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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1181

Filed: 5 June 2018

Mecklenburg County, No. 13 CRS 223624

STATE OF NORTH CAROLINA

v.

PHILLIP ROBERT SCOTT, JR., Defendant.

Appeal by Defendant from judgment entered 29 June 2017 by Judge William R. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 April 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Richard Croutharmel, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Phillip Robert Scott, Jr. ("Defendant") appeals following a jury verdict convicting him of first-degree murder. On appeal, he contends the trial court committed plain error by omitting the "inherently dangerous act" theory of malice from its second-degree murder jury instruction. We find no error.

I. Factual and Procedural Background

On 10 June 2013, the Charlotte-Mecklenburg Police Department arrested Defendant on a warrant for the murder of Danny Barrino. On 24 June 2013, a Mecklenburg County Grand Jury indicted Defendant for the murder of Barrino. On 26 June 2017, the court called Defendant's case for trial. The State's evidence tended to show the following.

The State first called Reggie Jordan. In 2013, he lived in the Lake Point apartment complex, in Charlotte, North Carolina. Defendant, known as "Unc", also lived in the complex. On 9 June 2013, Jordan and Defendant "sat around at [Defendant's] house for a little while" smoking marijuana before Jordan left. Defendant then came to Jordan's apartment, picked him up, and they walked together "somewhere."

After going "somewhere," Jordan and Defendant walked back to the apartment complex, and he saw "D." Jordan identified "D" as Barrino. Barrino sat on a staircase near Defendant's apartment building. Defendant told Barrino, "didn't I tell you not to come over here." Defendant repeated himself, and Barrino replied, "go ahead." Defendant then hit Barrino in his face. Defendant only stopped hitting Barrino when a gun fell "off the side of [Defendant's] waist." Once the gun fell, Barrino "somehow jumped over" Defendant and "started running towards the house." Barrino "was

running for his life." Defendant "picked the gun up and started running behind [Barrino] and shooting at him."[1]

The State called Dominique Nevills.[2] In 2013, Nevills lived in InTown Suites, near Defendant's apartment complex. He knew Defendant because he "purchased weed from him to smoke." On or about 9 June 2013, Nevills went to Defendant's apartment to purchase marijuana and Defendant showed him a gun. Defendant told Nevills he had the gun "[f]or the people that robbed him before, that he had something for them."

The State next called Steven Winterhalter, a homicide sergeant with the Charlotte-Mecklenburg Police Department. At the relevant times, Sergeant Winterhalter worked as the Violent Criminal Apprehension Team supervisor. On or about 9 June 2013, his unit was requested to locate Defendant for a warrant on a homicide.[3] He narrowed his search to an America's Best Value Inn on Billy Graham Parkway in Charlotte. On 10 June 2013, Sergeant Winterhalter went to the America's Best Value Inn. After Sergeant Winterhalter watched video surveillance of the exterior cameras of the hotel, reviewed the hotel registries, and spoke with the

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[1] Jordan did not testify whether Defendant's shots actually hit Barrino.

[2] The State also called: (1) James Forbis, an officer with the Charlotte-Mecklenburg Police Department at the time of the incident; (2) Gregory Tucker, a special operations officer of the canine unit in the Charlotte-Mecklenburg Police Department; and (3) Emily Carpenter, a crime scene technician with the Charlotte-Mecklenburg Police Department. Their testimonies are not dispositive to the issue on appeal.

[3] The record does not indicate who requested Sergeant Winterhalter's unit to locate Defendant.

hotel clerk, he determined Defendant was in one of the rooms of the hotel. He called the room, and the person who answered identified himself as "Johnny." Sergeant Winterhalter told "Johnny" the hotel was surrounded and he needed to come out. Defendant and a female came out of the room. Sergeant Winterhalter arrested Defendant.

The State next called Dr. James Sullivan, a pathologist and medical examiner at the Mecklenburg County Medical Examiner's Office. Dr. Sullivan conducted an autopsy of Barrino. Barrino had "one gunshot wound injury[,]" and some minor "blunt trauma injuries." The bullet entered Barrino's left side of his back, and exited at the front of his left chest. Dr. Sullivan opined Barrino's "[c]ause of death [was] gunshot wound to the back, abdomen, and chest."

The State rested. Defendant moved to dismiss the charge of first-degree murder. The trial court denied Defendant's motion.

Defendant testified on his own behalf. Defendant and his girlfriend, Denise Solomon, lived in the Lake Point apartment complex. Defendant sold marijuana from his apartment in small quantities. Defendant also smoked marijuana with Jordan and Nevills.

Defendant knew Barrino as "D" or "D man." During the seven months Defendant lived in the Lake Point apartment, he saw Barrino almost every day. Defendant saw Barrino with a gun approximately twice.

On 5 June 2013, Defendant heard a knock at his door. Although Defendant ordinarily looked through his peephole before opening his door, he did not this time because he "knew [he] had somebody coming to see [him]." As Defendant opened the door, two people "greeted [him] with guns." The attackers covered their faces. They pushed Defendant on the back and pushed Solomon to the floor. They hit Defendant on his face twice with a gun and said "they wanted to kill [them]." The attackers took money from Defendant and Solomon's apartment. Defendant did not call the police to report the incident, as he was scared because he sold marijuana.

After the attack, Defendant purchased a gun "[b]ecause [he] was scared, and [he] had to protect [his] family as being a man, the head of [his] household." Defendant heard rumors circulating the neighborhood that Barrino "was involved or set it up[.]" Between 6 June and 9 June 2013, Defendant did not contact Barrino or threaten him.

On 9 June 2013, Defendant and Solomon woke to a "commotion" outside their apartment door. Defendant opened the door and saw Barrino and a couple of other people standing in the breezeway. Defendant asked Barrino to move "[b]ecause [h]e just had a home invasion, and [he] already heard rumors about [Barrino] ha[ving] something to do with it, and [Defendant] just felt like [Barrino] was antagonizing [him] by standing in front of [his] door making a whole bunch of noise at that time." Barrino left.

Defendant then went to a store with Jordan and had the gun with him, because he "was on a high alert, very scared for [him]self . . . [and his] home." When Defendant and Jordan returned from the store, Defendant saw Barrino sitting on the steps. Defendant asked Barrino to move and said "you didn't live here, you live at the other apartment, could you go where you live at." Barrino then stood up and punched Defendant in his face, knocking off Defendant's glasses. Defendant could not see clearly without his glasses, but fought with Barrino. Barrino "really had the best of [Defendant,]" because Barrino was younger and Defendant was "was intoxicated with marijuana." During the fight, Barrino kicked Defendant in the face, causing Defendant to fall against the staircase railing. The gun then fell off Defendant's waist.

Barrino saw the gun and said, "Unc, I'm going to kill you." Then Barrino ran. Defendant believed Barrino's threat, picked up his gun, and ran after him. Defendant believed Barrino was "[r]unning away to get a handgun to kill [him]." Defendant shot at Barrino. However, "[i]t was [his] intent to shoot [Barrino], but not to kill him." After the shooting, Defendant, scared, threw the gun in the woods behind the apartment complex. Defendant left his apartment and went to a hotel. Sergeant Winterhalter arrested Defendant at the hotel.

Defendant rested and renewed his motion to dismiss.[4] The trial court denied Defendant's motion. During the charge conference, the trial court stated it would use pattern jury instruction 104.36, "[t]he flight instruction on first-degree murder," and 206.13, "first-degree murder, where a deadly weapon is used not involving self-defense, covering second-degree murder and voluntary manslaughter[.]" Defendant objected to the "flight" instructions, and the trial court overruled the objection. Defendant made no other objections during the charge conference.

The trial court instructed the jury, *inter alia*:

> Under the law and the evidence in this case it is your duty to return one of the following verdicts: Guilty of first-degree murder, or guilty of second-degree murder, or guilty of voluntary manslaughter, or not guilty.
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> First-degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.
>
> For you to find the Defendant guilty of first-degree murder the State must prove five things beyond a reasonable doubt. First, that the Defendant intentionally and with malice killed the victim with a deadly weapon. Malice means not only hatred, ill will, or spite, as it is ordinarily understood to be sure that is malice, but it also means that condition of the mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in another's death without just cause, excuse, or justification.

[4] Defendant called Dr. Faye Sultan, a forensic psychologist and a licensed practicing psychologist. However, her testimony is not dispositive to the issue on appeal.

> If the State proves beyond a reasonable doubt that the Defendant intentionally killed the victim with a deadly weapon, or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the victim's death, you may infer first that the killing was unlawful and second that it was done with malice, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.
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> . . .
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> And, fifth, that the Defendant acted with deliberation, which means that the Defendant acted while the Defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the Defendant was in a state of passion or excited when the intent was carried into effect.
>
> . . .
>
> Second-degree murder differs from first-degree murder in that neither specific intent to kill, premeditation, nor deliberation are necessary elements. In order for you to find the Defendant guilty of second-degree murder, the State must prove beyond a reasonable doubt that the Defendant unlawfully, intentionally, and with malice wounded the victim with a deadly weapon, thereby proximately causing the victim's death.

During deliberations, the jury requested a "more clear definition of deliberation[.]" The trial court brought the jury back into the courtroom to clarify "whether they mean deliberation amongst themselves or deliberation as used in the jury instruction." The jury responded it requested a more clear definition of "[d]eliberation on the instruction on first-degree murder" and on "the cool state of mind, we want that clarified, what it is before, after, during, or either of them."

The trial court explained "deliberation means that something is done consciously, that there—purposefully [sic]. Those would be considered sentiments for deliberation. Something is done consciously or purposefully after having given it some thought and with consideration." The court further clarified the meaning of "cool state of mind" as:

> what it is saying is that the Defendant acted with deliberation, which means the Defendant acted while the Defendant was in a cool state of mind. And then it goes on to say that the Defendant's passions, his emotions, were not so aroused that he couldn't engage in that conscious deliberation, in that thoughtful process, in making a conscious decision. He does not have to be without emotion.

The court explained the "cool state of mind" is "[a]t the time of the crime charged."

The jury found Defendant guilty of first-degree murder. The trial court sentenced Defendant to life in prison without parole. Defendant gave timely oral notice of appeal.

II. Standard of Review

We review challenges to jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). Additionally, "an issue that was not preserved by objection noted at trial . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2017). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375,

378 (1983) (quotation marks and citation omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

III. Analysis

Defendant contends the trial court committed plain error by omitting the "inherently dangerous act" theory of malice from its second-degree murder jury instructions. We disagree.

"[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *Id.* at 171, 200 S.E.2d at 191 (citations omitted).

"It is well settled that three forms of homicide exist under North Carolina law." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citation omitted). "The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation." *Id.* at 449, 527 S.E.2d at 46 (citations omitted). "The elements of second-degree murder, on the other hand, are: (1) the unlawful killing, (2) of another human being, (3) with malice, but

(4) without premeditation and deliberation." *Id.* at 449, 527 S.E.2d at 46-47 (citations omitted).

"[T]he important distinction between first-degree murder and second-degree murder: First degree murder, which has as an essential element the intention to kill, has been called a specific intent crime. Second degree murder, which does not have this element, has been called a general intent crime." *Id.* at 449, 527 S.E.2d at 47 (quoting *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994)). Additionally, "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." *Id.* at 450, 527 S.E.2d at 47 (quotations marks and citations omitted) (brackets in original). "In connection with [second-degree murder and voluntary manslaughter], the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed[.]" *Id.* at 450, 527 S.E.2d at 47 (citations omitted) (brackets in original).

There is "a meaningful distinction . . . between specific intent as an element of a crime and evidence of intent proffered to establish the element of malice for second-degree murder." *Id.* at 450, 527 S.E.2d at 47. "Malice is an essential element of second-degree murder." *State v. Lail*, ___ N.C. App. ___, ___, 795 S.E.2d 401, 407 (2016) (citation omitted).

> North Carolina recognizes at least three malice theories: (1) "express hatred, ill-will or spite"; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to "manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) a "condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."

Id. at ___, 795 S.E.2d at 407 (quoting *Coble*, 351 N.C. at 450-51, 527 S.E.2d at 47). "The second type of malice [is] commonly referred to as 'depraved-heart' malice[.]" *Id.* at ___, 795 S.E.2d at 407 (quotation marks and citations omitted) (brackets in original). While "[t]his type of malice is frequently used to support second-degree murder convictions based on drunk driving[,]" it has also been used to support a murder conviction where the reckless use of a deadly weapon caused another's death. *Id.* at ___, ___, 795 S.E.2d at 407, 409 (citation omitted). *See also State v. Lilliston*, 141 N.C. 857, 858, 54 S.E. 427, 427 (1906) (upholding a murder conviction of a defendant who engaged in a shooting in a crowded railroad station room and accidently killed an innocent bystander).[5]

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[5] *See also State v. Mosley*, ___ N.C. App. ___, 806 S.E.2d 365 (2017). In *Mosley*, defendant appealed from a jury verdict convicting him of second-degree murder. *Id.* at ___, 806 S.E.2d at 367. He argued the trial court improperly sentenced him for a Class B1 offense and the verdict only supported a sentence for a Class B2 offense. *Id.* at ___, 806 S.E.2d at 367. Typically, second-degree murders are classified as Class B1 felonies. *Id.* at ___, 806 S.E.2d at 367 (citation omitted). One exception is for the depraved-heart theory of malice, which is classified as a Class B2 felony. *Id.* at ___, 806 S.E.2d at 367-68 (citation omitted). Our Court distinguished the case from *Lail* and noted "there was evidence of defendant's reckless use of a rifle, a deadly weapon." *Id.* at ___, 806 S.E.2d at 368. Thus, there was evidence supporting a depraved-heart theory of malice for second-degree murder. Because the verdict sheet was ambiguous regarding upon which theory of malice the jury convicted

In *State v. Lail*, this Court rejected a similar argument.[6] In *Lail*, the State's evidence established defendant, the victim, and a person named Mark spent the night drinking and smoking crack together. *Id.* at ___, 795 S.E.2d at 404. When the victim later tried to leave the house, a fight ensued outside, and defendant beat the victim. *Id.* at ___, 795 S.E.2d at 404. Defendant then went inside the home, grabbed a butcher knife, and "cut [the victim's] throat two or three times with the butcher knife[,]" then disposed of the victim's body with Mark's help. *Id.* at ___, 795 S.E.2d at 405.

Defendant's evidence generally corroborated most of the State's evidence except for one major difference—Mark, not defendant, cut the victim's neck. *Id.* at ___, 795 S.E.2d at 405-06. The trial court charged the jury on first-degree murder, second-degree murder, and manslaughter. *Id.* at ___, 795 S.E.2d at 406. The court instructed the jury on two theories of malice—express malice and deadly weapon malice—but did not instruct the jury on depraved-heart malice. *Id.* at ___ 795 S.E.2d at 406. The jury found defendant guilty of second-degree murder. *Id.* at ___, 795 S.E.2d at 406. At sentencing, defendant and the State disagreed regarding whether

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defendant, this Court held the trial court erred in sentencing defendant for a Class B1 felony. *Id.* at ___, 806 S.E.2d at 369.

[6] While *Lail* concerned sentencing issues, the question before the Court was still whether "the evidence presented may have supported a finding that [defendant] acted with depraved-heart malice." ___ N.C. App. at ___, 795 S.E.2d at 408. The question before us today is whether the trial court erred by omitting certain jury instructions, thus whether the evidence supported an instruction for the depraved-heart or "inherently dangerous act" theory of malice.

the trial court should sentence defendant as a Class B1 or Class B2 felon. *Id.* at ___, 795 S.E.2d at 406. The issue was based "on whether depraved-heart malice supported the conviction." *Id.* at ___, 795 S.E.2d at 406. The trial court sentenced defendant as a Class B1 felon, concluding there was no evidence supporting a depraved-heart theory of malice.

Defendant appealed and alleged, *inter alia*, the trial court improperly sentenced him as a B1 felon, since the evidence presented may have supported a finding he acted with depraved-heart malice. *Id.* at ___, 795 S.E.2d at 408. This Court upheld the trial court's sentencing of defendant as a B1 felon and found no error, because the evidence did not support defendant acted with depraved-heart malice. *Id.* at ___, 795 S.E.2d at 409-11. This Court reasoned, "[t]he evidence neither suggested that defendant slashed around a knife so recklessly or wantonly that he inadvertently killed someone nor that defendant used an imprecise weapon or aimed so indiscriminately as to manifest a mind utterly without regard for human life and social duty." *Id.* at ___, 795 S.E.2d at 409.

Similarly, here, Defendant did not waive the gun imprecisely or indiscriminately to "manifest a mind utterly without regard for human life and social duty." *Id.* at ___, 795 S.E.2d at 409. Rather, Defendant aimed the gun at Barrino and said he meant to shoot him, not kill him. Defendant's actions were not inadvertent or reckless; rather, they were intentional. Thus, the trial court correctly

concluded the evidence supported jury instructions based on the first and third theories of malice and did not commit error in its jury instructions. Accordingly, we hold the trial court did not err, or commit plain error, in omitting the "inherently dangerous act" definition of malice from its second-degree murder jury instruction.

IV. Conclusion

For the foregoing reasons, we find no error in the jury's verdict or in the judgment entered.

NO ERROR.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).