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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1290

Filed: 21 January 2020

Cumberland County, No. 16 CRS 063320, 057652, 057694

STATE OF NORTH CAROLINA

v.

TYRONE JUDEA HALL, III, Defendant.

Appeal by Defendant from judgments entered 1 May 2018 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 4 September 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth N. Strickland, for the State.*

*Anne Bleyman for defendant-appellant.*

MURPHY, Judge.

On appeal, Defendant makes two arguments. First, he argues the jury should not have received flight instructions. For a trial court to give an instruction on flight, a defendant's leaving of the crime scene must include some evidence the defendant took steps to avoid apprehension. It cannot be based merely upon failing to stay at the location or moving on with his or her activities. Here, the trial court did not err

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in giving a flight instruction when Defendant fled a shooting, ran to a friend's car, and later went to another state where police eventually found him hiding under a bed.

Second, Defendant argues the trial court committed plain error in not instructing the jury on voluntary manslaughter. A jury must not be coerced into convicting a defendant of murder when the evidence would permit the jury to rationally find defendant guilty of voluntary manslaughter and acquit him of murder. The jury here could have rationally found imperfect self-defense, which reduces murder to voluntary manslaughter. Taken in the light most favorable to Defendant, Defendant believed the victim recognized him from a previous crime, believed the victim was armed, believed he heard a gun cock behind a door, and believed he was at risk of death or serious bodily harm. Despite the presence of imperfect self-defense, the trial court did not plainly err because there was only a possible impact and not a probable impact on the jury. Defendant used a deadly weapon, which raises a presumption of malice.

**BACKGROUND**

On 8 August 2015, Abraham Shuler ("Shuler"), David Rivera ("Rivera"), and Tyrone Judea Hall, III ("Defendant") decided to rob Joshua Richard Gutierrez ("Gutierrez"), a known drug dealer. Sometime after 1:00 AM, the three went to Gutierrez's home, where Gutierrez, his girlfriend Keishanna Finch ("Finch"), and his

friend D'Allen Higgins (“Higgins”) were sitting in the living room. Rivera knocked on the door and ordered a gram of marijuana. Gutierrez allowed Rivera inside, and Rivera waited at the door. While waiting, Rivera was texting and looking down the entire time.

As Gutierrez was bagging the marijuana, Shuler and Defendant rushed in yelling “get on the ground.” Defendant and Shuler carried pistols and wore bandanas to cover their faces. Rivera, Gutierrez, and Finch complied. Higgins recognized Shuler by his physical appearance, and recognized Defendant after he stated “Where’s it at? Where’s the money? Where’s the weed?” Rivera pretended as though he was not involved. After taking money, marijuana, and a few other items, Shuler and Defendant grabbed Rivera by his shirt and left. Gutierrez did not report the robbery because of the nature of his business.

On 12 November 2015, Defendant, his cousin, and Rivera decided to buy marijuana from Gutierrez—the same person they robbed only four months earlier. Rivera remained in the car while Defendant and his cousin went inside to make the purchase. Finch, who was inside Gutierrez’s home, could not see who Gutierrez interacted with when he answered the door, but she heard their conversation. Gutierrez spoke to the person at the door “in a friendly manner” and spoke as if he knew the person. Gutierrez then left the door, counted the money he was given, and had begun bagging the marijuana when three bullets came through the door. Rivera

heard two of the gunshots while waiting several minutes for Defendant and his cousin. Gutierrez and Finch were shot. Defendant and his cousin hurried back to the car and Defendant told Rivera to take him home. During the ride, Defendant explained what happened.

In the car, Defendant told Rivera that he knocked on the door, he heard somebody verbally answer but not open the door, he thought Gutierrez recognized them, he thought Gutierrez had a gun, he heard a gun cock, and then he, Defendant, shot through the door. Rivera ended up dropping off Defendant and his cousin at Keith Reynolds's ("Reynolds") home. There, Defendant told Reynolds he had killed "Scooby," which was one of Gutierrez's nicknames:

Q. Describe for us what [Defendant] was doing when he came into your house?

[Reynolds.] I mean, he was pacing, he was pacing in a circle.

Q. Was he saying or singing –

[Reynolds.] Yeah, he was singing [a] G Herbo song.

...

Q. Who is G Herbo?

[Reynolds.] It's a rapper that's from Chicago.

Q. What was the song he was singing?

[Reynolds.] All I know I kept hearing him say "hollows eating up your back."

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. . .

Q. “Hollows eating up your back” what is that in reference to?

[Reynolds.] I mean, that’s a bullet.

. . .

Q. How did it come up that y’all had a conversation –

[Reynolds.] Because he was like when I came in my room my baby mama was like I’ve got to talk to you about something. And I was like what is it. And then he told me.

Q. What did he tell you?

[Reynolds.] He said he shot somebody.

Q. What particularly did he say that he had done in terms of firing a number of shots things like that?

[Reynolds.] No, he just said he killed somebody.

Q. Did he say who?

[Reynolds.] Yeah, I mean, I asked him, and then he named the name, and he said Scooby, and I was like, who is Scooby, and then I got it from other people that it was [Gutierrez].

When law enforcement arrived at Gutierrez’s home, they found three bullet holes in the front door, one .38 caliber shell casing, and two .45 caliber shell casings. A firearms expert testified that the .45 caliber bullet recovered from Gutierrez’s body and the .45 caliber bullet recovered from Gutierrez’s home were fired from the same gun. Finch was also taken to the hospital and treated for a gunshot wound.

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The autopsy revealed that Gutierrez had been shot twice, once in the chest and once in the thigh. Gutierrez's cause of death was the gunshot wound to the chest. A .45 caliber projectile was recovered from Gutierrez's chest.

Over a year later in June 2016, an inspector for the United States Marshal Service in Fugitive Operations was assigned to apprehend Defendant. Two months later, Defendant was found in his girlfriend's Baltimore, Maryland home hiding under a bed. He was then returned to North Carolina to be prosecuted.

Defendant was indicted for second-degree kidnapping, robbery with a dangerous weapon, felonious conspiracy, felonious breaking or entering, first-degree murder, discharging a firearm into an occupied dwelling, and assault with a deadly weapon with intent to kill inflicting serious injury. The trial began on 23 April 2018 and Defendant did not testify or present evidence.

During trial, it was revealed that in March 2016, a Colt .45 caliber firearm was found in the Baltimore home. After Maryland authorities conducted a trace of the firearm, the Colt was transferred from Baltimore to Cumberland County as evidence in this case. They discovered the Colt had been reported stolen from Cumberland County about a year earlier. Higgins testified that he stole the Colt from a vehicle in 2015 and sold it to Reynolds. In turn, Reynolds sold the Colt, before the 12 November 2015 shooting, to Defendant. The firearms expert testified that the markings on the shell casings at the crime scene matched those made by the Colt.

Defendant was found not guilty of assault with a deadly weapon inflicting serious injury and second-degree kidnapping. Defendant was found guilty of second-degree murder, discharging a firearm into an occupied dwelling, robbery with a firearm, conspiracy to commit robbery with a dangerous weapon, and felonious breaking or entering. Defendant appeals his conviction.

### **ANALYSIS**

#### **A. Jury Instruction on Flight**

Defendant argues his convictions for robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and felonious breaking or entering must be vacated because Defendant was prejudiced when the trial court erroneously instructed the jury on flight. We disagree.

“[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] trial court may not instruct a jury on defendant’s flight unless there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.” *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (internal citation and quotation marks omitted). “So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for

defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977).

"To merit an instruction on flight, the defendant's leaving of the crime scene must be bolstered by some evidence that defendant took steps to avoid apprehension." *State v. Rainey*, 198 N.C. App. 427, 442-43, 680 S.E.2d 760, 772 (2009) (internal citations and quotation marks omitted) (upholding flight instruction where the defendant left the crime scene, fled to Ohio, and subsequently failed to appear in court); *see Levan*, 326 N.C. at 165, 388 S.E.2d at 434 (upholding flight instruction where the defendant left the crime scene, attempted to conceal the crime, and was arrested a year later in his own home in North Carolina); *State v. Stitt*, 201 N.C. App. 233, 251, 689 S.E.2d 539, 553 (2009) (upholding flight instruction where the defendant left the crime scene and was found in New York, despite the defendant's assertion that traveling to New York was a standard practice); *State v. Allen*, 193 N.C. App. 375, 382, 667 S.E.2d 295, 300 (2008) (upholding flight instruction where the defendant left the crime scene in a stolen vehicle; made no effort to contact the authorities, obtain help, or surrender himself; drove from North Carolina to Virginia; and was arrested in Florida after an arrest warrant had been issued).

Here, the evidence presented at trial established that on 12 November 2015 Defendant left the scene of the shooting. Rivera testified how he heard gunshots and was a party to Defendant's leaving of the scene:



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Q. When you heard gunshots did – we hear it in Fort Bragg all the time it sounds like it's gunshots very far away and sometimes you hear gunshots close, could you tell whether the gunshots you're talking about were close or far away?

[Rivera.] They were close.

Q. When you heard gunshots were they coming from the direction of the trailer that these guys had just gone?

[Rivera.] At first, I didn't know where they were coming from, but I mean, you could tell where they were coming from, but.

Q. So, did you notice that they were coming from that direction at some point?

[Rivera.] I just know they were coming off. . . . They were echoing.

Q. They were echoing, I got-you. Did – after you heard gunshots what was the next thing you saw or heard?

[Rivera.] I heard, seen them come back to the car and he got –

Q. Who came back to the car?

[Rivera.] [Defendant] and [his cousin].

Q. Now, again, I don't want to put words in your mouth, were they walking, running?

[Rivera.] Running.

. . .

Q. [D]escribe them to me.

[Rivera.] They was just in a hurry.

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Q. Okay. Did they get back in the vehicle?

[Rivera.] Yeah.

Q. Did they get back where they came from [sic] same spot?

[Rivera.] Yes.

Q. So that puts [Defendant's cousin] where?

[Rivera.] In the back.

Q. And puts [Defendant] where?

[Rivera.] In the front seat.

Q. When [Defendant] got in the front seat – what happened? Did somebody say something?

[Rivera.] No, he just told me to take him home.

Q. Did he sound like he was in a hurry or was he calm?

[Rivera.] Made me take him home, just kind of in a hurry.

Q. Did you start the car?

[Rivera.] Yeah. . . . It was already started.

Q. So, did you start to moving?

[Rivera.] Yeah.

Q. Where did you head?

[Rivera.] To drop him off.

This alone is sufficient as “some evidence” of flight. *See Rainey*, 198 N.C. App. at 442, 680 S.E.2d at 772.

In addition, like the defendants in *Allen* and *Stitt*, Defendant left the crime scene and took steps to avoid apprehension by later going to Baltimore and then hid under his girlfriend's bed when law enforcement executed its search warrant for Defendant's arrest. *See Rainey*, 198 N.C. App. at 442, 680 S.E.2d at 772. Defendant contends that being found in another state where his family and girlfriend lived was not evidence that he was avoiding apprehension. However, "[t]he fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *Irick*, 291 N.C. at 494, 231 S.E.2d at 842. The trial court did not err when it instructed the jury on flight.

#### **B. Lesser-Included Offense Instruction**

Defendant also argues the trial court plainly erred when it did not instruct the jury on the lesser-included offense of voluntary manslaughter. We agree that the trial court erred but do not conclude this error had a probable impact on the jury. The error did not rise to the level of plain error.

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.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations omitted). Here, during the jury charge conference, Defendant did not request an instruction on voluntary manslaughter. However, on appeal, Defendant specifically and distinctly contends the trial court’s failure to instruct *ex mero motu* on voluntary manslaughter amounts to plain error. Thus, we review for plain error.

“The law is well settled that ‘a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts.’” *State v. Coleman*, 161 N.C. App. 224, 233, 587 S.E.2d 889, 895 (2003) (quoting *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002)). “[A] jury should not be coerced into a verdict because there was no lesser included offense submitted to the jury which better fit the evidence.” *Id.* at 233, 587 S.E.2d at 895. “Still, the ‘trial court should refrain from indiscriminately or automatically instructing on lesser included offenses. Such restraint ensures that the jury’s discretion is channelled so that it may convict a defendant of only those crimes fairly supported by the evidence.’” *State v. Holmes*, 822 S.E.2d 708, 717 (N.C. Ct. App. 2018), *rev. denied*, 824 S.E.2d 415 (N.C. 2019) (quoting *State v. Taylor*, 362 N.C. 514, 530, 669 S.E.2d 239, 256 (2008) (alteration omitted). Accordingly, “[a]n 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

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greater.” *State v. Taylor*, 362 N.C. 514, 530, 669 S.E.2d 239, 256 (2008) (quoting *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771).

Two homicide instructions are conceivable from the facts of this case. The first is for second-degree murder. “Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.” *State v. Jenkins*, 300 N.C. 578, 591, 268 S.E.2d 458, 466-67 (1980). The other is for voluntary manslaughter. “Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation.” *State v. Rogers*, 323 N.C. 658, 667, 374 S.E.2d 852, 858 (1989). “Voluntary manslaughter is a lesser included offense of second-degree murder[.]” *State v. Owens*, 65 N.C. App. 107, 109, 308 S.E.2d 494, 497 (1983) (citations omitted).

A difference exists between second-degree murder and voluntary manslaughter: only second-degree murder requires a showing of malice. *Rogers*, 323 N.C. at 667, 374 S.E.2d at 858. “Malice is that condition of the mind which prompts one person to take the life of another intentionally without just cause, excuse or justification.” *Id.* It “is implied from a killing with a deadly weapon.” *State v. McMillan*, 214 N.C. App. 320, 325, 718 S.E.2d 640, 644 (2011). But “[e]vidence of self-defense or proof of adequate provocation can negate the presumption of malice.” *Id.* Indeed, imperfect self-defense can call for a voluntary manslaughter instruction:

[I]f the defendant believed it was necessary to kill the deceased in order to save himself from death or great bodily

harm, and the defendant's belief was reasonable because the circumstances at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but the defendant, although without murderous intent, was the aggressor or used excessive force, the defendant would have lost the benefit of perfect self-defense. In this situation he would have shown only that he exercised the imperfect right of self-defense and *would remain guilty of at least voluntary manslaughter.*

*State v. Wilson*, 354 N.C. 493, 516, 556 S.E.2d 272, 287 (2001) (emphasis added) (quoting *State v. Bush*, 307 N.C. 152, 159, 297 S.E.2d 563, 568 (1982), *overruled on other grounds by State v. Milsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002)). Then, the defendant “is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter.” *State v. Norris*, 303 N.C. 526, 532, 279 S.E.2d 570, 574 (1981) (quoting *State v. Crisp*, 170 N.C. 785, 793, 87 S.E. 511, 515 (1916)).

Taking these principles together, a voluntary manslaughter instruction “must be given only if the evidence would permit the jury rationally to find[.]” *Taylor*, 362 N.C. at 530, 669 S.E.2d at 256, that “the defendant believed it was necessary to kill the deceased in order to save himself from death or great bodily harm[; that] the defendant’s belief was reasonable because the circumstances at the time were sufficient to create such a belief in the mind of a person of ordinary firmness[; and that] the defendant, although without murderous intent, was the aggressor or used excessive force.” *Wilson*, 354 N.C. at 516, 556 S.E.2d at 287. Although imperfect self-defense is not grounds for acquittal from murder, “a jury should not be coerced

into a [murder] verdict because there was no lesser included offense submitted to the jury,” such as voluntary manslaughter, “which better fit the evidence” for imperfect self-defense, which would reduce murder to voluntary manslaughter. *Coleman*, 161 N.C. App. at 233, 587 S.E.2d at 895; *see Wilson*, 354 N.C. at 516, 556 S.E.2d at 287 (stating that a defendant “would remain guilty of at least voluntary manslaughter” when he or she “exercised the imperfect right of self-defense”). At a minimum, “proof of adequate provocation can negate the presumption of malice”—a requirement of murder—when a defendant uses a deadly weapon in a homicide. *McMillan*, 214 N.C. App. at 325, 718 S.E.2d at 644; *see Rogers*, 323 N.C. at 667, 374 S.E.2d at 858.

Defendant had the right to receive an instruction on voluntary manslaughter based on imperfect self-defense. He had prior criminal interactions with the victim and knew that the victim was a drug-dealer who was likely to be armed. *See, e.g., State v. Briggs*, 140 N.C. App. 484, 488, 536 S.E.2d 858, 860 (2000) (discussing that an “officer was aware that drug dealers frequently carry weapons”). Rivera testified about how Defendant told him that Gutierrez probably recognized him, Defendant, from the August 2015 robbery:

Q. Now, what – tell us about the conversation, what did [Defendant] say about those gunshots?

...

[Rivera.] He got in the car, he told me *he probably recognized [sic] from the first time we broke in.*

Q. So, . . . [Defendant] said to you he probably recognized him from the first robbery, referring to [Gutierrez] as the “he” recognizing [Defendant], is that, is that how you understood him to say?

[Rivera.] Yeah, yeah.

Coupled with the click of a cocked gun, a reasonable person with the same knowledge may rightfully fear for his life. At a minimum, a person would think his or her life is in danger. Such a person may well overreact and shoot through the door at the cocked-gun sound to protect his or her life. Indeed, Rivera next testified regarding Defendant’s explanation of why he shot through the door:

Q. After [Defendant] said he probably recognized him, did he follow-up with any explanation of why [Defendant] fired shots through that door?

[Rivera.] Cause he thought [Gutierrez] had a gun and [Defendant] – well, he thought [Gutierrez] had a gun so he fired first.

. . .

Q. Say that one more time. How did he follow that up?

[Rivera.] He said he probably recognized him, and *instead of him firing first he fired first*.

Q. I’m not needling you, I’m really trying not to poke you with a stick here, a lot of “he’s” going on. I want to make sure the jury understands what you’re saying and the way you mean it. So, substitute the names to the he’s. So, [Defendant] said that [Gutierrez] probably recognized him, that is [Gutierrez] probably recognized [Defendant], and did [Defendant] hear something?

[Rivera.] That’s right.



Q. What did [Defendant] say he heard?

[Rivera.] *A gun cock.*

Q. Is, was [Defendant] talking about, kind of explaining why [Defendant] fired shots through the door?

[Rivera.] Yes, sir.

Q. Okay. Was it clear to you that that's what [Defendant] was talking about?

[Rivera.] Yeah.

Q. That [Gutierrez] may have recognized him so [Defendant] heard a gun cock, [Defendant] thought somebody was going to shoot him, so he fired – rather [Defendant] fired first?

[Rivera.] Yes, sir.

Q. Was that – I want to make sure I'm not putting words in your mouth, is that how you understood that conversation?

[Rivera.] Yeah, that's correct.

Q. What was his demeanor like as he was explaining this to you?

[Rivera.] *Breathing hard, scared probably.*

From this testimony, a jury could rationally find that, although he used excessive force, Defendant believed it was necessary to kill Gutierrez in order to save himself from death or great bodily harm and that the circumstances at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. Under

our plain error standard, the jury would possibly be impacted if given the choice between murder and manslaughter. That choice, however, would not have had a *probable* impact on the jury.

Killing another with a deadly weapon raises a presumption that the killing was unlawful and malicious, and the circumstances of this case do not satisfactorily negate such a presumption. *State v. Carter*, 254 N.C. 475, 478-79, 119 S.E.2d 461, 464 (1961); *see State v. Johnson*, 278 N.C. 252, 259, 179 S.E.2d 429, 433 (1971) (“A presumption of malice arises from a killing which results from the intentional use of a deadly weapon. A finding of malice rules out manslaughter in this case.”). Because Defendant used a deadly weapon, second-degree murder can be presumed. Taken together, the absence of voluntary manslaughter instructions did not have “a probable impact on the jury’s finding that [Defendant] was guilty” of second-degree murder. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

Thus, “it is *possible* that the jury could have determined that the [Defendant acted in imperfect self-defense], and would have, therefore, convicted Defendant of only [voluntary manslaughter] had it been instructed on this lesser-included offense.” *State v. Edgerton*, 234 N.C. App. 412, 422, 759 S.E.2d 669, 675 (2014) (Dillon, J., dissenting), *rev’d for the reasons stated in the dissenting opinion*, 368 N.C. 32, 769 S.E.2d 837 (2015). “However, . . . the evidence was sufficient to sustain the finding

that the [Defendant acted with intent and malice such that Defendant], indeed, [committed second-degree murder].” *Id.* at 422, 759 S.E.2d at 675-76. “Accordingly, [we] cannot say that the jury ‘probably’ would have convicted Defendant of [voluntary manslaughter] if given that option.” *Id.* at 422, 759 S.E.2d at 676.

**CONCLUSION**

For the above reasons, the trial court did not err when it instructed the jury on flight. Due to imperfect self-defense, the trial court did err when it failed to instruct the jury on the lesser-included offense of voluntary manslaughter, but this error was not plain error because the absent instruction did not have a probable impact on the jury.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judge INMAN concurs in a separate opinion.

Judge BERGER concurs in a separate opinion.

Report per Rule 30(e).

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INMAN, Judge, concurring in separate opinion.

I concur in the result reached by the majority opinion. I write separately because, unlike my colleagues, I think it is unnecessary for this Court to consider whether the trial court erred in failing to instruct the jury on the lesser-included offense of voluntary manslaughter. Having unanimously concluded that Defendant has failed to demonstrate plain error, no further review is required. *See, e.g., State v. Laws*, 345 N.C. 585, 600, 481 S.E.2d 641, 649 (1997) (holding, without analysis of alleged error in a jury instruction, that assuming arguendo it was error, it was not plain error); *State v. Davis*, 230 N.C. App. 58, 748 S.E.2d 189, 193 (2013) (same).

BERGER, Judge, concurring in separate opinion.

I concur with the majority that the trial court did not err when it instructed the jury on flight. Furthermore, I concur in the result reached by the majority that there was no plain error. However, because the trial court did not err when it did not instruct the jury on the lesser-included offense of voluntary manslaughter, there can be no plain error. Thus, the majority’s analysis of whether the alleged error had a probable impact on the jury is unnecessary.

“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.’ ” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations omitted).

“The trial court is required to charge on a lesser offense only when there is evidence to support a verdict finding the defendant guilty of such lesser offense. However, when all the evidence tends to show that defendant committed the crime charged and did not commit a lesser included offense, the court is correct in refusing to charge on the lesser included offense.” *State v. Hickey*, 317 N.C. 457, 470, 346 S.E.2d 646, 655 (1986) (internal citation and quotation marks omitted).

“Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.” *State v. Jenkins*, 300 N.C. 578, 591, 268 S.E.2d 458, 466-67 (1980). “Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation.” *State v. Rogers*, 323 N.C. 658, 667, 374 S.E.2d 852, 858 (1989). “Voluntary manslaughter is a lesser included offense of second-degree murder[.]” *State v. Owens*, 65 N.C. App. 107, 109, 308 S.E.2d 494, 497 (1983) (citations omitted). The difference between second-degree murder and voluntary manslaughter is that a showing of malice is only required for second-degree murder. *Rogers*, 323 N.C. at 667, 374 S.E.2d at 858. “Malice is that condition of the mind which prompts one person to take the life of another intentionally without just cause, excuse or justification.” *Id.* at 667, 374 S.E.2d at 858. “Malice is implied from a killing with a deadly weapon.” *State v. McMillan*, 214 N.C. App. 320, 325, 718 S.E.2d 640, 644 (2011). “Evidence of self-defense or proof of adequate provocation can negate the presumption of malice.” *Id.* at 325, 718 S.E.2d at 644.

The majority contends there was sufficient evidence that Defendant acted in imperfect self-defense. I disagree.

There are two types of self-defense: perfect and imperfect. Perfect self-defense excuses a killing altogether, while imperfect self-defense may reduce a charge of murder to voluntary manslaughter. For defendant to be entitled to an instruction on either perfect or imperfect self-defense, the evidence must show that defendant believed it to be

necessary to kill his adversary in order to save himself from *death or great bodily harm*. In addition, defendant's belief must be "reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness."

*State v. Ross*, 338 N.C. 280, 283, 449 S.E.2d 556, 559-60 (1994) (citations omitted).

"This Court will consider the facts in the light most favorable to defendant to determine if the evidence presented at trial was sufficient to warrant an instruction regarding voluntary manslaughter based on imperfect self-defense." *State v. Coley*, 193 N.C. App. 458, 468, 668 S.E.2d 46, 53 (2008). However, "[a] defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State's evidence but not all of it." *State v. Bumgarner*, 147 N.C. App. 409, 417, 556 S.E.2d 324, 330 (2001) (citation and quotation marks omitted).

In support of an instruction on voluntary manslaughter, the majority emphasizes that the victim knew Defendant, the victim knew Defendant was a drug-dealer, and Defendant heard the click of a cocked gun. While these facts alone may put a reasonable person in fear, these facts do not "show that defendant believed it to be *necessary to kill his adversary* in order to save himself from death or great bodily harm." *Ross*, 338 N.C. at 283, 449 S.E.2d at 559-60 (emphasis added). These facts

do no more than indicate merely some vague and unspecified nervousness or fear; they do not amount to evidence that the defendant had formed any subjective belief that it was necessary to kill the deceased in order to save himself from death or great bodily harm. Instead, all

of the evidence tends to indicate that the defendant had not formed a belief that it was necessary to kill [the deceased] in order to save himself from death or great bodily harm.

*State v. Bush*, 307 N.C. 152, 159-60, 297 S.E.2d 563, 568 (1982). Here, the record contains no evidence that Defendant actually believed it was necessary to kill Gutierrez.

Also, there was no evidence presented demonstrating there was an imminent threat to Defendant because there was no evidence presented showing how much time had elapsed between when Defendant purportedly heard the gun cock and when Defendant shot through the door. The State's evidence showed that Defendant went to Gutierrez's home with a loaded weapon, and after Gutierrez closed the door to bag the marijuana, five to seven minutes later, Defendant shot through the closed door and left. Thus, an instruction on voluntary manslaughter was not warranted because there was no evidence in the record demonstrating that it was necessary or reasonably appeared to be necessary to kill in order for Defendant to protect himself from death or great bodily harm.

Accordingly, the trial court did not err when it did not instruct the jury on the lesser-included offense of voluntary manslaughter.