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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-469

Filed: 5 June 2018

Davie County, No. 14CRS050399

STATE OF NORTH CAROLINA

v.

MICHAEL BRYAN FREEMAN, Defendant.

Appeal by defendant from judgment entered on or about 18 November 2016 by Judge Martin B. McGee in Superior Court, Davie County. Heard in the Court of Appeals 13 December 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.

Jeffrey William Gillette, by defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction for second degree murder. We vacate defendant's sentence and remand for resentencing consistent with this opinion.

I. Background

This case arises from defendant's conviction for second degree murder. We briefly summarize the underlying facts on appeal as the only substantive issue raised is not properly before us. On 7 April 2014, defendant and Mr. Foster became intoxicated and began arguing; for about fifteen minutes, defendant repeatedly kicked Mr. Foster in the head with his boots and hit him in the face. Later, defendant choked Mr. Foster and eventually left him unconscious on the floor. Mr. Foster died from "blunt trauma to the head."

Defendant was indicted for murder, tried by a jury, and convicted of second degree murder. The trial court entered judgment on a Class B1 Felony and sentenced defendant to a minimum term of 264 months and a maximum term of 329 months. Defendant appeals.

II. Sufficiency of the Evidence

Defendant first contends the trial court erred in not dismissing his case for insufficient evidence of malice. The State argues and defendant concedes he failed to preserve the argument of insufficient evidence of malice before the trial court. In his reply brief, defendant requests that this Court suspend our rules under Rule 2 of the Rules of Appellate Procedure and hear his argument despite the fact that it is not properly before us.

After our review of the record and the substantial evidence of the violent and excessive force with which defendant beat Mr. Foster to death we have decided in our

discretion not to review defendant's argument under Rule 2 because there is no evidence that this is an exceptional case where it is necessary for the public good or to prevent manifest injustice. *See State v. Biddix*, 244 N.C. App. 482, 489–90, 780 S.E.2d 863, 868 (2015) ("Under Appellate Rule 2, this Court has discretion to suspend the appellate rules either upon application of a party or upon its own initiative. Appellate Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances. This Court's discretionary exercise to invoke Appellate Rule 2 is intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions. On the record before us, Defendant has not demonstrated, and we do not find, the exceptional circumstances necessary to exercise our discretion to invoke Appellate Rule 2[.]" (citations and quotation marks omitted)).

III. Sentencing

Defendant's only remaining argument is regarding his sentence. Defendant contends "[t]he trial court committed reversible error when it sentenced Mr. Freeman as a B1 felon, where the court had charged the jury on both B1 and B2 theories of malice, and the verdict sheet did not indicate which theory the jury had found[.]" The State again argues defendant failed to preserve this issue because he stipulated to

the classification as B1 rather than B2, but a defendant cannot stipulate to a question of law regarding the classification of his felony. *See generally State v. Arrington*, ___ N.C. App. ___, 803 S.E.2d 845, 848, *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 734 (2017) ("Defendant's stipulation in connection with his guilty plea went beyond a factual admission that the 1994 Conviction existed. Instead, it constituted a stipulation as to the issue of whether the 1994 Conviction should be treated as a Class B1 or Class B2 felony—a question that required the retroactive application of a distinction in classifications that did not exist at the time of Defendant's conviction in 1994 and thus required a legal analysis as to how the 1994 Conviction would be classified under the new statutory scheme. Therefore, because Defendant's stipulation involved a question of law, it should not have been accepted by the trial court and is not binding on appeal.") Although the State attempts to distinguish *Arrington* because here no "retroactive application" is required, the general principle holds that a defendant may not stipulate to a question of law and the classification of a felony is one such question. *See generally id.*

The State also contends that because defendant did not object to the jury's general verdict sheet we may only review this issue for plain error, but that is not what our Court determined in a recent and similar case, *State v. Mosley*, ___ N.C. App. ___, ___, 806 S.E.2d 365, 367 (2017). In *Mosley* this Court allowed *de novo* review based upon another similar case:

We reach only the first issue on appeal, which is similar to an issue recently addressed by this Court in *State v. Lail*, ___ N.C. App. ___, 795 S.E.2d 401 (2016), *disc. review denied*, 369 N.C. 254, 796 S.E.2d 927 (2017). We review *de novo* whether the sentence imposed was authorized by the jury's verdict.

. . . .

Before addressing the defendant's argument, this Court explained the relevant law on malice as it relates to second degree murder as follows:

> Malice is an essential element of second-degree murder. North Carolina recognizes at least three malice theories:
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> (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.
>
> The second type of malice is commonly referred to as depraved-heart malice.
>
> . . . .
>
> Prior to 2012, all second degree murders were classified as Class B2 felonies. In 2012, our General Assembly amended N.C. Gen. Stat. § 14-17 to classify all second degree murders as Class B1 felonies except for in two specific exceptions, in which second degree murder remains a Class B2 felony. The exception at issue here is found in N.C. Gen. Stat. § 14-17(b)(1), which states:
>
> > The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done 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.

This exception is the previous common law definition of depraved-heart malice.

Id. at ___, 806 S.E.2d at 367-68 (citations, quotation marks, brackets, and footnote omitted).

Mosley then goes on to examine *Lail*, where though the jury verdict was general and did not specify the type of malice found, the verdict was not ambiguous:

> In *Lail*, the Court rejected the defendant's contentions finding [instead] that
>
> > no evidence presented would have supported a finding that the defendant acted with B2 depraved-heart malice. The evidence presented supported only B1 theories of malice and the jury was instructed only on those theories[, and thus there was no evidence to support defendant acted with B2 depraved heart malice as he contended on appeal]. Therefore, although the jury was not instructed to answer under what malice theory it convicted defendant of second-degree murder, it was readily apparent from the evidence presented and instructions given that the jury, by their verdict, found defendant guilty of B1 second-degree murder.

Id. at ___, 806 S.E.2d at 368 (citation and brackets omitted).

Mosley then distinguished the case before it from *Lail*:

> Pertinent to this case, however, this Court noted that
>
> > a general verdict would be ambiguous for sentencing purposes where the jury is charged on second-degree murder and presented with evidence that may allow them to find that either B2 depraved-heart malice or another B1 malice theory existed. In such a situation, courts cannot speculate as to which malice theory the jury used to support

its conviction of second-degree murder.

In the present case, the jury unanimously convicted defendant of second degree murder. The jury verdict, however, was silent on whether the second degree murder was a Class B1 or a Class B2 offense. Defendant's first argument on appeal is that the jury's general verdict of guilty of second degree murder is ambiguous for sentencing purposes because there was evidence in this case of depraved-heart malice to support a verdict of guilty of a Class B2 second degree murder. We agree.

. . . .

In the case *sub judice*, unlike in *Lail*, there was evidence of defendant's reckless use of a rifle, a deadly weapon. Specifically, defendant testified that as he was arguing with the victim, he was holding the rifle with his finger on the trigger and without the safety on. Defendant stated this was how he always handled the rifle—finger on the trigger and no safety. Defendant testified that in this instance, the gun went off when the victim grabbed the barrel of the rifle and he pushed her away. There was also testimony about the safety on the rifle and testimony from a firearm expert that you would never teach anyone to have their finger on the trigger until they are ready to fire. Moreover, the State argued to the jury that defendant's actions amounted to more than criminal negligence, claiming that defendant's handling of the rifle amounted to gross recklessness or carelessness as to amount to the heedless indifference to the safety and rights of others.

In response to defendant's argument that the evidence supported a depraved-heart theory of malice and a Class B2 second degree murder, the State points to other evidence presented in the case from which the State claims the trial judge could have correctly concluded that the Class B1 felony sentence was proper. That evidence, however, is not in question. There is no doubt that there is evidence of malice supporting a Class B1 second degree murder. The issue presently before this Court is whether there is also evidence from which the jury could have found depraved-heart malice to convict defendant of a Class B2 second degree murder. We hold there is such evidence in

> this case.
>
> Because there was evidence presented which would have supported a verdict on second degree murder on more than one theory of malice, and because those theories support different levels of punishment under N.C. Gen. Stat. § 14-17(b), the verdict rendered in this case was ambiguous. When a verdict is ambiguous, neither we nor the trial court is free to speculate as to the basis of a jury's verdict, and the verdict should be construed in favor of the defendant. Given the ambiguity in the second degree murder verdict in this case, we vacate defendant's sentence and remand the matter for resentencing for second degree murder as a Class B2 felony offense.
>
> In order to avoid such ambiguity in the future, we recommend two actions. First, the second degree murder instructions contained as a lesser included offense in N.C.P.I.—Crim. 206.13 should be expanded to explain all the theories of malice that can support a verdict of second degree murder, as set forth in N.C.P.I.—Crim. 206.30A. Secondly, when there is evidence to support more than one theory of malice for second degree murder, the trial court should present a special verdict form that requires the jury to specify the theory of malice found to support a second degree murder conviction.

Id. at ___, 806 S.E.2d at 368-39 (citations, quotation marks, and brackets omitted).

Here, as in *Mosley*, *see id.*, the jury was instructed as the different types of malice which may support a verdict for second-degree murder. Here also the evidence supports a theory of depraved heart murder because defendant committed "an inherently dangerous act . . . done 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" when he was intoxicated, beat Mr. Foster for over 15 minutes, and left him on the floor to die. *See id.* at ___, 806 S.E.2d at 367-68. Also

as in *Mosley*, the State directs us to evidence which supports a theory of malice *other* than depraved heart arguing there was "ample evidence of malice under any definition, including evidence that would support a jury finding of non-depraved-heart malice. . . . In fact, the prosecutor emphasized to the jury in the State's closing argument that the evidence certainly showed defendant acted with ill will, spite, or hatred." But as *Mosley* made clear, the State's evidence of "ill will, spite, or hatred" for purposes of "non-depraved-heart-malice"

> is not in question. There is no doubt that there is evidence of malice supporting a Class B1 second degree murder. The issue presently before this Court is whether there is also evidence from which the jury could have found depraved-heart malice to convict defendant of a Class B2 second degree murder.

Id. at ___, 806 S.E.2d at 368-69. "Because there was evidence presented which would have supported a verdict on second degree murder on more than one theory of malice, and because those theories support different levels of punishment under N.C. Gen. Stat. § 14-17(b), the verdict rendered in this case was ambiguous." *Id.* at ___, 806 S.E.2d at 369. "Given the ambiguity in the second degree murder verdict in this case, we vacate defendant's sentence and remand the matter for resentencing for second degree murder as a Class B2 felony offense." *Id.*

IV. Conclusion

As defendant failed to properly preserve his issue regarding the sufficiency of the evidence we will not consider that issue. As to defendant's sentence, we vacate

and remand for resentencing as a Class B2 felony.

VACATED and REMANDED for resentencing.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).