IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-466

Filed: 31 December 2020

Scotland County, Nos. 13CRS053473-74

STATE OF NORTH CAROLINA

v.

TIMARIUS FREDERICK BAKER, Defendant.

Appeal by Defendant from judgment entered 16 May 2018 by Judge Richard T. Brown in Scotland County Superior Court. Heard in the Court of Appeals 21 January 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, for the State.

Appellate Defender Glenn Gerding and Assistant Appellate Defender Nicholas C. Woomer-Deters for the defendant.

McGEE, Chief Judge.

Timarius Frederick Baker ("Defendant") appeals from judgment entered upon jury verdicts finding him guilty of first-degree murder and robbery with a dangerous weapon. Defendant contends on appeal that the trial court erred by (1) failing to consider Defendant's subaverage intellectual functioning when adjudicating Defendant's suppression motion; (2) failing to instruct the jury on second-degree murder; and (3) denying Defendant's motion to dismiss the charge of felony murder

based on insufficient evidence of the underlying offense of robbery with a dangerous weapon. We remand for a new suppression hearing and conclude that Defendant received a trial free from error based on his remaining arguments.

I. Background

A. Factual Background

On the evening of 30 November 2013, Demonsha Clegg went to a night club called Club Encore ("the Club") in South Carolina, near the North Carolina–South Carolina border, with her two older sisters, Katrina and Lanisha. They drove to the Club in Lanisha's boyfriend's GMC Envoy SUV. They parked the SUV in a lot across the street from the Club and left their cellphones in the SUV. To get into the Club, all patrons went through a security screening where they removed their shoes, walked through a metal detector, were scanned with a handheld metal detector, and were frisked by a bouncer. The three sisters entered the club around midnight and bought a pitcher of an alcoholic cocktail; Demonsha also drank several light beers and some brandy at Katrina's home before they went to the Club. Demonsha drank some of the cocktail and then told her sisters that she was ill. Katrina took Demonsha to the restroom where Demonsha vomited. When Demonsha returned to the table, she was still not feeling well, and she eventually decided to leave the Club and rest in the SUV. She left at 12:49 a.m.

Katrina and Lanisha left the Club about 20 minutes later and saw that the SUV was gone. Because they had left their cellphones in the SUV, they borrowed cell phones from patrons of the Club as they were leaving the club in order to call Demonsha's cell phone and the other cell phones in the SUV. Demonsha answered the phone on one attempt at 2:09 a.m. Katrina "scream[ed] and holler[ed]" at Demonsha and then heard Demonsha say that she was "all right," and "Sister, he said that y'all said it's ok." Katrina heard a male voice say, "We still in South Carolina," and the call ended. Katrina and Lanisha kept calling Demonsha, but she never picked up the phone again.

Katrina and Lanisha got a ride back home and went to law enforcement to report Demonsha missing. They were later told by Detective Jamie Laviner of the Laurinburg Police Department that Demonsha's body was found at a park just outside of Laurinburg, North Carolina the next day, and she had died from gunshot wounds to her head, stomach, and arm. Police also found three spent shell casings on the ground near Demonsha's body. The missing SUV was located outside of Rowland, North Carolina, where Defendant lived and it had been burned.

Police began investigating Demonsha's murder at the Club because she was found with an admission armband for the Club on her wrist. They obtained surveillance footage and the entry roster from the Club. Among other individuals entering and leaving the Club, the footage showed Demonsha and her sisters,

Defendant, and several of Defendant's friends and associates. The footage showed that Defendant arrived at the Club at 11:21 p.m. on 30 November 2013.

At trial, the head of security at the Club, James McDonald, testified that he removed Defendant from the Club because he was jumping into other Club patrons and disregarding instructions from security personnel to calm down. Security personnel "slammed [Defendant to] the ground" and escorted him out of the Club. Footage showed he left the Club at 12:41 a.m. on 1 December. While Defendant had arrived at the club in his friend Jeremy Cousar's car, he did not leave in that car after he had been removed by security. Several friends of Defendant's—Le'Byron McKoy, Eddrick Southern, Dexter McRae, and Deshon Thurman—arrived at the club together in Mr. McKoy's car while Defendant was sitting in the parking lot after having been removed. Mr. McKoy offered to give Defendant a ride home to Rowland, but Defendant refused to leave. Mr. McKoy accidentally locked his keys in the car, so Defendant got a "clothes hanger out of somebody's car[,]" "popped the lock[,]" and "helped [Mr. McKoy] get [his] keys."

The day after Demonsha was murdered, Defendant told friends that Mr. McKoy drove him home, but he told other friends that "he took a car" to get home and "[b]urned it up" "after he took it[.]" Defendant asked Mr. McKoy and Mr. Southern to tell anyone who asked about his whereabouts that he rode back with Mr. McKoy, Mr. Southern, Mr. McRae, and Mr. Thurman from the Club. When police first

questioned Mr. Southern, he told them that Defendant rode back with them but later acknowledged this was not the case.

Police interviewed several of the individuals identified on the surveillance video, including Deshawn McDaniel, whom police asked to determine whether Defendant would participate in an interview. Mr. McDaniel told Lieutenant Jon Edwards of the Rowland Police Department that Defendant was not with him and Mr. Cousar when they left the club. Another man from Rowland, Antonio McRae, told Lt. Edwards that he heard Defendant stole a car after he was kicked out of the club and that he was known to carry a gun.

Defendant called Lt. Edwards on 3 December 2013 and Lt. Edwards scheduled an interview at the police department with Defendant for later that day. Lt. Edwards told Defendant he was investigating an incident that happened at the club. Defendant spent about three hours in an interview room with Lt. Edwards with approximately 20 minutes of the interview being recorded.

Defendant ultimately gave three statements to Lt. Edwards which Lt. Edwards reduced to writing. During the first written statement, Defendant admitted to having a gun, being at the Club on the night of 30 November 2013, and being ejected from the Club. Defendant denied knowing anything about Demonsha's murder and stated that he left the Club with Mr. McKoy. In the second statement, Defendant confessed to meeting Demonsha and that she spoke on the cellphone with

"a girl and a dude"; that she was "drunk"; that they went to his house and had consensual sex; that he gave Demonsha five dollars and then went into his house, leaving her outside in the car. Defendant then told Lt. Edwards that they had sex in "an alleyway near his house[,]" not in his house.

After giving the second statement, Defendant went to the restroom, and Lt. Edwards went outside to smoke a cigarette. Lt. Edwards also retrieved a pocket recorder from his car and recorded his final interview with Defendant. Defendant then admitted to killing Demonsha. He told Lt. Edwards that after he and Demonsha had sex, she tried to "set [him] up" by claiming he raped her and that he was scared. Defendant admitted to shooting and killing Demonsha and to setting the SUV on fire in order to get rid of his fingerprints, and to getting rid of the gun after the murder. Lt. Edwards testified that he never gave Defendant *Miranda* warnings until after he confessed to killing Demonsha.

At trial, the State presented testimony from a forensic scientist who compared known samples of Defendant's DNA to samples taken from Demonsha's body. Semen found on Demonsha's stomach, sweatpants, and sweatshirt matched Defendant's DNA profile.

B. Procedural History

Defendant was indicted for first-degree murder and robbery with a dangerous weapon on 22 February 2016. Two years later Defendant was indicted for first-degree rape on 19 February 2018.

The State initially gave notice that it would proceed capitally in the case. A Rule 24 pretrial conference was held before Judge Richard T. Brown on 11 December 2017. At the hearing, the prosecutor stated that she had determined, based on a psychological evaluation of Defendant and his school records, "that it is well-established that the defendant's I.Q. [intelligence quotient] is lower than 70 beginning in childhood and that has persisted well before the commission of this crime." The State then elected not to seek the death penalty and submitted a Rule 24 order to the trial court, that was reviewed by defense counsel, so stating. The trial court then issued a Rule 24 order, finding as fact

> That on December 11, 2017, District Attorney Kristy Newton informed the court that, pursuant to G.S. 15-A-2004, after having reviewed school records and other materials that established that the defendant had an I.Q. below 70 prior to the commission of this offense, the State elects to withdraw its request to seek the death penalty against this defendant.

Defendant moved to suppress his statement to the police on constitutional and statutory grounds on 15 August 2016, arguing that "[t]he totality of the circumstances show that the interview was custodial. Further, the Defendant's [i]ntellectual [d]isability shows that [his] statements were not voluntary[ ] and were the result of

promises and deception." Defendant submitted with the motion an affidavit of Jennifer Sapia, Ph.D, a clinical psychologist retained by defense counsel to perform a psychological assessment of Defendant. Dr. Sapia administered a Wechsler Adult Intelligence Scale, "the latest version of the most widely accepted individual measure of cognitive ability." Defendant received an I.Q. score of 63. That I.Q. score classified "his general intellectual ability in the Extremely Low range of intellectual functioning[.]" Dr. Sapia concluded that Defendant's "overall thinking and reasoning abilities exceed those of only 1% of individuals his age." She also noted that Defendant had been diagnosed previously with mild mental retardation, that he "demonstrates significant cognitive deficits which puts his functional level at an age much lower than his chronological age[,]" and that a previous evaluation had determined that Defendant functions at a third-grade level.

Judge Brown heard Defendant's motion to suppress on 16 through 18 April 2018. After Defendant presented evidence on the motion, the court asserted that, while Defendant raised the issue of his intellectual functioning in the motion, Defendant did not present any evidence at the hearing of his subaverage intellectual functioning. Defense counsel and the trial court then engaged in the following exchange:

> [DEFENSE COUNSEL]: There's no showing [of Defendant's intellectual functioning] at this hearing, Your Honor. There are previous documents in the file that indicate that he has been evaluated and found to be

> intellectually disabled. And I would address that in argument. . . . Your Honor, they're part of the court file. I'd ask that the court file be made part of the record.
>
> THE COURT: I'm not sure that, for the purposes of this hearing, I can just take judicial notice of the contents of the file in that fashion. I'm -- at the very least, I will hear motions on the other -- or hear argument on the other aspects that are raised in the motion to suppress[.]

After a recess, the trial court ruled as follows:

> I will allow argument as to matters raised in the motion but only as to issues raised in the motion which are supported by evidence before the Court. So I'm going . . . to scrutinize pretty carefully any argument related to mental-health issues, because there's very little, if any, evidence before the Court on that. There are other issues that are raised.

Judge Brown denied Defendant's motion to suppress his statement. In the order denying the motion, the trial court made the following findings of fact regarding Defendant's intellectual ability:

> 36) That the defendant has raised in his motion an allegation that his functional intellectual level affected the voluntariness of his statement[;] there is no evidence to support that claim;
>
> . . .
>
> 40) That the defendant has not produced any evidence to support a contention that his intellectual functioning level affected the legality of his statements, and the evidence before the Court refutes any such contention raised in his motion[.]

The trial court then concluded as a matter of law that

> the defendant, who was not under arrest at the time he made his statements to Investigator Jon Edwards, was not in custody or otherwise deprived of his freedom of action in any significant way as associated with a formal arrest and was not in custody at the time such statements were made[, and his] statements were made voluntarily and did not result from any deception or promises by law-enforcement officers[.]

Defendant was tried before a jury beginning 7 May 2018 with Judge Brown presiding. At the charge conference, Defendant requested a jury instruction on the lesser included offense of second-degree murder. The trial court denied the request. The jury returned verdicts on 16 May 2018 finding Defendant not guilty of first-degree rape but guilty of robbery with a dangerous weapon and first-degree murder under theories of premeditation and deliberation and felony murder based on the underlying predicate offense of robbery with a dangerous weapon. The court imposed a sentence of life imprisonment without parole for first-degree murder and a consecutive sentence of 84 to 113 months of imprisonment for robbery with a dangerous weapon.

Defendant gave oral notice of appeal.

II. Analysis

Defendant contends that, in light of the State's concession that Defendant's I.Q. is less than 70, this Court must remand for a new suppression hearing because

the trial court erred in failing to consider his subaverage intellectual functioning in evaluating the voluntariness of Defendant's statement to law enforcement. Defendant also argues that he should be granted a new trial because the trial court erred in failing to instruct the jury on second-degree murder and because the State presented insufficient evidence that he committed armed robbery, and therefore that the evidence was insufficient to support a felony murder conviction.

We agree that Defendant is entitled to a new suppression hearing. We conclude that Defendant is not entitled, however, to a new trial based on his remaining arguments.

A. Suppression Hearing

Defendant contends that his "low I.Q.—which was conceded by the State—was an important factor for the court to consider in assessing the totality of the circumstances under which [Defendant] confessed." Defendant argues that the State made a judicial admission that Defendant had a low I.Q. and that the trial court erred in failing to consider that admission in its evaluation of the voluntariness of Defendant's statement. We agree.

i. Preservation and Standard of Review

Defendant concedes that he failed to preserve an appeal from the denial of his motion to suppress. We therefore review his challenge to the denial of the motion to suppress for plain error. *State v. Waring*, 364 N.C. 443, 468, 701 S.E.2d 615, 632

(2010). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). A fundamental error is one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* It is an error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002) (citations and quotation marks omitted).

ii. Merits

The trial court concluded (1) that Defendant 'was not in custody or otherwise deprived of his freedom of action in any significant way as associated with a formal arrest and was not in custody at the time such statements were made;" and (2) that Defendant's "statements were made voluntarily and did not result from any deception or promises by law-enforcement officers[.]" While alluding to his argument before the trial court that he was subject to an impermissible custodial interrogation, Defendant principally argues on appeal that the trial court erred in failing to consider the State's judicial admission of his subaverage I.Q. in determining the voluntariness of his confession.

> The rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by the police only applies to custodial interrogation. A suspect is in custody when a reasonable person in his position would

> believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way. . . . Ordinarily, when a suspect is not in custody at the time he is questioned any admissions or confessions made by him are admissible so long as they are made knowingly and voluntarily.

State v. Braswell, 312 N.C. 553, 556, 324 S.E.2d 241, 244 (1985) (internal citations and quotation marks omitted). To determine whether a defendant was subjected to custodial interrogation, the court "must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint of freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997). This objective inquiry does not account for any personal characteristics of the suspect. *State v. Buchanan*, 353 N.C. 332, 341-42, 543 S.E.2d 823, 829 (2001); *cf. J.D.B. v. North Carolina*, 564 U.S. 261, 277, 180 L. Ed. 2d 310, 327 (2011) (holding that "courts cannot simply ignore" a juvenile's age, so long as it would have been objectively apparent to a reasonable officer or was known to the officer at the time of interrogation, in the *Miranda* custody analysis). Defendant's subaverage intellectual functioning, therefore, would not have played a role in the trial court's determination that Defendant was not in custody at the time he gave his statement to officers.

We address, then, Defendant's argument that the trial court erred in failing to consider his intellectual functioning in assessing the voluntariness of his statements, an inquiry separate from the custody assessment. In general, a suspect's statement

is voluntary if it is "the product of an essentially free and unconstrained choice by its maker." *State v. Wilkerson*, 363 N.C. 382, 431, 683 S.E.2d 174, 204 (2009) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 1057 (1961)). A suspect's statement is involuntary, or coerced, when the suspect's "will [is] overborne." *Dickerson v. United States*, 530 U.S. 428, 434, 147 L. Ed. 2d 405, 413 (2000). When determining whether a statement was voluntary, a court must consider all relevant circumstances—"both the characteristics of the accused and the details of the interrogation." *Id.*; *Withrow v. Williams*, 507 U.S. 680, 689, 123 L. Ed. 2d 407, 417 (1993) ("[W]e continue to employ the totality-of-circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process.").

In assessing the totality of the circumstances, factors that the reviewing court should consider include, among others, "the youth of the accused, his lack of education, or his low intelligence[.]" *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 862 (1973). Specifically, a defendant's "mental capacity, or his lack of it, is an important factor to be considered in determining the voluntariness of a confession." *State v. Thompson*, 287 N.C. 303, 318-19, 214 S.E.2d 742, 752 (1975) (citing *Blackburn v. Alabama*, 361 U.S. 199, 205-06, 4 L. Ed. 2d 242, 247 (1960); *State v. Thorpe*, 274 N.C. 457, 462-63, 164 S.E. 2d 171, 175 (1968); *State v. Whittemore*, 255 N.C. 583, 587-88, 122 S.E. 2d 396, 399 (1961)). Failing to make necessary findings of

fact in reviewing a motion to suppress is error. *See State v. Council*, 232 N.C. App. 68, 75, 753 S.E.2d 223, 229 (2014).

Defendant concedes that he presented no evidence of his subaverage intellectual functioning at the suppression hearing. Defendant argues, however, that the trial court erred in failing to consider the State's judicial admission of Defendant's intellectual functioning in considering the totality of the circumstances surrounding Defendant's confession.[1]

"A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute." *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981). A judicial admission is "binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it, and relieving the other party of the necessity of producing evidence to establish an admitted fact." *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981).

In this case, the State, through counsel, conceded that Defendant's I.Q. was lower than 70 at the Rule 24 hearing and in the proposed Rule 24 order it submitted to the court. At the Rule 24 hearing, the State announced, "[Defense counsel] has shared a number of materials with me[,] and I have reviewed those and determined

[1] We note that, although Defendant submitted the affidavit of Dr. Sapia with his motion to suppress, he does not argue on appeal that the trial court erred in failing to consider the affidavit. We thus address only his argument that the trial court erred in failing to consider the State's judicial admission of Defendant's subaverage I.Q.

that it is well-established that the defendant's I.Q. is lower than 70 beginning in childhood and that has persisted well before the commission of this crime." The State also submitted a proposed Rule 24 order, signed by the trial court, that included the following finding of fact:

> On December 11, 2017, [counsel for the State] informed the court that, pursuant to G.S. 15-A-2004, after having reviewed school records and other materials that established that the defendant had an I.Q. below 70 prior to the commission of this offense, the State elects to withdraw its request to seek the death penalty against this defendant.[2]

The trial court signed the proposed order and, based on the above finding of fact, ordered that the case proceed non-capitally. In short, the State, the defense, and the trial court all agreed Defendant had a significantly diminished intellectual capacity.

We therefore conclude that the prosecutor's repeated acknowledgement that Defendant had an I.Q. below 70 amounted to a judicial admission of that fact. The trial court therefore erred in failing to consider that "binding" admission in evaluating the totality of the circumstances surrounding Defendant's confession. *Thomas*, 54 N.C. App. at 241, 282 S.E.2d at 517 ("[J]udicial admissions [ ] are [ ] binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it[.]"); *see Schneckloth*, 412 U.S. at 226, 36 L.Ed. 2d

[2] An individual with "[a]n intelligence quotient of 70 or below" is considered to have "significantly subaverage general intellectual functioning" and, thus, be ineligible for the death penalty. N.C. Gen. Stat. § 15A-2005(a)-(b) (2019).

at 862 (voluntariness of defendant's statement determined by totality of circumstances, including "the characteristics of the accused").

Because the trial court erred in failing to consider the State's judicial admission of Defendant's low I.Q., we must determine whether this error amounts to plain error. *See State v. Powell*, 253 N.C. App. 590, 605, 800 S.E.2d 745, 754 (2017). The voluntariness of a confession is no mere passing concern; it is a carefully guarded constitutional right. *Blackburn*, 361 U.S. at 210, 4 L.Ed.2d at 250 ("Where the involuntariness of a confession is conclusively demonstrated at any stage of a trial, the defendant is deprived of due process by entry of judgment of conviction without exclusion of the confession."). Also, as noted above, a defendant's "mental capacity, or his lack of it, is an important factor to be considered in determining the voluntariness of a confession." *State v. Thompson*, 287 N.C. at 318-19, 214 S.E.2d at 752 (1975). Further, the practical implications of the trial court's admitting a criminal defendant's confession without a thorough consideration of its voluntariness are difficult to overstate: because a confession is the "best evidence" of a defendant's guilt, *State v. Fox*, 274 N.C. 277, 289, 163 S.E.2d 492, 501 (1968), "no one can say what weight and credibility the jury gave the confession" at issue, *State v. Bartlett*, 121 N.C. App. 521, 523, 466 S.E.2d 302, 303 (1996).

In short, the trial court failed to consider a factor central to the voluntariness and legality of Defendant's confession, which, in turn, was potentially central to his

conviction. This amount to "a miscarriage of justice" sufficient to constitute plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

iii. Remedy

Having concluded that the trial court plainly erred in failing to consider the State's judicial admission that Defendant has subaverage intellectual functioning, we consider the appropriate remedy.

> Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial. If the trial court determines that the motion to suppress was properly denied, then defendant would not be entitled to a new trial because there would have been no error in the admission of the evidence, and his convictions would stand. If, however, the court determines that the motion to suppress should have been granted, defendant would be entitled to a new trial.

State v. McFarland, 234 N.C. App. 274, 284, 758 S.E.2d 457, 465 (2014) (internal marks and citations omitted) (finding no other prejudicial error and remanding for the trial court to consider defendant's suppression motion). We therefore remand this matter for a new suppression hearing with instructions for the trial court to consider and address the State's judicial admission of Defendant's subaverage I.Q. The trial court, in its discretion, may also review additional evidence pertaining to Defendant's cognitive capacity. The trial court may then again deny the motion to suppress, leaving Defendant's convictions intact, or may grant the motion to suppress and order a new trial. *See State v. Santillan*, 259 N.C. App. 394, 400-01, 815 S.E.2d 690, 694

(2018) (remanding for new suppression hearing with instructions for trial court to address facts necessary to determine voluntariness of defendant's statement).

B. Jury Charge

Defendant further contends that he is entitled to a new trial regardless of the outcome of a new suppression hearing. Defendant makes two arguments; we address each in turn. Defendant first argues that the trial court erred by refusing to instruct the jury on the lesser included offense of second-degree murder. We disagree.

i. Standard of Review

When properly preserved, "[a]ssignments of error challenging the trial court's decisions regarding jury instructions are reviewed de novo by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

ii. Merits

> An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater. When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant.

State v. Clark, 201 N.C. App. 319, 323, 689 S.E.2d 553, 557 (2009) (internal marks and citations omitted). However, "[w]here the State's evidence is positive as to each

element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002).

First-degree murder may be based on the theory of felony murder or on the theory of premeditated and deliberated murder:

> Premeditation means that the defendant formed the specific intent to kill for some length of time, however short, before the actual killing. Deliberation means that the intent to kill was executed in a cool state of blood, without legal provocation, and in furtherance of a fixed design for revenge or to accomplish some unlawful purpose.

State v. Cummings, 323 N.C. 181, 188, 372 S.E.2d 541, 547 (1988). The term "cool state of blood" does not mean "an absence of passion and emotion[.]" *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981) (citation omitted). "[P]assion does not always reduce the crime since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time." *Id.* at 113, 282 S.E.2d at 795 (citation omitted). Because premeditation and deliberation "are processes of the mind, they are not susceptible to direct proof and must almost always be proved by circumstantial evidence." *State v. Corn*, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981). Circumstances to consider whether a defendant committed a premeditated and deliberate murder include but are not limited to:

> (1) absence of provocation on the part of deceased, (2) the statements and conduct of the defendant before and after

> the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Sierra, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994) (citation omitted).

Second-degree murder is a lesser included offense of first-degree murder. *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 925 (2000). Second-degree murder "is defined as the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Phipps*, 331 N.C. 427, 458, 418 S.E.2d 178, 194 (1992). Evidence that the assailant and homicide victim engaged in physical combat can support a second-degree murder instruction. *See Misenheimer*, 304 N.C. at 114, 282 S.E.2d at 795-96 (addressing evidence that defendant and homicide victim engaged in physical struggle); *Phipps*, 331 N.C. at 458-59, 418 S.E.2d at 195 (addressing evidence that homicide victim used a crowbar and pocketknife with intent to attack perpetrator).

Defendant contends that a second-degree murder instruction was warranted because the intent to kill arose when Demonsha accused him of rape, not in a "cool state of blood". However, the State presented evidence that Defendant retrieved a gun at some point after being thrown out of the Club by security personnel and shot Demonsha three times standing outside of the car while she was inside, based on the location of the shell casings, before burning the car in order to hide his fingerprints.

There is no evidence that Demonsha and Defendant engaged in physical combat, *see Misenheimer*, 304 N.C. at 114, 282 S.E.2d at 795-96, or that Demonsha attacked Defendant, *see Phipps*, 331 N.C. at 458-59, 418 S.E.2d at 195. There was no evidence presented that Demonsha provoked Defendant, was armed, or initiated the altercation. *See Sierra*, 335 N.C. at 758, 440 S.E.2d at 794. There is no evidence that Defendant became so enraged after Demonsha accused him of rape that he killed her in a heat of passion without premeditation and deliberation. Even taking Defendant's statements in the light most favorable to him, "passion does not always reduce the crime since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time." *Misenheimer*, 304 N.C. at 113, 282 S.E.2d at 795 (citation omitted). The trial court did not err by denying Defendant's request for a second-degree murder instruction.

C. Felony Murder Conviction

Defendant also argues that the State presented insufficient evidence to support the conviction of robbery with a dangerous weapon and that, therefore, insufficient evidence supports his felony murder conviction. We disagree.

i. Standard of Review

"This Court reviews a trial court's denial of a motion to dismiss *de novo*." *State v. Stroud*, 252 N.C. App. 200, 208, 797 S.E.2d 34, 41 (2017). To survive a motion to

dismiss, the State must present "substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* "In reviewing the trial court's ruling, we must evaluate the evidence in the light most favorable to the State, and all contradictions in the evidence must be resolved in its favor." *Id.* at 209, 797 S.E.2d at 41.

ii. Merits

Defendant contends that the State presented insufficient evidence that he committed robbery with a dangerous weapon "because the evidence in the light most favorable to the State showed that [Defendant] took control of the truck with the decedent's permission, and not pursuant to the use, or threatened use, of a firearm."

The elements of robbery with a dangerous weapon are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). It matters not whether, where a victim of robbery with a dangerous weapon dies, the taking occurs before or after the victim is killed; "[a]ll that is required is that the elements of armed robbery occur under circumstances and in a timeframe that can be perceived as a single transaction." *State v. Fields*, 315 N.C. 191, 201–02, 337 S.E.2d 518, 524–25 (1985). Similarly, it also "does not depend

upon whether the threat or use of violence precedes or follows the taking of the victim['s] property." *State v. Green*, 321 N.C. 594, 605, 365 S.E.2d 587, 594 (1988). "[P]rovided that the theft and the force are aspects of a single transaction, it is immaterial whether the intention to commit the theft was formed before or after force was used upon the victims." *Id.*

In *State v. Flaugher*, 214 N.C. App. 370, 713 S.E.2d 576 (2011), the defendant argued that her assault on the victim "was not made to induce him to part with his money[;] rather the State's evidence show[ed] her demand for money to be an afterthought." *Id.* at 379, 713 S.E.2d at 585. Our Court disagreed, reasoning that

> when the circumstances of the alleged armed robbery reveal defendant intended to permanently deprive the owner of his property and the taking was effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction.

Id., (quoting *State v. Fields*, 315 N.C. 191, 203, 337, S.E.2d 518, 525 (1985)). Viewing the evidence in the light most favorable to the State, this Court concluded that "even if defendant's initial motive was to hurt or kill [the victim], the fact that she at some point later developed the motive to rob him is immaterial." *Id.* at 380, 713 S.E.2d at 585.

The same is true in this case. Defendant argues that his taking of the truck after shooting and killing Demonsha "was, at most, 'an afterthought' tangential to

the use of a firearm." But, viewed in the light most favorable to the State, the State's evidence shows a continuous chain of events connecting the murder and the taking of the SUV. The State's evidence shows that Defendant and Demonsha rode for some time in the SUV together, that they had sex, that Defendant shot Demonsha three times, and that he took the car and set fire to it in order to destroy the evidence of the murder. By taking and burning the SUV, Defendant demonstrated an "intent to permanently deprive" Demonsha of the car. *Id.* at 380, 713 S.E.2d at 585. As we said in *Flaugher*, "even if [D]efendant's initial motive was to hurt or kill [Demonsha], the fact that [ ]he at some point later developed the motive to rob [her] is immaterial." *Id.* at 380, 713 S.E.2d at 585. We therefore conclude that the trial court did not err in denying Defendant's motion to dismiss the charge of felony murder based on the underlying charge of robbery with a dangerous weapon.

III. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying Defendant's request for a second-degree murder jury instruction or in denying Defendant's motion to dismiss. However, we hold that the trial court erred by failing to consider the State's judicial admission that Defendant has an I.Q. below 70. We therefore remand for a new suppression hearing with instructions for the trial court to consider Defendant's subaverage I.Q. in assessing the voluntariness of his

confession. In its discretion, the trial court may also review additional evidence pertaining to Defendant's cognitive capacity in its voluntariness inquiry.

NO ERROR IN PART; REMANDED IN PART.

Judges STROUD and BROOK concur.

Report per Rule 30(e).