

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-502

Filed: 17 December 2019

Guilford County, Nos. 16 CRS 24127, 24130, 70665

STATE OF NORTH CAROLINA

v.

HENRY THOMAS HAIRSTON

Appeal by defendant from judgments entered 2 November 2018 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 14 November 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne J. Brown, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant.*

ARROWOOD, Judge.

Henry Thomas Hairston (“defendant”) appeals from judgments entered upon his convictions for voluntary manslaughter and possession of a controlled substance. For the following reasons, we find no error.

I. Background

On 18 April 2016, defendant was indicted on one count each of first-degree murder, possession of methamphetamine, and attaining habitual felon status. Defendant’s charge for possession of methamphetamine was superseded by an

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indictment for possession of 4-chloromethcathinone on 25 June 2018. Defendant's case came on for trial in Guilford County Superior Court before the Honorable L. Todd Burke on 29 October 2018.

At trial, Tashera Thaxton ("Ms. Thaxton"), Latoya Settle ("Ms. Settle"), and defendant's nephews Jerard and Charles McCollum ("Jerard" and "Charles") testified as follows. On the night of 13 March 2016, defendant and his nephews had driven from Reidsville to celebrate a friend's birthday at a Greensboro bar called Lucky 7's. They exited the bar when it closed at 2 a.m. and met Ms. Thaxton, Ms. Settle, and defendant's cousin Sharonda Irving ("Ms. Irving"), all of whom were friends from Reidsville. In the parking lot, an individual from another group of around five men approached Ms. Settle and asked if she would perform sexual acts for money. Defendant, his nephews, and the women rebuked the man's advances.

The three groups then exited the parking lot in their respective automobiles, with Jerard driving himself, Charles, and defendant, and Ms. Irving driving the women in her silver minivan. At a red light, the other group of men pulled up alongside Jerard's vehicle, smashed a bottle against it, and proceeded to engage in a high-speed pursuit of defendant and his nephews. Ms. Irving followed the vehicles. Jerard feared for their lives and worried that the men would shoot at his car. Detective Stanley Marrow and Officer Camara Gosmon of the Greensboro Police Department were working an off-duty security detail in the parking lot of a

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Greensboro nightclub called Shooters on the night of 13 March 2016. Upon seeing a police car, Jerard pulled into a parking lot in hopes that the presence of law enforcement would de-escalate the situation. Ms. Irving's vehicle arrived shortly thereafter. Defendant and his nephews quickly exited the vehicle and were immediately met with an attack from the other group of men. In the parking lot, a large fight occurred in which Markos Leonard Jones ("Mr. Jones") was killed.

Testimony from Detective Marrow, Officer Gosmon, and other responding officers tended to show that Detective Marrow and Officer Gosmon were engaged in conversation in the otherwise empty parking lot when, at approximately 2:30 a.m., they became aware of a brawl of fifteen to twenty people breaking out. This brawl consisted of up to four distinct fights between groups of several individuals. Neither officer observed a weapon being used by any of the combatants. The officers responded to the affray and, in the course of breaking up the first two fights, made separate contact with both defendant and Mr. Jones. Mr. Jones told Officer Gosmon that he was trying to break up a fight. Defendant told Detective Marrow that he was trying to get those he knew to disperse from the parking lot. The officers called for backup, because the brawl was too large for two officers to subdue.

When the officers next saw defendant and Mr. Jones, the two were near each other and Mr. Jones turned away from defendant, bent over clutching his neck, and was bleeding profusely. Detective Marrow then asked two nearby individuals with

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“deep lacerations” on their lower arms who had a knife, and their response led Detective Marrow to believe it was defendant. Defendant was the closest person to Mr. Jones at this time. Defendant began to walk toward the silver minivan belonging to Ms. Irving and, ignoring Detective Marrow’s repeated orders to halt, bumped aside a woman standing by an open door of the minivan and made a “furtive move” appearing to throw an item into the vehicle. Detective Marrow then arrested defendant and found a controlled substance commonly known as “bath salts” on his person. Officer Deon Carter then found a bloody knife in the driver’s seat of the vehicle. Two investigating officers testified that defendant had blood on his shoes and clothing. Detective Tony Hinson testified that, during defendant’s subsequent interview at the police station, he repeatedly stated that he suffered no injuries in the fight and did not need to go to the hospital.

Private investigator Edward Cobbler (“Mr. Cobbler”) testified that he interviewed defendant about the events in question on 31 March 2016. Defendant admitted to him that he had obtained a knife from his nephew’s car. Defendant stated that during the fight several individuals were stomping and hitting him on the ground and he grabbed the knife from his pocket and “came out swinging[,]” cutting several of his attackers. He then threw the knife in the silver minivan belonging to Ms. Irving.

A forensic analyst from the State Crime Laboratory testified that Mr. Jones' DNA was present on swabs collected from the knife and from blood spots on the interior and exterior of the silver minivan. The medical examiner who conducted the autopsy of Mr. Jones testified that his death was caused by a stab wound to his neck consistent with the bloody knife on which his DNA was found.

At the close of the State's evidence, defendant moved to dismiss the charge of first-degree murder and its lesser-included offenses. The trial court denied the motion and defendant presented his own evidence as detailed above. Defendant renewed his prior motion to dismiss at the close of all evidence. The court again denied his motion. The trial court then held an off-the-record, *in camera* charge conference with counsel for defendant and the State. An agreement was reached to instruct the jury on, among other things, possession of the "bath salt" 4-chloromethcathinone, first-degree murder, second-degree murder, and voluntary manslaughter. The court instructed the jury on these offenses, and the jury subsequently returned a verdict finding defendant guilty of voluntary manslaughter and possession of 4-chloromethcathinone.

## II. Discussion

On appeal, defendant argues that: (a) the trial court erred in denying his motion to dismiss the charge of murder and the lesser-included offense of voluntary manslaughter; (b) alternatively, if this issue has not been preserved for appellate

review, defendant's counsel rendered ineffective assistance in failing to preserve the issue of evidentiary sufficiency; and (c) the trial court erred in its instructions to the jury on voluntary manslaughter. We address each argument in turn.

A. Motion to Dismiss

Defendant argues that the trial court erred in denying his motion to dismiss the charge of first-degree murder and the lesser-included offense of voluntary manslaughter because there was insufficient evidence from which a reasonable jury could convict him. We disagree.

As an initial matter, we note that defendant has properly preserved this assignment of error for our review by renewing his prior general motion to dismiss based on the evidence at the close of all evidence pursuant to N.C.R. App. P. 10(a)(1), (a)(3) (2019). Defendant's counsel made a general motion to dismiss based on the State's evidence, and proceeded to argue more specifically that the evidence warranted dismissal under the doctrine of self-defense. *See, e.g., State v. Glisson*, 251 N.C. App. 844, 847, 796 S.E.2d 124, 127 (2017) (“[A] general motion to dismiss for insufficiency of the evidence preserves all issues regarding the insufficiency of the evidence, even those issues not specifically argued before the trial court.”) (citation omitted); *State v. Pender*, 243 N.C. App. 142, 152-53, 776 S.E.2d 352, 360 (2015) (holding that defendant's general motion to dismiss preserved all arguments as to sufficiency of evidence to convict on all his charges, where counsel subsequently made

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more specific arguments concerning only some elements of some charges against defendant during his argument in support of general motion to dismiss). Therefore, we review the trial court's denial of defendant's motion to dismiss *de novo* to determine whether substantial evidence supported the charge of voluntary manslaughter. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

“Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). “The trial court is not required to determine that the evidence excludes every reasonable hypothesis of

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innocence before denying a defendant's motion to dismiss." *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997) (citation omitted).

Voluntary manslaughter is the intentional, unlawful killing of a human being either: (1) perpetrated "by reason of sudden anger or 'heat of passion' that temporarily removes reason and malice or (2) a premeditated and deliberated first-degree murder or second-degree murder for which the defendant has an imperfect right to self-defense." *State v. Alston*, 161 N.C. App. 367, 373, 588 S.E.2d 530, 535 (2003) (citations omitted), *aff'd*, 359 N.C. 61, 602 S.E.2d 674 (2004). Because defendant's conviction for voluntary manslaughter could have resulted from the jury finding that he committed second-degree murder but for an imperfect right of self-defense, we need not decide whether the State produced substantial evidence of the greater offense of first-degree murder.

Second-degree murder is a killing done with malice and without premeditation and deliberation. *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citations omitted). Malice may be found from, among other things, "evidence that a person intentionally inflicted a wound that results in death." *Id.* at 451, 527 S.E.2d at 47 (citation omitted). An imperfect right of self-defense exists where: (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[;]" (2) this belief "was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a



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belief in the mind of a person of ordinary firmness[;]” but (3) “the defendant, without murderous intent, either was the aggressor in bringing on the affray or used excessive force.” *State v. Lyons*, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995) (citations omitted). Excessive force is “more force than [is] necessary or reasonably appear[s] to [the defendant] to be necessary under the circumstances to protect himself from death or great bodily harm.” *Id.* (citation omitted).

In the instant case, killing in the “heat of passion” and imperfect self-defense by an aggressor were not theories advanced by the State; nor was the jury instructed on such theories. Thus, to survive defendant’s motion to dismiss the charge of voluntary manslaughter, the State was required to present substantial evidence that: (1) defendant intentionally inflicted a wound upon Mr. Jones, (2) proximately causing his death, (3) under an actual, reasonable belief that use of force was necessary to prevent death or great bodily harm, (4) by use of force that was greater than was, or appeared, necessary under the circumstances to prevent such harm. Viewed in a light most favorable to the State, there was substantial evidence of each of these four elements.

First, the State put forth substantial evidence that defendant intentionally wounded Mr. Jones with a knife. Viewed in a light most favorable to the State, the evidence suggested that defendant and his nephews exchanged words with another group of men leaving Lucky 7’s regarding their disrespect towards defendant’s female

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friends. Defendant and his nephews were then pursued by this group of men in a car chase that ended in the Shooter's parking lot. During the car chase, defendant obtained a knife from his nephew's car. Defendant and his nephews exited the vehicle and immediately became involved in a large brawl with their pursuers. Defendant used the knife to cut several people in the brawl, including Mr. Jones, and then secreted it into his cousin's nearby vehicle.

Second, the State put forth substantial evidence that Mr. Jones' death was proximately caused by a stab wound to his neck from the knife in question. The medical examiner who conducted Mr. Jones' autopsy testified that his death was caused by a stab wound to his neck consistent with the bloody knife on which his DNA was found.

Third, the State put forth substantial evidence that defendant stabbed Mr. Jones due to an actual, reasonable belief that use of force was necessary to defend himself from death or great bodily harm. Viewed in the State's favor, the evidence suggested that defendant and his nephews were aggressively pursued into the Shooter's parking lot by another group of men. This group of men attacked defendant in the parking lot. Several of these men continued their assault against defendant even after he fell to the ground. Defendant reasonably feared that he may face serious harm if he did not take action to repel his attackers, and he was thus entitled to use at least some degree of force.

Fourth and finally, the State put forth substantial evidence that defendant used more force than was necessary in the circumstances to defend himself against death or great bodily harm. Viewed in a light most favorable to the State, the evidence suggests that stabbing Mr. Jones in the neck escalated the nature of the brawl and exceeded what reasonably appeared necessary to defend himself in what was essentially a collection of fistfights.

The State put forth substantial evidence from which a reasonable juror could find that defendant would have committed second-degree murder, but for his entitlement to use self-defense that he abused by using excessive force. Therefore, the trial court did not err in denying defendant's motion to dismiss the charge of voluntary manslaughter.

B. Ineffective Assistance of Counsel

Because we hold that defense counsel's motions to dismiss adequately preserved defendant's challenge to sufficiency of the evidence for appellate review, counsel did not render ineffective assistance on this ground and we need not further review this claim.

C. Jury Instructions for Voluntary Manslaughter

Finally, defendant argues that the trial court plainly erred in its instructions to the jury on voluntary manslaughter. We disagree.

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Defendant first asserts that he has preserved this issue for appellate review. The transcript reflects that the trial court briefly described the results of the off-the-record charge conference. This included an agreement to give an instruction on first-degree murder, second-degree murder, and voluntary manslaughter without reference to any specific pattern instructions for each offense. Defendant contends that the trial court's synopsis of the charge conference, together with the similar instruction ultimately given to the jury, implies that it agreed to give N.C.P.I. Crim. 206.10 (2018). Thus, any deviation from this requested pattern instruction would be preserved for our review despite defense counsel's subsequent failure to object to the court's ultimate instructions. *See State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018) ("When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection."). Based on the record before us, we cannot infer an agreement to use a specific pattern instruction.

Accordingly, our review is limited to plain error. N.C.R. App. P. 10(a)(2), (a)(4) (2019); *State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333-34 (2012).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously

affect[s] the fairness, integrity or public reputation of judicial proceedings.

*Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (alteration in original) (internal quotation marks and citations omitted). “In giving jury instructions, . . . the court is not required to follow any particular form, as long as the instruction adequately explains each essential element of the offense.” *State v. Fletcher*, 370 N.C. 313, 325, 807 S.E.2d 528, 537 (2017) (alteration, internal quotation marks, and citations omitted). Using this guiding principle, we find no error in the trial court’s instructions.

Defendant first argues that the trial court plainly erred in its instructions on voluntary manslaughter by failing to note that the jury would have to find beyond a reasonable doubt that “(1) [defendant] killed Jones by an intentional and unlawful act[ ] and (2) [defendant]’s act was the proximate cause of Jones’s [sic] death.” This argument is unsupported.

In its charge to the jury, the trial court first included a simple definition of each charge it was to consider: first-degree murder, second-degree murder, and voluntary manslaughter. The court briefly described voluntary manslaughter as follows:

Voluntarily [sic] manslaughter on the facts in this case is if you find the defendant was acting in self[-]defense, whether he used excessive force, the defendant will be excused from first[-]degree murder and second[-]degree murder on the ground of self[-]defense . . . .

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Then the court went into greater detail on the doctrines of perfect self-defense and imperfect self-defense by use of excessive force, noting that “[i]f the [S]tate fails to prove that the defendant did not act in self[-]defense, you may not convict the defendant of either first[-] or second[-]degree murder. However, you may convict the defendant of voluntary manslaughter if the [S]tate proves that the defendant used excessive force.” The court proceeded to enumerate each element the jury would have to find beyond a reasonable doubt in order to convict defendant of each of the three charges in succession. The full instruction on first-degree murder included a detailed explanation of proximate causation. Together, the full instructions on second-degree murder and voluntary manslaughter were as follows:

For you to find the defendant guilty of second[-]degree murder, the [S]tate must prove beyond a reasonable doubt that the defendant unlawfully, intentionally, and with malice wounded the victim with a deadly weapon proximately causing the victim’s death.

The [S]tate must also prove that the defendant did not act in self[-]defense.

Voluntarily [sic] manslaughter on these facts is if you find the defendant was acting in self[-]defense and the defendant . . . used excessive force.

Voluntarily [sic] manslaughter is committed if the defendant kills in self[-]defense but uses excessive force under the circumstances. The burden is on the [S]tate to prove beyond a reasonable doubt that the defendant did not act in self[-]defense.

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However, if the [S]tate proves beyond a reasonable doubt that the defendant, though otherwise acting in self[-]defense used excessive force, the defendant would be guilty of voluntarily [sic] manslaughter.

If you do not find the defendant guilty of murder or voluntarily [sic] manslaughter, you must find the defendant not guilty.

The court then gave a final instruction on each of the three offenses, ending with the following instruction on voluntary manslaughter:

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the victim with a deadly weapon and thereby proximately caused the victim's death, and that the defendant used excessive force, it would be your duty to find the defendant guilty of voluntarily [sic] manslaughter.

However, if the [S]tate has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self[-]defense and that the defendant used excessive force, then the defendant's actions . . . would be justified by self[-]defense and it would be your duty to return a verdict of not guilty.

The instant case is not one in which the trial court made a material misstatement of the requirements to convict defendant of voluntary manslaughter and later corrected itself. *See State v. Cousins*, 289 N.C. 540, 547-50, 223 S.E.2d 338, 343-45 (1976). Rather, the trial court merely omitted the *actus reus* and proximate causation elements in some references to voluntary manslaughter directly preceded

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by descriptions of second-degree murder containing these elements. The trial court ended with a full recitation of the elements of voluntary manslaughter.

Read as a whole, the instructions clearly explain: (1) that, in order to find defendant guilty of second-degree murder, the State was required to prove that defendant proximately caused Mr. Jones' death by intentionally wounding him with a deadly weapon, and did not do so in self-defense; and (2) that, in order to find defendant guilty of voluntary manslaughter, the State was required to prove the same facts except that defendant acted in self-defense but used excessive force. This instruction sufficiently explained each element the jury would have to find beyond a reasonable doubt to convict defendant of voluntary manslaughter. Therefore, the trial court did not err on this ground.

Defendant further argues that “[t]he only option given to the jury to find [defendant] not guilty was based on the jury’s determination that the State failed to prove beyond a reasonable doubt that [defendant] did not act in self-defense and that he did not use excessive force.” This argument is without merit. The instructions clearly apprised the jury that, as with the charge of second-degree murder, it must find defendant not guilty of voluntary manslaughter if the State failed to prove as a preliminary matter that defendant intentionally wounded Mr. Jones or proximately caused his death.



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Because the jury was informed of the essential elements it would have to find beyond a reasonable doubt in order to convict defendant of voluntary manslaughter, the trial court did not err in its jury instructions.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges DILLON and DIETZ concur.