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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1143

Filed: 3 September 2019

Guilford County, No. 16CRS071857

STATE OF NORTH CAROLINA,

v.

SHENIKA CHENNEL SHAMBERGER, Defendant.

Appeal by defendant from judgment entered 15 May 2018 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 8 May 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

BERGER, Judge.

On May 15, 2018, a Guilford County jury convicted Shenika Chennel Shamberger ("Defendant") of second degree murder. Defendant appeals, arguing that the trial court plainly erred by not including accident's final mandate when it instructed the jury, and erred by denying her request for a jury instruction on involuntary manslaughter. We find no plain error in part, and no error in part.

Factual and Procedural Background

The evidence at trial tended to show that the victim in this case, Marcus McQueen ("McQueen"), was one of several individuals at a gathering at a residence where Defendant had been staying. McQueen began arguing with another occupant over moonshine. Defendant asked them to stop arguing. The argument continued, however, and Defendant asked McQueen to leave. McQueen refused.

Later, McQueen and others were gathered in the driveway. Defendant then decided to take her son with her to run some errands. According to one witness, while outside, Defendant and McQueen were "having words." According to the witness, Defendant told McQueen, "You don't know who you're fucking with. I will kill you." McQueen was sitting on a bucket to the right of a truck throughout this encounter with Defendant. McQueen responded, "ain't nobody going to mess with me."

Defendant got in a truck that she drove once or twice a week. She started the truck, and looked at McQueen for a few seconds. According to a witness, Defendant revved the engine and when she hit the gas to leave out of the driveway, the truck began moving forward. Defendant drove the truck toward McQueen, and ran over him. She stopped when the truck hit a nearby house. McQueen was still under the truck and died at the scene. When a by-stander stated that the police should be called, Defendant said, "Fuck it, call the police."

At trial, Defendant testified that she did not intend to hit or kill McQueen. She stated that she did not even notice that she had run over McQueen until she had hit the house and exited the truck. She also testified that the gear indicator on the truck was stuck in "park" and did not move when the truck was shifted into gear.

Expert witnesses for the State and Defendant testified that the throttle worked properly and that there was nothing wrong with the operation of the vehicle. The State's expert witness specifically stated that the "gear indicator stayed in the parked position, but it was clear which gear you were in, whether it was reverse, neutral, or drive. And there was no issue with getting it into any of those gears." Defendant's expert witness testified that he had visually inspected the truck, but had not driven it. Based on his visual examination, he testified that "from a mechanical standpoint, everything was connected like it should be" and that the brakes appeared that they did work. He also testified that the indicator that informs you if the truck is in park, neutral, or drive, did not work. With regard to the trajectory of the truck, he testified that it took about 1.9 seconds "from the time the vehicle first started moving until the time it hit the house."

Defendant was indicted for first degree murder, and subsequently tried on April 30, 2018. Defendant filed a motion requesting special jury instructions on levels B1 and B2 second degree murder. During the jury charge conference, Defendant also requested instructions on accident and involuntary manslaughter. The trial court

agreed to instruct on accident, but not on involuntary manslaughter. Over Defendant's objection to excluding an instruction on involuntary manslaughter, the trial court instructed the jury on first degree murder, B1 second degree murder, and B2 second degree murder. The trial court then stated the law on accident as follows:

> A killing is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence.
>
> A killing cannot be premeditated or intentional or culpably negligent if it was the result of an accident. When the defendant asserts that the victim – alleged victim's death was the result of an accident, she is in fact denying the existence of those facts which the [S]tate must prove beyond a reasonable doubt in order to convict her of a crime. The burden is on the state to prove these essential facts and, in so doing, disprove the defendant's assertion of accidental death.
>
> The [S]tate must satisfy you beyond a reasonable doubt that the alleged victim's death was not accidental before you may return a verdict of guilty.

On May 15, 2018, the jury found Defendant guilty of level B1 second degree murder. Defendant was sentenced to 276 to 344 months in custody. Defendant appeals.

Analysis

I. Jury Instructions

Defendant did not object when the trial court did not give the final mandate on Defendant's accident instruction to the jury. However, Defendant contends on appeal that the trial court plainly erred in omitting the final mandate. We disagree.

If an instructional error is not preserved below, it nevertheless may be reviewed for plain error "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." Moreover, because plain error is to be "applied cautiously and only in the exceptional case," the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotation marks omitted)).

> "It is well established that 'the trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct.' " *State v. Hornsby*, 152 N.C. App. 358, 367, 567 S.E.2d 449, 456 (2002) (quoting *State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984)), *appeal dismissed*, 356 N.C. 685, 578 S.E.2d 316 (2003). "Regardless of requests by the parties, a judge has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence. The trial judge may in his discretion also instruct on the subordinate and nonessential features of a case without requests by counsel." *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982) (citing *State v. Ward*, 300 N.C. 150, 266 S.E.2d 581 (1980)).

State v. McHone, 174 N.C. App. 289, 294-95, 620 S.E.2d 903, 907 (2005).

"Our Supreme Court has held that the failure of the trial court to provide the option of acquittal or not guilty in its charge to the jury can constitute reversible error." *Id.* at 295, 620 S.E.2d at 907. In addition, "our appellate precedent illustrates the importance placed upon the trial court's obligation to provide a not guilty final mandate to juries." *Id.* at 296, 620 S.E.2d at 908.

In *McHone*, this Court first concluded that "the trial court's failure to provide a not guilty final mandate constituted error[.]" *Id.* at 297, 620 S.E.2d at 909. However, this Court further noted that in order to determine whether the trial court's error constituted plain error, the following factors should be considered: (1) "the jury instructions on murder in their entirety"; (2) "the content and form of the first-degree murder verdict sheet"; and (3) "the instructions and verdict sheet for the [other] offenses[.]" *Id.* at 297-98, 620 S.E.2d at 909 (first alterations in original); *State v. Jenrette*, 236 N.C. App. 616, 637, 763 S.E.2d 404, 417 (2014) (applying *McHone* factors and concluding "that Defendant has failed to show plain error"); *State v. Calderon*, 242 N.C. App. 125, 134, 774 S.E.2d 398, 406 (2015) (applying *McHone* factors and determining that "while it was error for the trial court to fail to deliver the not guilty mandate during its instruction on the offenses of robbery with a firearm and common law robbery, we hold this error does not rise to the level of plain error.").

In the present case, in considering the jury instructions in their entirety, three theories of murder were presented to the jury: first degree murder, level B1 second

degree murder, and level B2 second degree murder. Additionally, the trial court instructed the jury on accident according to jury pattern instruction 307.10. Although the trial court did not include the final mandate from 307.10, the trial court did include the possibility that the jury could find Defendant not guilty of any crime based on accident and concluded the instructions with:

> The [S]tate must satisfy you beyond a reasonable doubt that the alleged victim's death was not accidental before you may return a verdict of guilty.

Unlike in *McHone*, which "essentially pitted one theory of first degree murder against the other," here, there was nothing that "impermissibly suggested that the jury should find that the killing was perpetrated by defendant on the basis of at least one of the theories." *McHone*, 174 N.C. App. at 297, 620 S.E.2d at 909 (emphasis removed). After instructing the jury on first and second degree murder, the trial court stated, "If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of *not guilty*." (Emphasis added). Thus, the trial court provided a not guilty mandate, it merely failed to do so in the accident instruction.

While the better practice would have been for the trial court to have included 307.10's final mandate, the remainder of the accident instruction did adhere to the pattern jury instruction and reinforced that the jury did not have to return a guilty verdict. *Calderon*, 242 N.C. App. at 134, 774 S.E.2d at 406.

Moreover, the content and form of the murder verdict sheet provided the following options:

> GUILTY OF FIRST DEGREE MURDER,
> OR
> GUILTY OF SECOND DEGREE MURDER (LEVEL B1),
> OR
> GUILTY OF SECOND DEGREE MURDER (LEVEL B2),
> OR
> NOT GUILTY

Therefore, "the verdict sheet clearly informed the jury of its option of returning a not guilty verdict[.]" *Jenrette*, 236 N.C. App. at 633, 763 S.E.2d at 414. The third *McHone* factor is inapplicable, thus we need not address it. Because the instruction as a whole was correct and the exclusion of 307.10's final mandate did not have a probable impact on the jury's verdict, we find no plain error.

II. Involuntary Manslaughter

Defendant also contends that the trial court erred when it denied Defendant's request to instruct the jury on involuntary manslaughter. We disagree.

> This Court reviews a defendant's challenge to a trial court's decision to instruct the jury on the issue of the defendant's guilt of a lesser included offense, such as involuntary manslaughter, on a *de novo* basis. "[A] judge presiding over a jury trial must instruct the jury as to a lesser included offense of the crime charged where there is evidence from which the jury could reasonably conclude that the defendant committed the lesser included offense." In determining whether the evidence is sufficient to support the submission of the issue of a defendant's guilt of a lesser included offense to the jury, "courts must consider the evidence in the light most favorable to [the] defendant." However, "[i]f the State's evidence is sufficient

> to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense."

State v. Debiase, 211 N.C. App. 497, 503-04, 711 S.E.2d 436, 441 (2011) (internal citations 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." *State v. Millsaps,* 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

> Involuntary manslaughter is "the unlawful and unintentional killing of another human being, without malice, which proximately results from an unlawful act not amounting to a felony ... or from an act or omission constituting culpable negligence." *State v. Wallace*, 309 N.C. 141, 145, 305 S.E.2d 548, 551 (1983). Culpable negligence is "such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others." *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977).

State v. Wood, 149 N.C. App. 413, 416, 561 S.E.2d 304, 307 (2002). "Involuntary manslaughter is a lesser included offense of second degree murder[.]" *State v. Thomas,* 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989). "Involuntary manslaughter is distinguished from murder ... by the absence of malice, premeditation, deliberation, intent to kill, and intent to inflict serious bodily injury." *Debiase*, 211 N.C. App. at 505, 711 S.E.2d at 442 (citation and quotation marks omitted).

In the light most favorable to Defendant, her actions do not rise to the level of culpable negligence such that an instruction on involuntary manslaughter was warranted. Defendant denied that she and McQueen had an argument when she was getting into the truck. Defendant was aware that the gear shift indicator on the truck did not display the correct gear. She had operated the vehicle on prior occasions, including earlier that day without incident. She knew how to put the truck in gear and operate it despite the issue with the gear shift indicator. She testified that she thought the vehicle was in reverse, not drive. Her expert testified there was nothing wrong with operation of the vehicle. She could at all times operate the vehicle with the faulty gear shift indicator in a manner that (1) was not so reckless or careless so as to "import[ ] a thoughtless disregard of the consequences of the act or [(2) did not] show[ ] a heedless indifference to the rights and safety of others." *State v. Wilkerson*, 295 N.C. 559, 580, 247 S.E.2d 905, 917 (1978) (citation and quotation marks omitted). Thus, in the light most favorable to Defendant, her negligence entitled her to an instruction on accident, but did not rise to the level of culpable negligence.

In addition, the faulty gear shift indicator was not the proximate cause of McQueen's death. *See State v. Ellis*, 25 N.C. App. 319, 320, 212 S.E.2d 909, 910 (1975) ("[O]ne can be guilty of involuntary manslaughter whenever his culpable negligence is a proximate cause of the victim's death."). Even in the light most favorable to Defendant, it was her failure to put the vehicle, which she could operate safely despite

the defective gear shift indicator, in the proper gear that caused the truck to move forward and strike McQueen. While there may be some element of foreseeability in such an accident with an individual who was not familiar with this truck or the faulty gear shift indicator, and who noticed that the indicator did not move from "park" when the truck was placed in gear, such is not the case with Defendant.

Thus, Defendant's actions supported the instruction for accident, but not for involuntary manslaughter. The trial court did not err when it declined to instruct the jury on involuntary manslaughter because there was no evidence to support an instruction on involuntary manslaughter.

Conclusion

The trial court's exclusion of the final mandate in the instruction on accident did not rise to the level of plain error. Furthermore, the trial court did not err when it denied Defendant's request to instruct on involuntary manslaughter.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).