

NO. COA14-599

NORTH CAROLINA COURT OF APPEALS

Filed:31 December 2014

STATE OF NORTH CAROLINA

v.

Nash County  
No. 12CRS054414  
12CRS054416-17

BURNICE ANTWON HINNANT, JR.

Appeal by Defendant from judgments entered 17 October 2013  
by Judge Quentin T. Sumner in Nash County Superior Court. Heard  
in the Court of Appeals 21 October 2014.

*Attorney General Roy A. Cooper, III, by Special Deputy  
Attorney General Brenda Menard, for the State.*

*Unti & Smith, PLLC, by Sharon L. Smith, for the Defendant.*

DILLON, Judge.

Burnice Antwon Hinnant, Jr., ("Defendant") appeals from  
judgments entered upon a jury verdict finding him guilty of  
assault with a deadly weapon and second degree murder.

I. Background

The evidence tended to show the following: In the early  
morning hours of 2 September 2012, Defendant was involved in an

altercation with his cousin C.J. Hinnant<sup>1</sup> at a party. During the altercation, Defendant shot Jayquan Tabron with a .38 caliber revolver. Defendant testified in his own defense, stating that C.J. was reaching for what he believed to be a gun and that he intended to fire warning shots in the direction of C.J. but did not intend to hit him. One of these warning shots, however, hit Mr. Tabron in the chest, killing him. Mr. Tabron had been standing in a crowd next to C.J.

One of the State's witnesses testified that C.J. reached for his waistband before Defendant drew his weapon, and further, that it was C.J., not Defendant, who started the fight.

On 29 October 2012, a Nash County grand jury indicted Defendant with carrying a concealed handgun, assault with a deadly weapon with intent to kill, and first degree murder.<sup>2</sup> Defendant pleaded guilty to carrying a concealed handgun. The remaining charges in the matter came on for trial in Nash County Superior Court.

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<sup>1</sup> Because Defendant and C.J. Hinnant are cousins and share the same last name, C.J. Hinnant is referred to herein as "C.J."

<sup>2</sup> Defendant's liability for the murder is based on the doctrine of transferred intent, which provides that where "one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary." *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971), *overruled on other grounds by State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986).

The jury found Defendant guilty of assault with a deadly weapon and second degree murder. The trial court sentenced Defendant to prison for 180 to 228 months for second degree murder and 75 days for assault with a deadly weapon, consolidating the concealed weapon charge with the assault charge and ordering that the sentences run consecutively. Defendant filed notice of appeal in open court.

## II. Analysis

Defendant makes three arguments on appeal, which we address in turn.

### A. Self-Defense and Voluntary Manslaughter Instructions

Defendant first contends that the trial court erred in refusing to instruct the jury on self-defense and in omitting an instruction on voluntary manslaughter. We disagree.

A defendant is only entitled to an instruction on self-defense if evidence exists that (1) he "in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm" and (2) that such a belief was reasonable. *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). In this case, Defendant's argument fails because there was no evidence to support the first element of self-defense - that he "in fact" formed a belief that it was

necessary to kill C.J. - in that he testified that he was only firing warning shots. Specifically, our Supreme Court has held that a defendant is not entitled to jury instructions on self-defense or voluntary manslaughter "while still insisting . . . that he did not intend to shoot anyone[.]" *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996).

On the witness stand, Defendant testified that he did not intend to shoot C.J. or anyone else when he fired his weapon, but rather his intent was to fire warning shots, because he believed C.J. was reaching for a weapon:

I wasn't trying to harm C.J. or [Mr. Tabron], you know, I was just trying to get C.J. to back off of me. And I felt like if I pulled my gun out at the time, that would get him to back off of me. And that's what he did, he backed off of me.

. . . .

If I had reached my arm out and pointed my gun directly in front of me, I mean, I would have shot C.J. But like I said, *I was just trying to get C.J. to back off of me.* That's why I had pulled my gun out. And if C.J. had have pulled his gun out, yes, I would then have shot C.J., **but that wasn't my intent. My intent was just to get him to back off of me.**

(Emphasis added).

The facts of this case are almost identical to that faced by our Supreme Court in *Williams*. In *Williams*, the defendant

testified that he felt threatened during an altercation when he believed that one of his adversaries was reaching for a gun and testified that he fired warning shots in the air to make his adversaries back off, one of which struck and killed the victim:

The defendant testified that he felt threatened because [an adversary] reached at his belt as if he were reaching for a pistol. Defendant testified that he then pointed his pistol in the air and fired three shots to scare [his adversaries] and make them back off.

*Id.* at 872, 467 S.E.2d at 393. In holding that the defendant was not entitled to an instruction on self-defense, our Supreme Court stated as follows:

The defendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at anyone, that he did not intend to shoot anyone and that he did not know anyone had been shot. Clearly, a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat. The defendant's own testimony, therefore, disproves the first element of self-defense.

*Id.* at 873, 467 S.E.2d at 394.

Defendant argues that, notwithstanding his own testimony about his intent, he was nonetheless entitled to jury instructions on self-defense and voluntary manslaughter because there was other evidence presented at trial to support a finding

by the jury that he acted in self-defense. We agree that the testimony of other witnesses may have been sufficient for the jurors to conclude that it was reasonable for Defendant to use deadly force during his encounter with C.J.; however, such evidence only satisfies the second element of self-defense. Our Supreme Court has held that such evidence is irrelevant where the defendant's testimony about his own belief demonstrates that the first element was not present. *State v. Nicholson*, 355 N.C. 1, 30-31, 558 S.E.2d 109, 130-31 (2002). Specifically, in *Nicholson*, the Supreme Court held that the testimony of a witness stating that it was reasonable for the defendant to believe deadly force was necessary was irrelevant where the defendant himself testified that he did not intend to shoot anyone when he fired his weapon. *Id.* at 31, 558 S.E.2d at 131.

Here, Defendant's own testimony was that he did not intend to shoot anyone when he fired his weapon. Therefore, based on *Williams*, *Nicholson*, and other decisions by our appellate courts, we hold that Defendant was not entitled to an instruction on self-defense. See, e.g., *State v. Lyons*, 340 N.C. 646, 662, 459 S.E.2d 770, 779 (1995) ("[F]rom defendant's own testimony regarding his thinking at the critical time, it is clear he meant to scare or warn and did not intend to shoot

anyone," but rather intended to shoot at the top of a door); *State v. Reid*, 335 N.C. 647, 671, 440 S.E.2d 776, 789-90 (1994) (defendant cannot claim self-defense while also asserting that he did not aim his gun at the victim); *State v. Gaston*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 748 S.E.2d 21, 26-27 (2013) (defendant was not entitled to instruction on self-defense or voluntary manslaughter where he testified that the gun fired accidentally).

Defendant devotes the final two paragraphs of his first argument to the alternate contention that the trial court erred in refusing to instruct the jury on voluntary manslaughter based on a theory of adequate provocation. We disagree for the same reasons expressed above concerning his argument regarding self-defense. Voluntary manslaughter committed in the heat of passion and with adequate provocation requires that the defendant perpetrate the killing with the intent to kill. *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978). Again, Defendant testified that he did not intend to kill or injure anyone when he fired the gun. As in *Lyons*, where the defendant fires warning shots not intending to kill anyone, "the evidence . . . does not tend to indicate that the defendant in fact formed a belief that it was necessary to kill," and the

defendant is not entitled to a jury instruction on voluntary manslaughter based on a theory of adequate provocation. 340 N.C. at 663, 459 S.E.2d at 779. Accordingly, this final portion of Defendant's first argument is overruled.<sup>3</sup>

#### B. Involuntary Manslaughter Instruction

Defendant next argues that the trial court erred in refusing to instruct the jury on involuntary manslaughter. We disagree.

Involuntary manslaughter is an unintentional killing committed *without malice* that "proximately result[s] from the commission of an unlawful act not amounting to a felony or [] from some [other] act done in an unlawful or culpably negligent manner[.]" *State v. Fisher*, 318 N.C. 512, 524, 350 S.E.2d 334, 341 (1986). Our Supreme Court has held that where an unintentional killing results from the unintentional - yet

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<sup>3</sup> We note that in his reply brief Defendant relies heavily on *State v. Owens*, 60 N.C. App. 434, 299 S.E.2d 258 (1983). In that case, this Court held that an instruction on voluntary manslaughter was required despite the defendant's testimony that he pulled his gun out of fear of the victim, stating that "the jury could have concluded that [the] defendant intentionally fired the gun in self-defense but used excessive force." *Id.* at 436, 299 S.E.2d at 259. However, more recently, we recognized that *Owens* and other decisions in that line of cases were implicitly overruled by the Supreme Court's more recent decisions in *Williams* and *Nicholson*. *Gaston*, \_\_\_ N.C. App. at \_\_\_, 748 S.E.2d at 26. Therefore, Defendant's reliance on *Owens* is misplaced.



reckless or culpably negligent - use of a firearm "in the absence of intent to discharge the weapon," a jury instruction on involuntary manslaughter is appropriate. *State v. Wallace*, 309 N.C. 141, 146, 305 S.E.2d 548, 551-52 (1983). Where death results from the intentional use of a firearm or other deadly weapon as such, malice is presumed. *State v. Gordon*, 241 N.C. 356, 358-59, 85 S.E.2d 322, 323-24 (1955).

We believe that our resolution of this issue is controlled by our decision in *State v. Martin*, 52 N.C. App. 373, 278 S.E.2d 305, *disc. review denied*, 303 N.C. 549, 281 S.E.2d 399 (1981), which involved facts very similar to those in the present case. In *Martin*, the defendant testified that she intended to fire a gun in the direction of her husband but that she was intending only to fire warning shots to "keep him back," and was not trying to hit him:

I intentionally pulled the trigger. I did not intentionally shoot my husband. I intentionally pulled the trigger, thinking at the time that it would warn him back, not realizing that it was in the position to actually hit him.

*Id.* at 374, 278 S.E.2d at 307. We held that where the defendant testified that she intentionally fired the weapon and that the weapon did not discharge accidentally, the intentional discharge was "under circumstances naturally dangerous to human life" and

that "[t]his could not be involuntary manslaughter[,] " even if the defendant did not intend to wound anyone with the shot. *Id.* at 375, 278 S.E.2d at 307. Accordingly, we held that it was error to instruct the jury on involuntary manslaughter.

Like in *Martin*, Defendant here admitted that he intentionally fired the gun, but that he did not intend to wound C.J. or anyone else. However, since he intentionally fired the gun under circumstances naturally dangerous to human life, we hold that the trial court did not err in not giving an instruction on involuntary manslaughter. The cases cited by Defendant, *State v. Buck*, 310 N.C. 602, 313 S.E.2d 550 (1984), and *State v. Debiase*, 211 N.C. App. 497, 711 S.E.2d 436, *disc. review denied*, 365 N.C. 335, 717 S.E.2d 399 (2011), are easily distinguishable. Neither involved the intentional discharge of a firearm. *Buck* involved a stabbing, 310 N.C. at 605, 313 S.E.2d at 552, and *Debiase* involved an attack with a beer bottle, 211 N.C. App. at 508-09, 711 S.E.2d at 443-44. In the present case, the uncontradicted evidence showed that Defendant drew a loaded .38 caliber revolver and intentionally fired it twice in rapid succession in the direction of C.J. and the surrounding crowd. As in *Martin*, "all the evidence, including [D]efendant's testimony, shows that the deceased was fatally

wounded when [D]efendant intentionally discharged [his] gun under circumstances naturally dangerous to human life. There was no evidence of an accidental discharge of the weapon." 52 N.C. App. at 375, 278 S.E.2d at 307. Accordingly, this argument is overruled.

C. Absence of a Curative Instruction

In his final argument, Defendant contends that the trial court committed plain error by failing to instruct the jury to disregard certain testimony by a deputy investigating the case, after granting his motion to strike that testimony. The following colloquy transpired on direct examination of the deputy:

[DEPUTY]: [W]hy would you in the middle of a conflict with someone who . . . is pulling out a firearm on you, why would you choose to shoot up in the air over them. That doesn't make reasonable sense. That's not something that a reasonable person would do. If I believe someone is going to pull a weapon out on me, it's my intention to get my weapon out as quick as I can to discharge my weapon.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Sustained.

[DEPUTY]: -- to defend myself.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Motion to strike.

THE COURT: Motion is allowed.

[DEPUTY]: So, it didn't make sense to me why he was doing what he was doing and saying what he was saying. . . . You look down, believing that this person is pulling out a gun and then you come up and shoot your gun up in the air. That doesn't make sense.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

Defendant thus contends that the trial court's omission of an unrequested curative instruction constituted plain error where the court sustained his counsel's objections to the deputy's testimony as to what "made reasonable sense" twice, did so once more on its own motion, and granted his motion to strike that portion of the testimony. We disagree.

A trial court does not err in failing to provide an unrequested curative instruction unless the error or impropriety is extreme. *Smith v. Hamrick*, 159 N.C. App. 696, 699, 583 S.E.2d 676, 679, *disc. review denied*, 357 N.C. 507, 587 S.E.2d 674 (2003). Assuming, *arguendo*, that the trial court's failure to provide this instruction was error, we do not believe this failure had any *probable* impact on the jury's final determination. Accordingly, this argument is overruled.

### III. Conclusion

We believe that Defendant received a fair trial free from reversible error, and therefore uphold the challenged convictions.

NO ERROR.

Judge HUNTER, Robert C. and Judge DAVIS concur.