

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1119

Filed: 2 June 2015

Johnston County, No. 10 CRS 54081

STATE OF NORTH CAROLINA

v.

ADOLFO REYES MALDONADO

Appeal by Defendant from judgment entered 19 December 2013 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 2 March 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Mark Montgomery for Defendant.

McGEE, Chief Judge.

Adolfo Reyes Maldonado (“Defendant”) appeals from his conviction of felony murder, with the predicate felony being discharging a firearm into occupied property. Defendant contends that the trial court erred (1) by not instructing the jury on diminished capacity on the charge of discharging a firearm into occupied property, (2) by instructing the jury that discharging a firearm into occupied property could serve as the predicate felony to Defendant’s felony murder conviction, and (3) by not submitting voluntary manslaughter to the jury as a lesser-included offense of first-

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degree murder by premeditation and deliberation. We find no error as to Defendant's first two challenges and no prejudicial error as to the third.

I. Background

Defendant and his estranged wife, Elizabeth Reyes ("Ms. Reyes"), had a tumultuous relationship. The police regularly were called to intervene in their personal disputes. Defendant sought medical treatment for serious knife wounds inflicted by Ms. Reyes on multiple occasions. Defendant maintains that Ms. Reyes – who was approximately six feet tall and almost three hundred pounds, who was diagnosed with bipolar disorder, and who had a history of alcohol dependency, anger issues, and paranoid ideation – was abusive throughout their relationship. Officer Steve Little ("Officer Little"), who was "routinely involved in domestic calls" between Ms. Reyes and Defendant, testified that he never saw Ms. Reyes with anything more than superficial injuries and that she always appeared to be the aggressor in her altercations with Defendant.

However, the State also elicited testimony from Officer Little that, during a previous interview, he stated that both Ms. Reyes and Defendant drank to excess and Ms. Reyes "beat him as much as he beat her[.]" Additionally, Christy Metzger ("Ms. Metzger"), an investigator for the Johnston County Department of Social Services, testified about an interview she had with Ms. Reyes on 10 May 2010, during which Ms. Reyes asserted that Defendant was controlling and would not let her have money, friends, a phone, a car, or a job when they were together.

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The couple separated in May 2010, and Ms. Reyes moved in with her mother and stepfather, Sandra and John Benjamin Croft (“Ms. Croft” and “Mr. Croft”), along with the eleven-month-old son (“the Child”) of Ms. Reyes and Defendant. Thereafter, according to Ms. Metzger, Defendant began calling Ms. Reyes upwards of ten times a day while Ms. Reyes was at work, and sometimes at night. Ms. Reyes and Defendant were engaged in an ongoing child support dispute.

Defendant went to Mr. and Ms. Croft’s house (“the house”) on 1 July 2010. A child support hearing was scheduled for the following day. Defendant argued with Ms. Reyes and Mr. Croft in front of the house. Defendant then went to his truck, loaded his shotgun, and returned to the house. Ms. Reyes had gone inside the house. Mr. Croft testified he ran into the house, closed the front door, and said to Ms. Reyes, who was in the kitchen with the Child: “Your old man’s trying to kill us. Run.”

Defendant shot the front door and then entered the house. Mr. Croft ran into the master bedroom and, as he was closing the bedroom door, was shot by Defendant. Mr. Croft then jumped out a window and ran to a neighbor’s house for help. There was a subsequent confrontation inside the house between Defendant and Ms. Reyes that resulted in Ms. Reyes’ death and Defendant being non-critically shot in the face. Ms. Reyes suffered gunshots to her upper left buttock, upper right chest, and the back of her head. Defendant called 911 and was taken into custody when the police arrived.

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At trial, Defendant presented a number of character witnesses who testified to his peaceful nature. Defendant also presented the expert testimony of Dr. Ginger Calloway (“Dr. Calloway”). Dr. Calloway testified that, on the night of Ms. Reyes’ death, Defendant was suffering from post-traumatic stress disorder (“PTSD”) as the victim of ongoing abuse from Ms. Reyes.

During the charge conference, Defendant requested diminished capacity instructions on the charges of first-degree murder by premeditation and deliberation of Ms. Reyes, assault with a deadly weapon with intent to kill inflicting serious injury on Mr. Croft, attempted murder of Mr. Croft, felony breaking and entering, and discharging a firearm into occupied property. The trial court ruled that it would instruct on diminished capacity only on the charges of first-degree murder by premeditation and deliberation of Ms. Reyes, attempted murder of Mr. Croft, and felony breaking and entering. However, the trial court ruled that it would not give diminished capacity instructions on discharging a firearm into occupied property or assault with a deadly weapon inflicting serious injury on Mr. Croft. Defendant also argued that discharging a firearm into occupied property could not serve as a predicate felony to felony murder, on the grounds that there was an insufficient relationship between Ms. Reyes’ death and Defendant’s shooting into the house. The trial court disagreed.

The jury found Defendant guilty of misdemeanor breaking and entering and felony murder, with the predicate felony being discharging a firearm into occupied property.¹ Defendant appeals from his conviction for felony murder.

II. Standard of Review

This Court reviews challenges to the trial court's decisions regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

III. Diminished Capacity

Defendant first challenges the trial court's instructions on the charge of “willfully” discharging a firearm into occupied property. Specifically, Defendant argues that the “willful” element of this offense necessarily was subject to a diminished capacity instruction at trial. *See generally* N.C. Gen. Stat. § 14-34.1 (2013). We disagree.

“Diminished capacity is a means of negating . . . specific intent” by a defendant. *State v. Roache*, 358 N.C. 243, 282, 595 S.E.2d 381, 407 (2004) (citation and internal quotation marks omitted). It is not a defense to general intent crimes. *State v. Childers*, 154 N.C. App. 375, 382, 572 S.E.2d 207, 212 (2002). “[S]pecific-intent

¹ The jury also found Defendant guilty of discharging a firearm into occupied property, but the trial court arrested judgment on that conviction. *See State v. Best*, 196 N.C. App. 220, 229, 674 S.E.2d 467, 474 (2009) (“Under the Double Jeopardy Clause, a defendant may not be punished both for felony murder and for the underlying, predicate felony, even in a single prosecution.” (citation and internal quotation marks omitted)).

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crimes are crimes which have as an essential element a specific intent that a *result* be reached, while [g]eneral-intent crimes are crimes which only require the doing of some act.” *State v. Barnes*, __ N.C. App. __, __, 747 S.E.2d 912, 916 (2013), *aff’d per curiam*, 367 N.C. 453, 756 S.E.2d 38 (2014) (emphasis added). The North Carolina Supreme Court also has recognized the existence of “malice type” crimes, which are “neither [] specific nor [] general intent offense[s] but require[] *willful* and malicious conduct” by a defendant. *State v. Jones*, 353 N.C. 159, 167, 538 S.E.2d 917, 924 (2000) (internal quotation marks omitted). Our caselaw has interpreted “willful” to mean “the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law. [It] means something more than an intention to commit the offense.” *State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (citations and internal quotation marks omitted).

N.C.G.S. § 14-34.1, which defines discharging a firearm into occupied property, provides that

[a]ny person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

Because general intent crimes “only require the doing of some act” proscribed by law, *Barnes*, __ N.C. App. at __, 747 S.E.2d at 916, whereas the willful conduct in N.C.G.S. § 14-34.1 requires “something more than an intention to commit” such an act, *see*

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Ramos, 363 N.C. at 355, 678 S.E.2d at 226, Defendant urges this Court to view discharging a firearm into occupied property as neither a specific nor general intent crime, but rather as a “malice type” crime. Defendant further urges this Court to require diminished capacity instructions on “malice type” crimes when evidence of diminished capacity has been presented at trial.

Defendant’s argument fails on both fronts. His brief correctly notes that our North Carolina Supreme Court recognized the existence of “malice type” crimes in *Jones*, 353 N.C. at 167, 538 S.E.2d at 924. However, we are also bound by *State v. Byrd*, 132 N.C. App. 220, 222, 510 S.E.2d 410, 412 (1999), which held that “discharging a firearm into occupied property is a general intent crime[.]” *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

Even if we were to entertain the contention, *arguendo*, that our Supreme Court’s post-*Byrd* recognition of “malice type” crimes in *Jones* might prompt this Court to view discharging a firearm into occupied property as a “malice type” crime, the end result for Defendant would be no different. Defendant has provided no authority holding that “malice type” crimes are subject to diminished capacity

instructions.² Moreover, in other crimes requiring malicious conduct, such as second-degree murder, *see* N.C. Gen. Stat. § 14-17(b)(1) (2013), it is well-established that “[d]iminished capacity that does not amount to legal insanity is not . . . a defense to the element of malice.” *See State v. West*, 180 N.C. App. 664, 668, 638 S.E.2d 508, 511 (2006) (citing *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997)). As such, to the extent that there may be a meaningful distinction between general intent and “malice type” crimes, this distinction does not seem to come into play in the realm of diminished capacity instructions. “Diminished capacity is a means of negating . . . specific intent” only. *See Roache*, 358 N.C. at 282, 595 S.E.2d at 407. Therefore, the trial court did not err by declining to give a diminished capacity instruction on the charge of discharging a firearm into occupied property.³

² Defendant does cite *State v. Gunn*, 24 N.C. App. 561, 211 S.E.2d 508 (1975), for the contention that diminished capacity can negate the willfulness requirement of N.C.G.S. § 14-34.1. In *Gunn*, the trial court instructed the jury that discharging a firearm into occupied property was a specific intent crime. *Id.* at 563, 211 S.E.2d at 510. The jury still found the *Gunn* defendant guilty of this offense. *Id.* On appeal, this Court did not endorse the trial court’s classification of discharging a firearm into occupied property as a specific intent crime, but rather it found that there was no prejudicial error because the specific intent instruction only made the State overcome an even higher burden at trial. *Id.*

³ Also, contrary to Defendant’s position, it is not the case that “eliminat[ing] diminished capacity as a defense” here transformed discharging a firearm into occupied property into a strict liability offense by “effectively negat[ing] the statutory requirement that the discharge be willful [or] wanton.” The act that is proscribed by N.C.G.S. § 14-34.1 is not simply discharging a firearm into occupied property. It is “*willfully or wantonly*” discharging a firearm into occupied property, N.C.G.S. § 14-34.1 (emphasis added), and the State had the burden of proving this at trial.

IV. “Interrelationship” Between the Predicate Felony and Homicide

Defendant challenges the use of discharging a firearm into occupied property as the predicate felony to his felony murder conviction. Specifically, Defendant argues that there was an insufficient “interrelationship” between the death of Ms. Reyes and Defendant’s shooting into the house to support his felony murder conviction in the present case. We disagree.

The elements of felony murder are (1) that a defendant, or someone with whom the defendant was acting in concert, committed or attempted to commit a predicate felony under N.C. Gen. Stat. § 14-17(a) (2013);⁴ (2) that a killing occurred “in the perpetration or attempted perpetration” of that felony; and (3) that the killing was caused by the defendant or a co-felon. *See State v. Williams*, 185 N.C. App. 318, 329, 332, 648 S.E.2d 896, 904, 906 (2007). Regarding the second element, that the killing must occur “in the perpetration or attempted perpetration” of a predicate felony, *id.*, “[t]he law does not require that the homicide be committed to escape or to complete the underlying felony.” *State v. Terry*, 337 N.C. 615, 622, 447 S.E.2d 720, 723 (1994). Indeed, “there need not be a ‘causal relationship’ between the underlying felony and

⁴ The predicate felonies under this section are “any arson, rape or a sex offense, robbery, kidnapping, burglary, or *other felony committed or attempted with the use of a deadly weapon*[.]” *Id.* (emphasis added). In order to support a felony murder conviction, these predicate felonies also must be committed with “a level of intent greater than culpable negligence,” regardless of “[w]hether [they are] ‘general intent,’ ‘specific intent,’ or ‘malice [type]’ crimes[.]” *Jones*, 353 N.C. at 167, 538 S.E.2d at 924. In the present case, the jury found that Defendant acted willfully, which “means [he acted with] something more than an intention to commit the offense.” *See Ramos*, 363 N.C. at 355, 678 S.E.2d at 226.

the homicide, only an ‘interrelationship.’” *Id.* at 622, 447 S.E.2d at 724. “[A]ll that is required is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction.” *State v. Moore*, 339 N.C. 456, 462, 451 S.E.2d 232, 234 (1994) (citation and internal quotation marks omitted). Otherwise, there must be a “break in the chain of events leading from the initial felony to the act causing death” in order to render the felony murder rule inapplicable in a particular case. *Cf. id.* at 461, 451 S.E.2d at 234.

In *Moore*, the defendant assaulted his girlfriend at the home of her sister and her sister’s boyfriend. *Id.* at 460, 451 S.E.2d at 233. The defendant left the sister’s house but returned later in the day. *Id.* After the defendant’s girlfriend repeatedly refused to speak to him, the defendant began shooting into the sister’s house. *Id.* This prompted the sister’s boyfriend to go outside, confront the defendant, and exchange gunfire. *Id.* The sister’s boyfriend returned to the house – with serious gunshot wounds – and reloaded his gun, but he was unable to go back outside because the defendant continued to shoot into the house until police arrived. *Id.* at 460, 451 S.E.2d at 234. The sister’s boyfriend later died from his injuries, and the defendant was found guilty of felony murder at trial; the predicate felony was discharging a firearm into occupied property. *Id.* at 459, 451 S.E.2d at 233.

On appeal, the *Moore* defendant argued that the sister’s boyfriend’s going outside to confront him constituted a break in the chain of events between the

defendant's firing into the house and the death of the sister's boyfriend. *Id.* at 461, 451 S.E.2d at 234. However, our Supreme Court held that the requirement under N.C.G.S. § 14-17(a), that the killing be committed in the perpetration of a predicate felony was "sufficiently broad to include the entire series of relevant events beginning with the original shooting into the house and continuing until the sirens were heard and the shooting ceased." *Id.* at 462, 451 S.E.2d at 235.

The present case is distinguishable from *Moore* to an extent, in that the *Moore* defendant shot into the house before and after his direct confrontation with the sister's boyfriend. *See id.* at 460, 451 S.E.2d at 233–34. In the present case, Defendant stopped shooting *into* the house once he forced his way through the front door and continued shooting *inside* the house. Defendant also argues that, once he was inside the house, Ms. Reyes attempted to take the gun from him and that this confrontation by Ms. Reyes constituted a break in the chain of events that led to her death. Even taking Defendant's account of the events as true, just as the *Moore* Court held that the sister's boyfriend "did not break the chain of events by going outside to defend his home," *id.* at 462, 451 S.E.2d at 235, Ms. Reyes did not break the chain of events by defending herself inside her home after Defendant continued his assault indoors. Therefore, Defendant's shooting into the house and Ms. Reyes' subsequent death inside the house "occur[red] in a time frame that can be perceived as a single transaction." *See id.* at 462, 451 S.E.2d at 234. The trial court did not err by allowing

the discharging of a firearm into occupied property to serve as the predicate felony to Defendant's felony murder conviction.

V. The Trial Court Not Instructing the Jury On Voluntary Manslaughter

Defendant contends the trial court erred by not providing the jury with an instruction on voluntary manslaughter as a lesser-included offense of first-degree murder by premeditation and deliberation. Specifically, Defendant argues that the jury should have received an instruction on voluntary manslaughter based on the theory of imperfect self-defense. We find no prejudicial error by the trial court.

A defendant is entitled to a charge on a lesser-included offense when there is some evidence in the record supporting the lesser offense. Conversely, [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. James, 342 N.C. 589, 594, 466 S.E.2d 710, 713-14 (1996) (citations and internal quotation marks omitted). An instruction of voluntary manslaughter, based on the theory of imperfect self-defense, is appropriate where there is evidence that a defendant (1) believed it was necessary to kill the deceased in order to save himself from death or great bodily harm; (2) the belief was reasonable; and (3) although initially acting without murderous intent, the defendant was the original aggressor in the circumstance. *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 573 (1981).

In the present case, Defendant points out that the jury acquitted him of all charges requiring specific intent. This included convicting Defendant of

misdeemeanor breaking and entering, but acquitting Defendant of felony breaking and entering, which had the added element of entering the house with felonious intent. *See generally* N.C. Gen. Stat. § 14-54 (2013). Thus, Defendant maintains that the jury could reasonably have concluded that, although he was the original aggressor, Defendant entered the house without the felonious intent to seriously injure anyone inside,⁵ and that it became reasonably necessary for him to defend himself – lethally – during the subsequent confrontation with Ms. Reyes inside the house. Assuming *arguendo* that this would support an instruction on voluntary manslaughter, the trial court’s failure to give such an instruction did not amount to prejudicial error.

In *State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1976), the North Carolina Supreme Court held

[i]t is a well[-]established rule that when the law and evidence justify the use of the felony[]murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it.

Following *Swift*, “[t]he application of this standard . . . resulted in divergent lines of cases in the context of felony murder.” *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citations omitted). For example,

[i]n one group of cases, the Court has simply found that, applying the applicable evidentiary standard, the evidence

⁵ When the jury was instructed on felony breaking and entering, the only felonious intent the jury was instructed to consider was whether Defendant intended to commit an assault with a deadly weapon inflicting serious injury when he entered the house.

did not support submission of a lesser-included offense. Another group of cases suggests that if any evidence is presented to negate first-degree murder, then the jury must be instructed on the lesser-included offenses supported by the evidence. Yet another group of cases holds or suggests *in dicta* that if the evidence supports a conviction based on felony murder, the failure to instruct on [lesser-included offenses] is not error or not prejudicial error.

Id. After examining each of these lines of cases, our Supreme Court in *Millsaps* articulated the following principles regarding felony murder.

(i) If the evidence of the underlying felony supporting felony murder is in conflict and the evidence would support a lesser-included offense of first-degree murder, the trial court must instruct on all lesser-included offenses supported by the evidence whether the State tries the case on both premeditation and deliberation and felony murder or only on felony murder. *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555. (ii) If the State tries the case on both premeditation and deliberation and felony murder and the evidence supports not only first-degree premeditated and deliberate murder but also second-degree murder, or another lesser offense included within premeditated and deliberate murder, the trial court must submit the lesser-included offenses within premeditated and deliberate murder irrespective of whether all the evidence would support felony murder. *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178; *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68; *see also State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (holding that the failure to submit second-degree murder and involuntary manslaughter was not prejudicial error where the trial court submitted premeditation and deliberation, voluntary manslaughter, and felony murder; and the jury did not find premeditation and deliberation). (iii) If the evidence as to the underlying felony supporting felony murder is not in conflict and all the evidence supports felony murder, the trial court is not required to instruct on the lesser offenses included within premeditated and

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deliberate murder if the case is submitted on felony murder only. *See State v. Covington*, 290 N.C. 313, 226 S.E.2d 629.

Id. at 565, 572 S.E.2d at 773-74. Pursuant to the second principle in *Millsaps*, the trial court erred if it submitted both felony murder and murder by premeditation and deliberation to the jury but did not instruct on voluntary manslaughter, *assuming arguendo* it was supported by the evidence. *See id.* However, because “[D]efendant was found guilty of murder in the first degree on the theory of felony murder and was found not guilty on the charge of first-degree murder [by] premeditation and deliberation, no prejudice resulted from the court's failure to charge on voluntary manslaughter.” *See Wall*, 304 N.C. at 621, 286 S.E.2d at 75.⁶

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges BRYANT and STEELMAN concur.

⁶ Defendant also contends that he was entitled to an instruction on voluntary manslaughter under a “heat of passion” theory. For similar reasons, we find no prejudicial error by the trial court.