blood on Margarita, then said he did not know, then said maybe he saw a little blood “on his pants leg or something.” Defendant stated: “I’m trying to defend my house.” When pressed further about any blood Defendant might have seen on Margarita back at the car, Defendant stated that after the “scrap” at the shed he followed Margarita back to the car where Margarita was still trying to “get him,” and Defendant was just trying to keep from getting hurt. Defendant stated: “I’m trying to tell him to leave.” When asked again about blood, Defendant stated that, at the time, it looked like there was blood on Margarita’s “pants near his shirt.”

Captain Kelly then told Defendant he did not believe Margarita accidentally cut himself. When Defendant asked him why, Captain Kelly told him Margarita would not have already been bleeding when he got into the car if the injury had happened later—when he drove into the ditch. Defendant suggested the blood could have come from Defendant’s cut finger, but Captain Kelly told him that the small cut on Defendant’s finger would not have dripped blood. Captain Kelly told Defendant that the crime scene “told the story,” and Defendant needed to tell him how Defendant got the knife and cut Margarita—suggesting to Defendant that perhaps Defendant

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was scared of Margarita. Captain Kelly asked Defendant if Margarita had a gun.

Defendant responded:

“Like I said[,] mmm, yeah he pulled one on me, you know what I’m saying? I don’t know if he pulled a gun or what, I don’t know if he pulled a gun on me or what. All I know is I was trying to protect myself in self-defense. I wasn’t trying to kill this man, I wasn’t trying to hurt this man, this man was trying to do me bodily harm. I’m just trying to get him out of my yard, away from my house, away from my people and away from me so he can go back where he came from.

Captain Kelly asked again how Defendant got the knife and cut Margarita. Defendant first said: “I ain’t gonna say I cut him,” and denied ever holding the knife. Then Defendant said: “I picked it up one time for a little bit cuz he had the other, know what I’m saying? He grabbed the other knife and he was swinging at me trying to hurt me.” Defendant then said: “I don’t know, it happened so fast.” “[Margarita] swung at me, he cut my arm, I don’t know.” Defendant again admitted to handling a knife during the fight, stating he was not sure which hand he held it in, and that he did not hold the knife for long. When asked where he got the knife, Defendant said “off the ground right there at the shed where we were scuffling at.” Defendant admitted he and Margarita were still “wrestling” while Defendant was holding the knife, but that Margarita “knocked it out of my hand[,]” and “that’s when he got the other knife” from the car “and started swinging at me” through the car window “trying

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to stab me.” Defendant said that was when he jumped on the hood of the car, and Margarita sped toward the ditch in reverse.

Captain Kelly again—falsely—stated that only one knife was recovered from the scene, so Defendant’s story did not make sense. Defendant then said “far as I know, it might have been the same knife.” Defendant stated he was probably a little intoxicated, so “it was probably just the same knife.” When asked how mad he was at Margarita, Defendant stated he “wasn’t that mad.” “Not-not-not-not to kill – not to kill nobody.” Defendant stated he was high, so his memory might not be at its best, but he was “trying to remember right.” Defendant said he and Margarita got out of the car, walked over to the shed, and smoked some marijuana. Defendant then went inside to try and get money from his mother to pay Margarita, but could not get any money and returned to tell Margarita. Margarita got mad, pulled out a knife, and came after Defendant while they were near the shed. Margarita swung the knife at Defendant, Defendant knocked the knife out of Margarita’s hand, and Defendant picked up the knife. The altercation continued and they “wrestled.” Margarita managed to “jerk” the knife out of Defendant’s hand and “maybe” Margarita held onto that knife as he ran back to the car and Defendant followed.

Margarita, according to Defendant, then wielded the knife at Defendant through the car window. Margarita started the car, put it in gear, and Margarita

“bumped [Defendant] in [his] stomach” with the car.¹⁰ Defendant stated that, as Margarita was backing away from Defendant’s house, Defendant jumped on the hood and reached through the open window to prevent Margarita from leaving so Defendant could call the police. However, Margarita ended up dragging Defendant until Defendant hit the mailbox, fell to the ground, and blacked out. Defendant again said he thought Margarita accidentally stabbed himself when he drove the car into the ditch.

Captain Kelly reminded Defendant that he had admitted Margarita was already bleeding before he started the car, and Defendant agreed that “it looked like he was.” Captain Kelly told Defendant that the direction of the fatal wound looked like it was an upward thrust from a right-handed person. Defendant appeared to change his story and again deny ever having held a knife, but Captain Kelly stated he did not believe Defendant, and told Defendant that if Defendant stabbed Margarita by accident, he should say so. Defendant responded: “Alright man, I had it and it was an accident.” Defendant said that Margarita cut him on his hand while they were fighting, then stated: “I don’t know if he fell on it or what[,]” “but it was an accident[,]” and that Margarita “drug” him with the car after Margarita had been accidentally stabbed by Defendant.

ii. Defendant’s Statements at the Sheriff’s Office

¹⁰ Defendant told Captain Kelly that where he was hit still hurt “a little bit.”

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Captain Kelly asked Defendant if he would be willing to come with him to the sheriff's office for more questioning, and Defendant agreed. Captain Kelly and another investigator continued to question Defendant at the sheriff's office. As set forth in Defendant's brief, Defendant first stated: "Basically . . . it was self-defense" and he "wasn't trying to hurt anyone." When Margarita parked at Defendant's house, Margarita requested the money he was promised for driving Defendant home. Defendant suggested they smoke some of Margarita's marijuana over by the shed, and they did. Margarita asked Defendant for the money again, and Defendant told Margarita he would go get it and then "meet [Margarita] at the car." Defendant went inside but failed to get any money from his mother, so he returned outside and told Margarita he would have to pay him later. Margarita "pulled a little hunting knife" and came after Defendant. Defendant knocked the hunting knife out of Margarita's hand, and got cut on his finger in the process. Defendant and Margarita continued to fight, and "Margarita 'got a poke.'" Margarita took the knife from Defendant, ran to the car, then "drove the car and [Defendant] tried to stop him by jumping on the hood and grabbing in the window." Margarita ended up driving the car into the ditch, Defendant's "brother called the police, and his mother called an ambulance."

Defendant was then told about the kitchen knife that had been found near the shed, and that Defendant's mother had identified it as having come from inside her house. The investigators suggested Defendant "had put the [kitchen] knife in his

pocket when he went into the house to ask his mother for money.” Defendant “admitted it happened this way, but reiterated he never intended to hurt anyone.” Defendant said Margarita had first pulled the hunting knife on him when they were near the shed after Defendant told him he did not have any money. Defendant told the investigators he “pulled his knife only after Margarita drew his own knife first. They were tussling at this point.” Defendant stated Margarita knocked the kitchen knife out of Defendant’s hand near the shed. Defendant said he “also saw the [hunting knife] again when Margarita ran back to [the] car from the area near the shed.” Defendant “acknowledged he initially said Margarita got the [hunting] knife from the car[,]” but changed his story to say that Margarita had the knife with him when they started fighting by the shed. The investigators challenged this change in Defendant’s story, arguing that Margarita did not have any knife when he and Defendant started fighting by the shed—that only Defendant had a knife at that time. According to Defendant’s brief, Defendant “admitted he had gotten the [kitchen] knife but insisted Margarita pulled some shiny object out of his own pocket, which looked like a knife.”

iii. Return to Merits

Defendant argues that the State failed to present any evidence that contradicted Defendant’s statements that Margarita was the initial aggressor, and that Defendant believed margarita was the first to pull out a knife—or something

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that looked like a knife (or a gun). However, unlike in the cases cited by Defendant, Defendant's statements to the investigators in the present case do not "tend[] only to exculpate" him. *Johnson*, 261 N.C. at 730, 136 S.E.2d at 86 (citation omitted). Defendant's statements could have supported a theory that Defendant was the aggressor when he stabbed Margarita even if, as Defendant argues, he "only struck [] Margarita after Margarita first pulled his folding knife on [Defendant]."¹¹ Furthermore, additional evidence introduced by the State, when viewed in the light most favorable to the State, tends to support this theory.

For example, the evidence was sufficient for the jury to determine the events of 24 July 2014 transpired as follows. Defendant agreed to pay Margarita for a ride home, but Defendant knew he did not have the money to pay Margarita. Defendant and Margarita smoked Margarita's marijuana in the car, then they got out of the car and smoked more next to the shed. Defendant went inside his house and retrieved the kitchen knife, which he hid in his clothing. Defendant returned and informed Margarita that he did not have money to pay Margarita, and an altercation of some kind ensued next to the shed. Margarita may have initiated the confrontation, and Defendant may have believed that Margarita drew a knife, but Margarita did not have a knife at that time. Regardless, Defendant responded by pulling out the kitchen knife. Upon being confronted by Defendant wielding the kitchen knife,

¹¹ Defendant also contends that he "consistently told the police that he acted only in self-defense[.]" Obviously, we are not bound by Defendant's legal conclusions.

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Margarita, who was unarmed, attempted to flee by running to the car. Margarita managed to get to the car and start it before Defendant reached the car. Defendant then stabbed Margarita once through the open window of the car as Margarita was attempting to flee by driving the car in reverse down Defendant's driveway and toward the street. Defendant may have stabbed Margarita while Defendant was standing next to the car, or Defendant may have jumped on the hood of the car and then stabbed Margarita through the open window as Margarita was attempting to flee.

Even assuming, *arguendo*, that Margarita was the initial aggressor in an altercation near the shed, if the jury decided from the evidence that Margarita attempted to quit the altercation and flee from Defendant, and Defendant then pursued and attacked Margarita, Defendant then became the aggressor. As our Supreme Court has held: "A defendant may be deemed an aggressor if he 'has wrongfully assaulted another or committed a battery upon him.'" *State v. Cannon*, 341 N.C. 79, 82, 459 S.E.2d 238, 240 (1995) (citations and quotation marks omitted).

In *Cannon*, our Supreme Court reasoned:

[T]he evidence in this case permits the inference that defendant was the aggressor at the time he shot the victim[.] While the evidence shows that the victim initially went to defendant's home and began to argue with him, the evidence also shows that immediately before the victim was shot, she had "straightened her car up to go out the driveway," and she was about to leave. The evidence also reflects that the victim was shot from the side and from

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behind, further supporting the inference that defendant shot at the victim only after the victim had quit the argument and was trying to leave. On the evidence before it, the trial court properly allowed the triers of fact to determine that defendant was the aggressor.

Id. at 82–83, 459 S.E.2d at 241 (citation omitted); *see also State v. Watson*, 338 N.C. 168, 449 S.E.2d 694 (1994), *cert. denied*, 514 U.S. 1071, 131 L.E.2d 569 (1995). In the present case, it is true Defendant consistently stated Margarita was the initial aggressor. However, Defendant also stated multiple times that, after the altercation near the shed, Margarita ran back to the car and Defendant followed him. Defendant’s argument on appeal is that the evidence “indicat[es Margarita] was stabbed in the car”—*i.e.* after Margarita “ran” away from the shed area and was, arguably, attempting to flee to safety in the car.

Additional evidence supports a theory that Defendant delivered the lethal wound with the kitchen knife he had retrieved from his house while Margarita was attempting to flee. The kitchen knife had a longer blade, which was approximately the same length—twelve centimeters—as the estimated depth of the wound to Margarita. Both knives had Margarita’s blood on them but, because Margarita was only stabbed one time, only one of the knives could have picked up Margarita’s blood during delivery of the fatal blow. The folding knife was found right next to Margarita in the car, in an area covered with the blood that flowed from Margarita’s wound after

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he had been stabbed. The blood on the folding knife could have come entirely from Margarita's post-injury bleeding, and not from causing the fatal injury.

There is no similarly simple explanation for how Margarita's blood got on the kitchen knife if it was not the weapon used to deliver the fatal injury. It was found far away from Margarita's body, in the vicinity of the shed. If, as Defendant argues, Margarita received the fatal wound while he was in the car, the evidence in the light most favorable to the State would support a jury determination that Defendant stabbed Margarita with the kitchen knife through the open driver's window as Margarita was attempting to flee, causing Margarita to lose consciousness, resulting in the tire tracks leading in a straight line away from Defendant's house and into the ditch.¹² Defendant suffered no blow to his head, and never blacked out; he instead ran away from the dying Margarita with the bloody kitchen knife in his hand, and either dropped or threw it into the grass behind his house. Defendant then hid behind his house until he finally decided to come out and talk to Deputy Allred, feigning or exaggerating injuries to his leg, back, and abdomen in an attempt to convince police that Margarita had intentionally hit him with the car after Margarita had threatened Defendant with a knife.

However, the State presented substantial evidence that Defendant did not act in self-defense or imperfect self-defense. There was evidence from which the jury

¹² The fatal wound, as described by Dr. Lantz, was consistent with Margarita having been stabbed through the driver's window as Margarita sat in the driver's seat.

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could have found Defendant's actions failed to meet all four elements as set forth in *Presson*. *Presson*, 229 N.C. App. at 328–29, 747 S.E.2d at 654–55. If Margarita was attempting to drive away from Defendant and Defendant's house, the jury could have found that Defendant did not believe stabbing Margarita was necessary to protect himself or anyone else from death or great bodily harm, or that any such belief would have been reasonable. *Id.* The jury could have determined that Margarita fled from any initial confrontation by the shed and, therefore, Defendant became the aggressor by chasing him down while wielding the kitchen knife. *Id.* In light of the foregoing, the jury certainly could have determined that stabbing Margarita in the heart as he was attempting to flee constituted excessive force, since simply allowing Margarita to leave would have been sufficient to remove any threat that Margarita might have posed to Defendant or the people inside Defendant's house. *Id.*

In addition, Defendant's conduct after he stabbed Margarita "could have led the jury to reasonably infer that [D]efendant did not [act] in self-defense." *Kirby*, 206 N.C. App. at 455, 697 S.E.2d at 502. The evidence allows for an inference that "Defendant fled the scene and threw the [kitchen knife] into a nearby field immediately after" stabbing Margarita. *Id.* "Defendant's flight after the [stabbing] is clear evidence from which the jury could reasonably infer that [D]efendant knew that he had not killed in self-defense," *id.*, even though he eventually returned to the scene after removing the murder weapon—and possibly Margarita's cell phone—from

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the area near the car. Additional evidence potentially undermining the self-defense claims include Defendant's decision to take a knife from his house with him when he returned to Margarita, his false statements to the investigators and other efforts to hide or downplay his role in Margarita's death, and his failure to render aid to Margarita after having stabbed him. *See State v. Watson*, 338 N.C. 168, 180–81, 449 S.E.2d 694, 702 (1994), *overruled in part on other grounds*, *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995); *see also State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008). The totality of the State's evidence, considered in the light most favorable to the State, was "sufficient to 'throw a different light on the circumstances of the homicide' and to impeach [] [D]efendant's version of the incident. The State [wa]s not bound, therefore, by the exculpatory portions of [D]efendant's statement. The case [wa]s for the jury." *State v. Hankerson*, 288 N.C. 632, 638, 220 S.E.2d 575, 581 (1975), *rev'd on other grounds*, *Hankerson v. North Carolina*, 432 U.S. 233, 53 L. Ed. 2d 306 (1977).

Although Defendant does not make this argument on appeal, we also hold that the evidence, viewed in the light most favorable to the State, was sufficient to support finding each element of second-degree murder. "The elements of second-degree murder . . . 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). Assuming, *arguendo*, Defendant made

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a motion to dismiss the charge of second-degree murder, the trial court did not err in denying it. Defendant's argument is without merit.

B. Sentencing

In Defendant's second argument, he contends "the trial court abused its discretion" by failing to properly consider and apply mitigating factors in deciding Defendant's sentence. We disagree.

As Defendant recognizes, he was sentenced in the presumptive range.

[T]he trial court need make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences. When a trial court enter[s] a sentence within the presumptive range, the court d[oes] not err by declining to formally find or act on [a] defendant's proposed mitigating factors, regardless [of] whether evidence of their existence was uncontradicted and manifestly credible.

State v. Jarman, 238 N.C. App. 128, 132, 767 S.E.2d 370, 373 (2014) (citations and internal quotations omitted). Because Defendant was sentenced in the presumptive range, the trial court did not abuse its discretion. It is immaterial whether, as Defendant argues, the trial court initially found a mitigating factor then refused to consider additional mitigating factors. *Id.* This argument is without merit.

NO ERROR.

Judge COLLINS concurs.

Judge DIETZ concurs in the judgment and joins the majority in Section II.

Report per Rule 30(e).