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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-749

Filed 18 July 2023

McDowell County, No. 18 CRS 51290

STATE OF NORTH CAROLINA

v.

WALTER SYDNEY MITCHELL

Appeal by Defendant from a judgment entered 22 April 2022 by Judge Bradley B. Letts in McDowell County Superior Court. Heard in the Court of Appeals 25 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alvin W. Keller, Jr., for the State.

Drew Nelson, for Defendant.

WOOD, Judge.

Defendant appeals his conviction of first-degree murder and argues that the trial court erred by denying Defendant's request to instruct the jury on voluntary manslaughter. Based on the following reasons, we conclude Defendant received a fair trial, and if there be any error in the trial, it was harmless error.

I. Background

Having recently inherited a house, Matthew Pressley invited multiple people, including Cassandra Loftis, Arvin Hicks, Lacey Riddle, Russell Jackson, and Defendant, to stay in his home.

Around 20 July 2018, Defendant traveled with Ms. Riddle to a local garage where Defendant asked Mr. Randolph, the garage owner, if he would buy his truck. Mr. Randolph declined because he was skeptical of whether the truck worked and if Defendant actually owned it. Defendant had previously told him that someone else had used the truck incorrectly and left it on the side of the road where the keys were stolen by, as Defendant believed, Mr. Pressley. Upset with his inability to sell the truck, Defendant left and rode back to the house with Ms. Riddle to confront Mr. Pressley about the lost keys. Once there, Defendant grabbed a pistol from Ms. Riddle's car and questioned Mr. Pressley about the truck keys. Defendant eventually became violent, hitting Mr. Pressley with his fists and the pistol and accusing Mr. Pressley of stealing his truck keys. Defendant then raised the pistol, shot Mr. Pressley in the face, and fled the scene using Ms. Riddle's car.

At trial, the State called multiple witnesses who each presented varying accounts of the incident. Ms. Loftis testified she was inside the house at the time of the fight but heard Defendant outside yelling at Mr. Pressley and accusing him of having stolen Defendant's keys. Ms. Loftis further testified that Defendant sounded "mad" and that the men "started getting a little bit physical." She heard, but did not see, Defendant shoot Mr. Pressley.

Mr. Hicks testified that he heard a "commotion" in the yard, where it sounded like Defendant and Mr. Pressley were arguing over the stolen keys. He further testified that Defendant "smacked" Mr. Pressley with an "open hand" and that, following this, he heard a "real loud" noise. He said he did not hear any arguing from the two men but did hear the gunshot.

Ms. Riddle testified that she drove Defendant home and, immediately after she parked her car at the house, Defendant grabbed a gun and exchanged a "few words" with Mr. Pressley. The confrontation eventually turned into "an altercation" and then "escalated into [Defendant] shooting at the ground." Ms. Riddle also testified that she saw Defendant punch Mr. Pressley twice in the face and strike him with the gun before she heard two gunshots.

Mr. Jackson testified that Defendant entered the house and started "waiving a gun" in his face and then went outside to confront Mr. Pressley. Defendant and Mr. Pressley then started arguing about the stolen keys and began "fighting." He testified Defendant hit Mr. Pressley with the gun and in response, Mr. Pressley punched Defendant's face, causing Defendant to become angry and to shoot Mr. Pressley.

One month later, on 6 August 2018, a grand jury returned an indictment charging Defendant with first-degree murder. The trial began on 18 April 2022.

During trial, Defendant's attorney requested the trial court instruct the jury on the lesser-included offense of voluntary manslaughter. The trial court denied the motion. The trial court instructed the jury on the offenses of first-degree murder and

second-degree murder, and the jury was supplied with a verdict form listing options for "Guilty of First Degree Murder," "Guilty of Second Degree Murder," and "Not Guilty."

On 22 April 2021, the jury found Defendant guilty of first-degree murder. Defendant appeals from this judgment, as of right, pursuant to N.C. Gen. Stat. § 15A-1444.

II. Standard of Review

"We review the trial court's denial of the request for an instruction on the lesser included offense de novo." *State v. Laurean*, 220 N.C. App. 342, 345, 724 S.E.2d 657, 660 (2012). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted).

III. Discussion

Defendant argues the trial court erred when it did not instruct the jury on the lesser-included offense of voluntary manslaughter. Defendant properly moved to include the instruction prior to the charge to the jury and thus preserved the issue for our review.

Our state recognizes three forms of intentional homicide, first-degree murder, second-degree murder, and voluntary manslaughter. All three are relevant to this case and are discussed below.

"First-degree murder is the unlawful killing of a human being with malice and with a specific intent to kill, committed after premeditation and deliberation." *State v. Cozart*, 131 N.C. App. 199, 202, 505, S.E.2d 906, 909 (1998); *see* N.C. Gen. Stat. § 14-17 (2022). Malice may be of three types. *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). One involves "express hatred, ill-will[,] or spite, sometimes called actual, express, or particular malice." *Id.* Another involves inherently dangerous acts, so reckless and wanton "as to manifest a mind utterly without regard for human life." *Id.* The third type of malice is "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification." *Id.* (quoting *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 893 (1962)). Malice is seldom proved with direct evidence. *State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 58 (2003). Rather, it "is ordinarily proven by circumstantial evidence from which it may be inferred." *Id.* Such evidence can include:

> (1) absence of provocation on the part of the 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. Olson, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992) (citing *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693 (1986)). Specific intent to kill is "a necessary constituent of the elements of premeditation and deliberation in first

degree murder [and] is not an element of second degree murder or manslaughter." *State v. Barber*, 270 N.C. 222, 227, 154 S.E.2d 104, 108 (1967) (quoting *State v. Gordon*, 241 N.C. 356, 358, 85 S.E.2d 322, 323 (1955)). Deliberation is "an intent to kill carried out by the defendant in a cool state of blood." *State v. Young*, 324 N.C. 489, 493, 380 S.E.2d 94, 96 (1989). Premeditation is the formation of intent to kill "beforehand, for some length of time, however short." *Id.* Like malice, it is difficult to prove deliberation, premeditation, and defendant's specific mental intent by direct evidence. Therefore, circumstantial evidence can be used to satisfy these requirements.

"Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983); N.C. Gen. Stat. § 14-17(b) (2022).

"[V]oluntary manslaughter is an intentional killing without premeditation, deliberation[,] or malice but done in the heat of passion suddenly aroused by adequate provocation or in the exercise of imperfect self-defense where excessive force under the circumstances was used or where the defendant is the aggressor." *State v. Wallace*, 309 N.C. 141, 149, 305 S.E.2d 548, 553 (1983). "The 'specific intent [of first-degree murder] is either excused, justified, or negated by heat of passion arising under sudden and adequate provocation.' " *State v. Guin*, 282 N.C. App. 160, 167, 870 S.E.2d 285, 291 (2022) (quoting *State v. Rainey*, 154 N.C. App. 282, 287, 574 S.E.2d 25, 28 (2002)).

"Voluntary manslaughter is a lesser included offense of murder . . . ." *State v. Allbrooks*, 256 N.C. App. 505, 510, 808 S.E.2d 168, 172 (2017).

> The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Leroux, 326 N.C. 368, 378, 396 S.E.2d 314, 322 (1990).

Our Supreme Court held in *State v. Price* that, when the court improperly fails to submit a lesser included offense of the offense charged, and the jury only has two options in reaching a verdict—guilty of the offense charged and not guilty—then a verdict of guilty of the offense charged is not reliable, and a new trial must be granted. 344 N.C. 583, 589, 476 S.E.2d 317, 320 (1996). This is so because, in a case in which one of the elements of the offense charged remains in doubt but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction despite the existing doubt. *Id.* at 589, 476 S.E.2d at 321. However, *Price* distinguished that scenario with one similar to the case before us. It held, when a jury finds a defendant guilty of first-degree murder and had the option to find the defendant guilty of the lesser-included offense of second-degree murder, the court commits harmless error when it denies the defendant's motion to include voluntary manslaughter as a verdict option. *Id.* at 590, 476 S.E.2d at 321.

There are two rationales for this latter rule. In the first, by finding the

defendant guilty beyond a reasonable doubt of first-degree murder and rejecting second-degree murder, the jury rejected the possibilities that the defendant acted in the heat of passion or in imperfect self-defense (voluntary manslaughter). *Id.* In the second, a first-degree murder verdict clearly shows that the jurors were not coerced, for they had the right to convict in the second-degree. *Id.* The jury's decision indicates their certainty of the defendant's guilt of the greater offense. Therefore, the court's failure to instruct as to manslaughter could not have prejudiced the defendant. *Id*.

Price is not the only case contemplating our scenario. See *State v. Cunningham*, 344 N.C. 341, 363, 474 S.E.2d 772, 782 (1996) ("If there is error in the failure to submit voluntary manslaughter to the jury, it is harmless if the court submits first-degree murder based on premeditation and deliberation and second-degree murder, and the jury returns a verdict of guilty of first-degree murder."); *State v. Holt*, 342 N.C. 395, 398, 464 S.E.2d 672, 674 (1995). It is well established in North Carolina that when "a jury is properly instructed on first degree murder and second degree murder, and the jury returns a verdict of guilty of first degree murder, the failure to instruct on voluntary manslaughter is harmless error." *State v. Vaughn*, 324 N.C. 301, 309, 377 S.E.2d 738, 742 (1989)

Here, the trial court presented the jury with three options: (1) first-degree murder based on the theory of premeditation and deliberation, (2) second-degree murder, or (3) not guilty. After being instructed on these theories and deliberating,

the jury found Defendant guilty of first-degree murder. Therefore, because the jury found Defendant guilty of first-degree murder beyond a reasonable doubt after considering second-degree murder and potential innocence, the court's failure to instruct the jury on voluntary manslaughter is harmless error, if any.

Defendant would have this court "craft an exception to the general rule" articulated in *Price*. This creative caveat would have us hold that the trial court's denial of a voluntary manslaughter instruction constitutes prejudicial error "when the defendant requests the submission of this potential verdict based on the argument that he acted in the heat of passion, this request is denied by the trial court, and the defendant then makes a closing argument that does not include this potential defense." We decline to adopt this exception. The rationale espoused in *Price* is not thwarted when trial counsel does not pursue a heat of passion defense.

IV. Conclusion

In keeping with *Price*, we hold, if the trial court committed error by not instructing the jury on the offense of voluntary manslaughter, it was harmless error as the jury, declining to find Defendant guilty of the lesser-included offense of second-degree murder, found Defendant guilty of first-degree murder. Accordingly, we conclude Defendant received a fair trial, and if there be any error in the trial, it was harmless error.

NO ERROR.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).