

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 14-1175

Filed: 2 June 2015

Mecklenburg County, No. 12 CRS 220918

STATE OF NORTH CAROLINA,

v.

EDWARD DURANT HICKS, Defendant.

Appeal by defendant from judgment entered 19 March 2014 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Nicholas G. Vlahos, for the State.*

*DUNN, PITTMAN, SKINNER & CUSHMAN, PLLC, by Rudolph A. Ashton, III, for defendant.*

ELMORE, Judge.

On 19 March 2014, a jury found defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, and under the first degree felony murder rule. The trial court sentenced defendant to life imprisonment without parole. After careful consideration, we hold that defendant received a trial free from prejudicial error.

**I. Background**

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The State's evidence at trial tended to show the following: On 12 May 2012, Raymond Boyce (Boyce) was inside his residence on Zircon Street in Charlotte. Boyce looked outside his bedroom window and observed a Jaguar parked in the yard of his residence. Shortly thereafter, a minivan parked next to the Jaguar. Boyce recognized an individual named Calvin Scott (Scott) exit the Jaguar and walk towards the street while speaking on a cell phone. Scott returned to the Jaguar and sat in the driver's seat. Another person, who was unidentified at trial, exited the back seat of the Jaguar and left the area.

A third vehicle then arrived, and Boyce saw a man he knew to be Edward Durant Hicks (defendant) exit the third vehicle and walk towards the Jaguar while speaking to Scott. Beverly McHam (McHam) had previously seen defendant travel towards the direction of Zircon Street in a car driven by a white female who was later identified as April Bittle (Bittle).

Boyce saw defendant pull out a gun from his back pocket and heard Scott say, "man, what you doing, put that shit up." Defendant put the gun back in his pocket and appeared to walk away from the Jaguar. However, defendant then turned back towards the Jaguar, opened the rear driver's side door, and began shooting the front seat passenger, Nakio Cousart (the victim). Defendant fired at least four shots, each of which struck the victim and caused his death.

**II. Analysis**

**a.) Disclosure of Felony Murder Theory**

First, defendant argues the trial court erred by refusing to require the State to disclose its felony murder theory before the jury was empaneled. Specifically, defendant avers that because the State used a short-form indictment to charge him with murder, he lacked notice as to which underlying felony supported the felony murder charge. We disagree.

We review a trial court's denial of a motion for a bill of particulars for an abuse of discretion<sup>1</sup>. *State v. Garcia*, 358 N.C. 382, 390, 597 S.E.2d 724, 733 (2004). "A motion for a bill of particulars must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information." N.C. Gen. Stat. § 15A-925(b) (2013). Legal theories, however, do not constitute "factual information" as contemplated by N.C. Gen. Stat. § 15A-925. *Garcia*, 358 N.C. at 389, 597 S.E.2d at 732. N.C. Gen. Stat. § 15-144 (2013) by its very terms authorize a short-form indictments for a murder charge:

In indictments for murder . . . it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment 'with force and arms,' and the county of the

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<sup>1</sup> Defendant argues that the standard of review should be *de novo*. We disagree and note that even under a *de novo* review of this issue, defendant would not prevail.

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alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law[.] . . . [A]ny bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder[.]

Additionally, our Supreme Court “has consistently held that murder indictments that comply with N.C.G.S. § 15-144 are sufficient to charge first-degree murder on the basis of *any theory* set forth in N.C.G.S. § 14-17.” *Garcia*, 358 N.C. at 388, 597 S.E.2d at 731 (emphasis in original). N.C. Gen. Stat. § 14-17 (2013), in relevant part, classifies first degree murder as “[a] murder . . . by . . . willful, deliberate, and premeditated killing, or . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]” A murder committed in the perpetration of the crime of discharging a firearm into an occupied vehicle will also support a conviction of felony murder under N.C. Gen. Stat. § 14-17. *See State v. Wall*, 304 N.C. 609, 614, 286 S.E.2d 68, 72 (1982).

When the State’s indictment language sufficiently charges a defendant with first degree murder, it “is not required to elect between theories of prosecution prior to trial.” *Garcia*, 358 N.C. at 389, 597 S.E.2d at 732. Rather, “a defendant must be prepared to defend against any and all legal theories which the facts may support.” *Id.* (citations and quotation marks omitted).

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On the day of trial, and prior to jury selection, defendant made a motion to compel the State to disclose the felony it intended to use to support its felony murder theory. The trial court denied defendant's motion and noted defendant's objection to its ruling. Defendant, in essence, requested to learn about the State's theory of the case by a bill of particulars. However, the State pled facts sufficient to support the charge of first degree murder pursuant to N.C. Gen. Stat. § 14-17 by alleging in its indictment that defendant "unlawfully, willfully, and feloniously and of malice aforethought kill[ed] and murder[ed] Nakio Terrill Cousart." *See* N.C. Gen. Stat. § 14-17. According to the provisions of N.C. Gen. Stat. § 14-17, the State was authorized to present evidence at trial sufficient to support a first degree murder conviction under the theories of premeditation and deliberation, felony murder, or both. *See* N.C. Gen. Stat. § 14-17. As our case law makes clear, the State's legal theories are not "factual information" subject to inclusion in a bill of particulars, and no legal mandate requires the State to disclose the legal theory it intends to prove at trial. *See Garcia, supra*.

Moreover, defendant has failed to establish that he could not adequately prepare his defense without knowledge of the State's legal theory. At trial, the State, in part, proceeded under a theory of felony murder, presenting evidence that defendant committed the murder during the perpetration of feloniously discharging a firearm into a vehicle occupied by the victim. Before trial, the State complied with

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the open discovery rule: “Everything in [the State’s] file has been turned over to [defendant]. . . . Every information we have about [the victim] that is part of the investigation of this matter has been provided to [defendant].” *See* N.C. Gen. Stat. § 15A-903 (2013). Prior to trial, the State also provided defendant with a copy of Boyce’s recorded statement to officers in which he described what he saw and heard relating to the shooting. Furthermore, defendant’s attorney indicated his knowledge that an alleged shooting had occurred in or around a vehicle:

Just so the Court’s aware that many parties state in this case that the defendant allegedly was in the car, that [the victim] was allegedly in the car and Mr. Scott was in the car. So we would certainly argue that their statements would tend to be testimonial and self-serving on the part of Mr. Scott to basically help tie the story where he was indeed to be the shooter.

Based on the foregoing analysis, we hold that the trial court did not err by refusing defendant’s request to require the State to disclose its felony murder theory before the jury was empaneled.

#### **b.) Scott’s Out-of-Court Statement**

Next, defendant argues the trial court erred by admitting an out-of-court statement made by Scott through the testimony of Boyce. Specifically, defendant avers that the admission of Scott’s out-of-court statement constituted prejudicial hearsay because it “basically accused [defendant] of being the shooter.” We disagree.

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We review this issue *de novo*. See *State v. McLean*, 205 N.C. App. 247, 249, 695 S.E.2d 813, 815 (2010) (“The admissibility of evidence at trial is a question of law and is reviewed *de novo*.”).

The out-of-court statement at issue is Boyce’s testimony that “[Scott] said [to defendant], ‘man, what you doing, put that shit up.’” At trial the following colloquy occurred:

PROSECUTOR: And on the 12th of May 2012 who was-- what happened on that day?

BOYCE: Well, I was sitting up there in my window picking wild hairs from my face. A Jaguar pulled up, backed into the yard.

PROSECUTOR: Who did?

BOYCE: A Jaguar.

PROSECUTOR: Oh, I’m sorry.

BOYCE: There was another van was [sic] behind him backing up into the yard. So I was sitting at the window talking to a friend of mine in my bedroom. [Scott] got out of his car, he was on the phone walking to the front of the car to the street.

PROSECUTOR: You said [Scott] was on the phone?

BOYCE: Yes.

PROSECUTOR: What car did he get out of?

BOYCE: The Jaguar.

PROSECUTOR: He walked towards the street on the

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phone?

BOYCE: Yes.

PROSECUTOR: Then what happened?

BOYCE: [He] [c]ome back to the Jaguar, was on the phone, got back in his car, and after a while then this SUV or another kind of van pulled up. A dude jumped out of it, walked to the Jaguar, talking to [Scott], reached in his back right pocket, pulled out a gun. [Scott] said man, what you doing, put that shit up. So he put it back in his pocket.

DEFENDANT'S ATTORNEY: Objection, Your Honor.

BOYCE: Huh?

THE COURT: To?

DEFENDANT'S ATTORNEY: [Scott's] statement. Motion to strike.

PROSECUTOR: Your Honor, the State would contend that that's an excited utterance or present sense impression. They both apply. Nor is it a statement necessarily offered for the truth of the matter.

THE COURT: Which is it?

PROSECUTOR: I think it falls under all three of those, frankly.

THE COURT: You're not offering it for the truth of the matter?

DEFENDANT'S ATTORNEY: No.

THE COURT: All right.

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Even if we presume *arguendo* that Boyce's testimony regarding Scott's out-of-court statement constituted inadmissible hearsay, any purported error arising from its admission was non-prejudicial. See *State v. LePage*, 204 N.C. App. 37, 43, 693 S.E.2d 157, 162 (2010) ("Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.").

Boyce testified that from his window bedroom he observed a Jaguar parked in the yard of his residence. A minivan immediately parked next to the Jaguar. Boyce then observed Scott exit the Jaguar and walk towards the street while speaking on a cell phone. Scott returned to the Jaguar and sat back inside the vehicle. Another person, who was not identified at trial, exited the Jaguar and left the scene. A third vehicle then arrived, and Boyce saw defendant exit the third vehicle and walk towards the Jaguar, reach into his back pocket, pull out a gun, open the vehicle's rear left door, and shoot into the vehicle multiple times. He further testified that the shooter never went inside the Jaguar. Boyce made an in-court identification of defendant as the sole shooter and recognized him as being a member of his neighborhood. Boyce's testimony alone that he saw defendant pull out a gun renders the admission of Scott's out-of-court statement to defendant as non-prejudicial.

However, George Potts also corroborated Boyce's account. Potts testified that he looked outside a window from his house and observed an individual exit a vehicle that was driven by a white female. The individual walked towards the Jaguar,

opened the “back end of the back door” of the Jaguar, and shot “four times in the car.” He also stated that the shooter never went inside the Jaguar.

McHam had known defendant for a year or two before the date of trial. She testified that she was in her front yard and observed the victim drive past her. Approximately twenty minutes later, she saw defendant in a vehicle with a white female and subsequently heard “some shots, three shots.” She walked towards the direction of the gun shot sounds and saw defendant “running towards . . . other apartments.”

The first responding officer found the victim unresponsive in the front passenger seat of the Jaguar, with his head “to the left and leaning back in the seat[.]” The State’s forensic pathologist testified that all of defendant’s four gunshot wounds were consistent with being shot from outside the vehicle’s rear driver’s side door.

Based on the foregoing evidence, defendant has failed to show that the admission of Scott’s lone out-of-court statement could have affected the result of the trial. As such, we hold that the purported erroneous admission of Scott’s statement was not prejudicial to defendant.

**c.) Motion to Dismiss Murder Charge Under the Felony Murder Rule**

Defendant argues the trial court erred by denying his motion to dismiss the first degree murder charge under the felony murder rule for insufficient evidence. Specifically, defendant argues the State failed to present sufficient evidence to

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support the felony charge of discharging a firearm into occupied property because there was conflicting evidence as to whether defendant fired the shots from inside or outside the vehicle. We disagree.

We review a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). This Court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Clagon*, 207 N.C. App. 346, 350, 700 S.E.2d 89, 92 (2010) (citation and quotation marks omitted). "In ruling on a motion to dismiss, [we] must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom." *Id.* (citation and quotation marks omitted).

The test of the sufficiency is the same whether the evidence is circumstantial or direct, or both: the evidence is sufficient to withstand a motion to dismiss and to take the case to the jury if there is evidence which tends to prove the fact or facts in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture.

*State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981) (citations and quotation marks omitted). "Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve." *State v. Agustin*, \_\_ N.C. App. \_\_, \_\_, 747 S.E.2d 316, 318, *review denied*, \_\_, N.C. App. \_\_, \_\_, 749 S.E.2d 864, 865 (2013) (quotation marks omitted).

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The felonious crime of discharging a firearm into occupied property, in relevant part, requires that an individual “willfully or wantonly discharges . . . any firearm . . . into any . . . vehicle . . . while it is occupied[.]” N.C. Gen. Stat. § 14-34.1 (2013). An individual discharges a firearm “into” an occupied vehicle under the statute even if the firearm is inside the vehicle, as long as the individual is outside the vehicle when discharging the firearm. *See State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988).

Contrary to defendant’s assertion, mere contradictions in the evidence do not warrant a dismissal of the case. *See Agustin*, \_\_ N.C. App. at \_\_, 747 S.E.2d at 318. Rather, our inquiry is whether the State presented sufficient evidence that defendant was outside the vehicle when he discharged the firearm. In the light most favorable to the State, the State presented sufficient evidence to withstand defendant’s motion to dismiss. Boyce testified that defendant was the shooter, and although defendant opened the Jaguar’s rear driver’s side door, defendant never went inside the vehicle. Potts stated that the shooter never went inside the vehicle when he discharged the firearm. Additionally, the State’s forensic pathologist provided testimony to indicate that defendant was outside the vehicle when he shot the victim. Accordingly, the trial court did not err by denying defendant’s motion to dismiss the first degree murder charge based on the underlying felony of discharging a firearm into an occupied property.

**d.) Motion to Dismiss Murder Charge Based on Premeditation and Deliberation**

Defendant also argues the trial court erred by denying his motion to dismiss the first degree murder charge based upon the insufficiency of evidence of premeditation and deliberation. We disagree.

Premeditation means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. Deliberation means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

*State v. Clark*, \_\_ N.C. App. \_\_, \_\_, 752 S.E.2d 709, 711 (2013), *review denied*, 367 N.C. 322, 755 S.E.2d 619 (2014) (quotation marks omitted). However, “if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated.” *Id.* (quotation marks omitted).

The State must generally prove both premeditation and deliberation by circumstantial evidence. *See id.* Our Courts have articulated situations from which premeditation and deliberation can be implied under the circumstances:

(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)

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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).

The evidence presented at trial shows the absence of provocation on the part of the victim. No evidence indicated that the victim exited the Jaguar or interacted with defendant at all. No weapons were found in the Jaguar or on the victim's person when law enforcement officers investigated the scene post mortem, indicating that the victim was unarmed when defendant allegedly shot him. The fact that defendant shot the victim at least four times is further evidence of premeditation and deliberation.

Defendant's actions before the shooting also establish premeditation and deliberation. Bittle testified that she had previously traded her car for drugs. She met an unfamiliar individual on 12 May 2012 to retrieve her car. That individual returned her vehicle and subsequently asked Bittle for a ride home, but gave her the location of Boyce's residence. Bittle dropped the individual at that location and observed him get inside the back seat of another vehicle. As she drove away, she heard shots fired. Bittle was unable to identify defendant as the individual in her car because she "didn't have a clear memory the night that it happened" and had never previously met defendant on the day of the shooting. However, Bittle noticed a beer can in her car on 12 May 2012 that had not been there when she loaned her car. A subsequent DNA swab of the can matched defendant's DNA profile.

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Boyce testified that defendant brandished a gun from his back pocket, exchanged a few words with Scott, put the gun back in his pocket as if he was about “to walk off[,]” and then “turned around, [came] back, opened the back driver’s door, and . . . just started shooting.” Thus, the circumstances would indicate, at a minimum, that defendant formed the specific intent to kill the victim over some period of time before the shooting. *See State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008) (asserting that arriving to the scene of a murder with a weapon “supports an inference of premeditation and deliberation”); *see also State v. Hunt*, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991) (“[N]o particular amount of time is necessary for the mental process of premeditation; it is sufficient if the process of premeditation occurred at any point prior to the killing.”).

Defendant’s actions after the shooting provide additional evidence of premeditation and deliberation. After the shooting occurred, the witnesses testified that defendant immediately left the scene. Such evidence would allow the jury to infer that defendant did not attempt to assist the victim. *See State v. Horskins*, \_\_ N.C. App. \_\_, \_\_, 743 S.E.2d 704, 709, *review denied*, \_\_ N.C. \_\_, 752 S.E.2d 481 (2013) (acknowledging that a defendant’s failure to attempt “to obtain assistance for the deceased” is a relevant consideration of premeditation and deliberation).

In the light most favorable to the State, the State presented sufficient evidence to put the issue of premeditation and deliberation before the jury. As such, the trial

court did not err by denying defendant's motion to dismiss the first degree murder charge based upon the theory of premeditation and deliberation.

**e.) Second Degree Murder Instruction**

Finally, defendant argues the trial court erred by denying his request for an instruction on the lesser included offense of second degree murder. We disagree.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "[Arguments] 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). "[A]n error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quotation marks omitted).

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 the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime, an instruction on lesser included offenses is not required.

*State v. Northington*, \_\_ N.C. App. \_\_, \_\_, 749 S.E.2d 925, 927 (2013), *appeal dismissed*, 367 N.C. 331, 755 S.E.2d 622 (2014) (citations and internal quotation

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marks omitted). A trial court's failure to instruct on a lesser-included offense "constitutes reversible error not cured by a verdict of guilty of the offense charged." *State v. Tillery*, 186 N.C. App. 447, 449-50, 651 S.E.2d 291, 293 (2007) (quotation marks omitted). Second degree murder requires "(1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000).

Here, defendant requested the second degree murder instruction based on two theories: 1.) evidence from which the jury could find a lack of premeditation and deliberation and 2.) sufficient evidence that the shooting occurred inside the vehicle, and therefore the defendant would not be guilty of felony murder. We limit our analysis to a discussion of whether the State presented sufficient evidence of premeditation and deliberation because such an inquiry is dispositive to the question of whether the trial court erred by failing to instruct the jury on second degree murder. *See State v. Rogers*, \_\_ N.C. App. \_\_, \_\_, 742 S.E.2d 622, 629 (2013) ("Given that the State presented evidence of premeditation and deliberation, and there is no evidence in the record to suggest a lack thereof, we hold that the trial court did not err in denying defendant's request for an instruction on the lesser included offense of second-degree murder.").

Here, the evidence shows that defendant acted with premeditation and deliberation and there is no evidence in the record to suggest a lack thereof. As

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previously discussed, defendant asked Bittle for a ride home but provided her with the location of Boyce's residence where victim was located. Defendant removed a gun from his pocket, put the gun back in his pocket, and appeared to walk away from the Jaguar. However, he returned to the vehicle, fired at least four shots at the victim, and fled the scene.

Moreover, defendant has failed to direct us to conflicting evidence in the record with regard to premeditation and deliberation. Defendant merely points out that there was "no evidence that defendant knew [the victim], that there was any ill will between them, that there was a prior argument, or that the underlying felony was based upon premeditation and deliberation."

Accordingly, defendant was not entitled to a second degree murder instruction under a theory of premeditation and deliberation because the State's evidence is positive as to premeditation and deliberation and there is no conflicting evidence on those elements. *See State v. Laurean*, 220 N.C. App. 342, 348, 724 S.E.2d 657, 661-62 (2012) (rejecting defendant's argument that he was entitled to an instruction on second degree murder where evidence was sufficient to support a first degree murder charge and defendant did "not deny that he committed a homicide, he simply challenge[d] what he refer[ed] to as a lack of evidence of premeditation and deliberation"). In sum, the evidence would not permit the jury rationally to find

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defendant guilty of second degree murder and to acquit him of first degree murder under a theory of premeditation and deliberation.

Based on our analysis with regard to premeditation and deliberation, we need not address the merits of defendant's argument that a second degree murder instruction was necessary under the felony murder theory because of the alleged conflicting evidence regarding defendant's location during the shooting. In *State v. Phipps*, the defendant argued on appeal that the trial court erred by failing to instruct the jury on second degree murder. 331 N.C. 427, 457, 418 S.E.2d 178, 194 (1992). Our Supreme Court ruled that the trial court erred because "the State's evidence would have permitted a rational jury to convict him of second-degree murder" based on a lack of premeditation and deliberation. *Id.* at 457-59, 418 S.E.2d at 194-95. Importantly, however, our Supreme Court upheld defendant's conviction for first degree murder "because the jury based its verdict on both premeditation and deliberation and the felony murder rule[.]" and "[d]efendant's first-degree murder conviction under the felony murder rule [was] without error[.]" *Id.* at 459, 418 S.E.2d at 195.

Similar to *Phipps*, the jury in the case *sub judice* convicted defendant on the basis of "malice, premeditation and deliberation" as well as felony murder. Because the first degree murder conviction under a theory of premeditation and deliberation was without error for the reasons previously discussed, any purported error related

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to the trial court's failure to instruct on second degree murder with regard to the felony murder charge would be non-prejudicial. Defendant cannot show a reasonable possibility that had the second degree murder instruction been given, a different result would have been reached at trial. *See State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 770-71 (2002) ("[I]f a defendant is convicted of first-degree murder on the basis of both premeditation and deliberation and felony murder, then premeditated and deliberate murder alone supports the conviction[.]"). Accordingly, the trial court did not err by failing to provide the jury with a second degree murder instruction.

**III. Conclusion**

In sum, the trial court did not err by: refusing to require the State to disclose its felony murder theory before the jury was empaneled, denying defendant's motion to dismiss the first degree murder charge under the felony murder theory, or denying defendant's motion to dismiss the first degree murder charge under a theory of premeditation and deliberation. If the trial court erred by allowing Boyce to testify about a purported hearsay statement made by Scott or by refusing to instruct the jury on the lesser included offense of second degree murder, any such error was non-prejudicial.

NO PREJUDICIAL ERROR.

Judges GEER and DILLON concur.