IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-200

Filed 15 August 2023

Vance County, No. 17CRS51798

STATE OF NORTH CAROLINA

v.

AKEEM RUMEAL GRISSETT, Defendant.

Appeal by defendant from judgment entered 19 April 2021 by Judge John M. Dunlow in Vance County Superior Court. Heard in the Court of Appeals 25 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly N. Callahan, for the State of North Carolina.

Christopher A. Brook, for the Defendant.

DILLON, Judge.

Defendant Akeem Rumeal Grissett was convicted of second-degree murder and robbery with a firearm in connection with the killing of Christopher Smalls.

I. Background

The evidence at trial tended to show as follows: On the evening of 16 June 2017, Mr. Smalls attended a bachelor party at a house in Oxford with 35 to 40 other

people. An exotic dancer was hired to dance at this party. Defendant drove the dancer to the party, and he also picked up a male friend on the way. The dancer knew Defendant because she previously bought heroin from him and had engaged in a sexual relationship with him. The three arrived at the party around midnight.

At the party, the dancer began to dance in the living room, and Mr. Smalls began staring at her. He mouthed to the dancer, "I want you. I want you." After having a conversation with the dancer in the kitchen, Mr. Smalls paid her $300.00 to have sex with him after the party.

After the party, the dancer left with Defendant and his friend. They followed Mr. Smalls, who was driving another car. Mr. Smalls stopped his car when they reached a dirt road. Defendant also stopped, and the dancer exited to speak with Mr. Smalls. During this encounter, Mr. Smalls told the dancer that he did not feel comfortable having Defendant and his friend's present, and he asked her to have them wait at the store down the road. The dancer walked back to Defendant's car and did as Mr. Smalls requested. Defendant responded, "I'm not leaving you here with this [racial slur]. You don't know him. He could do anything. I'm not going to wait at no store." Defendant became angry. The dancer walked back to Mr. Smalls' car to see if they could meet up another time.

While the dancer spoke with Mr. Smalls, Defendant and his friend walked over to Mr. Smalls' car. The dancer ran back to Defendant's car and heard two or three gunshots coming from Mr. Smalls' car. She could not see exactly what transpired

between Defendant and Mr. Smalls because she had poor vision and lost her glasses. This altercation took place in the span of about two to three minutes. Defendant, his friend, and the dancer fled the scene. Sometime later, Mr. Smalls was discovered lying next to his car by a passerby. The passerby called for an ambulance. Mr. Smalls died from his injuries before the ambulance arrived.

During the investigation, law enforcement gathered substantial evidence that Defendant killed and robbed Mr. Smalls. Defendant was subsequently arrested and put on trial for the killing and robbery. The jury acquitted Defendant of first-degree murder but convicted him of second-degree murder and robbery with a firearm. Defendant appeals.

I. Analysis

Defendant makes two arguments on appeal concerning his conviction for second-degree murder, which we address in turn.

A. Jury Instructions

Defendant first argues that the trial court plainly erred by instructing the jury on second-degree murder and contends that there was no evidence consistent with this charge. We disagree.

We note Defendant's counsel requested the trial court to give a second-degree murder instruction, as the court had decided to instruct on first-degree murder:

> I mean, I generally prefer to have lesser included offenses, but I'm not sure there's any evidence that would tend towards that. I mean, obviously if the Court were inclined

> to second-degree murder, we'd certainly not be opposed to that. So I would request a second-degree murder instruction.

The State did not object to Defendant's request. The trial court, though, asked Defendant's counsel to explain what evidence supported the second-degree murder instruction. Defendant's counsel responded:

> I mean, I think that we don't necessarily know what happened once they got there. I mean, there seemed to be some sort of struggle. I mean, the car had moved, his [clothes] were removed things like that. So there could have been other circumstances than what [the dancer] had testified to that would do that. There could have been more than just premeditation and deliberation. There may have been some sort of struggle or something. But I will acknowledge there's no direct evidence of that. The lack of evidence has kind of been our point his whole time.

Our Supreme Court has held that "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991).

Further, while the jury could have inferred from the State's evidence that Defendant formed a specific intent to kill after premeditation and deliberation, thus supporting the first-degree murder instruction, the jury could have inferred from the State's evidence that Defendant had *not* formed a specific intent to kill after premeditation and deliberation, thus supporting the second-degree murder instruction. That is, the jury could have believed the State's evidence but had reasonable doubt as to whether Defendant premeditated and deliberated to kill,

rather than merely assault, the victim. Or, alternatively, the jury could have had reasonable doubt as to whether Defendant's intent to kill with the fatal blow/shot was formed only after premeditation and deliberation.

Indeed, our Supreme Court instructs that "[i]n order to convict a defendant of premeditated, first-degree murder, the State must prove (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007). It is not enough for the State to merely show that a defendant premeditated and deliberated on assaulting the victim; the State must show that the defendant premeditated and deliberated on *killing* the victim. Likewise, it is not enough for the State to show that a defendant had a specific intent to kill the victim, the State must also show that the defendant formed that intent after premeditation and deliberation.

In a case from 1979, our Supreme Court instructed that a second-degree murder instruction must be given where the State seeks a conviction for first-degree murder based on premeditation and deliberation, in order to allow the jury to decide whether the defendant premeditated/deliberated to kill:

> Assuming *arguendo* that there was no positive evidence of the absence of premeditation and deliberation, the trial court was still required to submit the issue of second degree murder to the jury. In the instant case the state relied upon premeditation and deliberation to support a conviction of murder in the first degree. In *State v. Harris*, 290 N.C. 718, 730, 228 S.E. 2d 424, 432 (1976), we held

> that, "in all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree." This requirement is present because premeditation and deliberation are operations of the mind which must always be proved, if at all, by circumstantial evidence. If the jury chooses not to infer the presence of premeditation and deliberation, it should be given the alternative of finding the defendant guilty of second degree murder.

State v. Poole, 298 N.C. 254, 258, 258 S.E.2d 339, 342 (1979).

However, four years later, our Supreme Court stated that a second-degree murder instruction is not required "in *every case* in which the State relies on premeditation and deliberation to support a conviction of first-degree murder." *State v. Strickland*, 307 N.C. 274, 281, 298 S.E.2d 645, 651 (1983) (emphasis in the original). Where the State has put forth evidence which establishes premeditation and deliberation of the intent to kill "and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial court should properly exclude from jury consideration the possibility of a conviction of second degree murder." *Id.* at 293, 298 S.E.2d 658.

The Court has since stated that "[a] defendant is not entitled to an instruction of [second-degree murder] merely because the jury could possibly believe some of the state's evidence [supporting first-degree murder] but not all of it." *State v. Leazer*, 353 N.C. 234, 240, 539 S.E.2d 922, 926 (2000).

However, where the State's evidence, if believed, is capable of conflicting

reasonable inferences, the defendant is entitled to a first-degree murder instruction and an instruction on a lesser homicide offense.[1] *See, e,g, State v. Jerrett*, 309 N.C. 239, 263, 307 S.E.2d 339, 352 (1983) (stating that it is "for the jury to resolve the conflicting inferences arising from the evidence"); *State v. Benton,* 299 N.C. 16, 260 S.E.2d 917 (1980) (testimony permitting conflicting evidence is for the jury to resolve).

Here, the evidence shows that the victim died during a struggle between him and Defendant, and there is no direct evidence as to what exactly transpired. We conclude the jury, believing the State's evidence, could still have had reasonable doubt as to whether Defendant had formed a specific intent to kill formed after premeditation and deliberation when he killed Mr. Smalls.

B. Ineffective Assistance of Counsel

Defendant argues that Defendant's trial counsel provided ineffective assistance of counsel when he did not move to set aside the unsupported conviction for second-degree murder. We disagree.

To demonstrate ineffective assistance of counsel ("IAC"), Defendant must establish that (1) his trial attorney's "performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S.

[1] Where the evidence is capable of conflicting inferences on premeditation and deliberation and if the defendant fails to request that a second-degree murder instruction be given and he is subsequently convicted for first-degree murder, he would only be entitled to plain error review of the trial court's failure to instruct on second-degree murder where he would have to show that the jury "probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

668, 687 (1984). "When a defendant challenges a conviction [based on an IAC], the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

In this case, as explained above, there was evidence that Defendant committed second-degree murder. There was evidence that he killed Mr. Smalls with malice. Further, as explained above, even if Defendant was not entitled to the second-degree murder instruction, it was not reversible error for him to have received it in this case. And we see no reasonable probability that had Defendant not received the second-degree murder instruction, he would have been acquitted of first-degree murder.

Therefore, we conclude that Defendant's trial counsel did not provide ineffective assistance of counsel.

II. Conclusion

We conclude that Defendant received a fair trial, free of reversible error.

NO ERROR.

Judges MURPHY and FLOOD concur.

Report per Rule 30(e).