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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-744

Filed: 3 March 2020

New Hanover County, No. 17CRS056263

STATE OF NORTH CAROLINA

v.

LEONARD CLEON POCKNETT, III, Defendant.

Appeal by defendant from judgment entered 28 January 2019 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 3 February 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara M. Van Pala, for the State.*

*Richard J. Costanza for defendant-appellant.*

BERGER, Judge.

Leonard Cleon Pocknett, III (“Defendant”) was found guilty of second-degree murder. Defendant was sentenced as a Class B1 felon. Defendant appeals, contending he should have been sentenced as a Class B2 felon. We find no error.

Factual and Procedural Background

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On May 11, 2017, Greg Gineman (“Gineman”) and Clifford Zirk (“Zirk”) were biking on a roadway in New Hanover County. Defendant was traveling on the same roadway in an SUV driven by his father. Defendant’s father almost hit Gineman and Zirk. Gineman yelled at the SUV, “Hey you’re on the wrong side” or “Watch out.”

Defendant and his father then followed Gineman and Zirk home. Once Gineman and Zirk stopped, Defendant and his father stopped and exited the SUV. Gineman initially tried to apologize but Defendant’s father said, “I don’t care. I’m going to f\*\*k you up anyways.” Defendant and his father then punched and kicked Gineman until he was unresponsive.

Zirk called 911, and Gineman was subsequently transported to the hospital and ultimately died. The medical examiner testified that Gineman’ had “severe pneumonia,” which “resulted in his lung being stuck to everything around it” and “multiple rib fractures.” According to his medical records, he had fractured a bone below his eyes and certain portions of his vertebrae, and he had a small hemorrhage in his head. Ultimately, the acute pneumonia was the cause of Gineman’s death.

At trial, Detective Nathan Boozell (“Detective Boozell”) testified that Defendant had admitted to exiting the SUV, punching Gineman at least twice in the face after his father had already punched and kicked him, and leaving Gineman on the ground. Defendant did not testify at trial.

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The trial court instructed the jury on second-degree murder and involuntary manslaughter. The jury returned a general verdict of guilty of second-degree murder. The trial court found several mitigating factors, including role, age, and voluntary acknowledgement of wrongdoing. Defendant was sentenced as a Class B1 felon and received 160 to 204 months imprisonment. Defendant appeals, alleging he “was improperly sentenced for second-degree murder as a class B1 felon, when the trial court failed to (1) instruct the jury on depraved-heart malice, and (2) provide the jury with a special verdict, where they could indicate what type of malice supported their guilty verdict.” (Uppercase font removed). We disagree.

### Analysis

Defendant first argues the trial court erred when it failed to instruct the jury on malice under a theory of depraved-heart. However, because Defendant failed to preserve this argument and failed to request plain error review, we decline to address this assignment of error.

“A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires . . . .” N.C.R. App. P. 10(a)(2); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999). However, “[i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on

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appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4); *see also State v. Schiro*, 219 N.C. App. 105, 115, 723 S.E.2d 134, 141 (2012).

During the charge conference, Defendant objected only to the trial court’s instruction as to the inclusion of hands and feet as deadly weapons. Defense counsel did not request that a definition of malice based on a depraved-heart ground be included and he did not object to the trial court’s omission of such an instruction. Moreover, on appeal, Defendant does not argue plain error. “By failing to “specifically and distinctly” argue that the purported error amounted to plain error, Defendant has waived plain error review.” *State v. Dawkins*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 827 S.E.2d 551, 555 (2019) (citation omitted). Therefore, Defendant has waived appellate review of this assignment of error.

Defendant also contends that he “was improperly sentenced for second-degree murder as a class B1 felon, when the trial court . . . failed to provide the jury with a special verdict, where they could indicate what type of malice supported their guilty verdict.” While this issue is preserved, the trial court did not err when it sentenced Defendant as a Class B1 felon.

Alleged sentencing errors “may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.” N.C. Gen. Stat. § 15A-1446(d)(18) (2019). “We review *de novo* whether the sentence imposed was

authorized by the jury's verdict." *State v. Lail*, 251 N.C. App. 463, 471, 795 S.E.2d 401, 408 (2016), *disc. review denied*, 369 N.C. 524, 796 S.E.2d 927 (2017).

Second-degree murder is the unlawful killing of another human being with malice but without premeditation and deliberation. *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000). North Carolina recognizes the following three theories of malice:

(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.

*State v. Mosley*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 806 S.E.2d 365, 367 (2017) (citation and quotation marks omitted). The second theory of malice is commonly referred to as "depraved-heart malice." *Id.* at \_\_\_, 806 S.E.2d at 368.

"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." *Id.* at \_\_\_, 806 S.E.2d at 367. The pertinent exception at issue in this case reads as follows:

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.

N.C. Gen. Stat. § 14-17(b)(1) (2019). Thus, “when the malice necessary to prove second degree murder is depraved-heart malice, a second-degree murder is punished as a Class B2 felony.” *State v. Roberts*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 836 S.E.2d 287, 295 (2019).

In *State v. Lail*, this Court held that the trial court properly sentenced the defendant as a Class B1 felon upon a general verdict of guilty of second-degree murder. *Lail*, 251 N.C. App. at 475, 795 S.E.2d at 411. The Court determined there was no ambiguity in the jury’s verdict after finding there was no evidence presented that would support a finding of depraved-heart malice or an instruction on that theory. *Id.* at 473-74, 795 S.E.2d at 410. The Court further noted that, at trial, the defendant never specifically rebutted the State’s theory of malice, advanced a depraved-heart malice theory argument, or requested a jury instruction on depraved-heart malice. *Id.* at 474, 795 S.E.2d at 410. This Court stated:

When considering the evidence presented and the instruction given, we conclude that there was no ambiguity in the jury’s general verdict. No evidence presented would have supported a finding that 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.

*Id.* at 475, 795 S.E.2d at 410. This Court concluded that, where “no evidence presented would support a finding of B2 depraved-heart malice, a trial court may

properly deduce from a general verdict that the jury found the defendant guilty of B1 second-degree murder.” *Id.* at 476, 795 S.E.2d at 411.

Such is the case here. There was no evidence that would have supported a finding of depraved-heart malice. Defendant argues “the *most* accurate interpretation of the evidence is that the Defendant (and his father) did not strike Gineman with the specific intent to cause his death; rather, they committed inherently dangerous acts (punching and kicking him) in a reckless and wanton manner, causing his death.” Defendant’s argument misconstrues the law on second-degree murder, and the evidence does not support a finding that Defendant punched and kicked Gineman recklessly and wantonly.<sup>1</sup>

“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.” *Coble*, 351 N.C. at 450, 527 S.E.2d at 47 (*purgandum*). Here, the evidence showed that Defendant deliberately punched Gineman after following him home. During a police interview, Defendant admitted he got out of the vehicle and punched Gineman at least twice in the face after his father had already repeatedly punched and kicked

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<sup>1</sup> In support of his argument, Defendant cites to two unpublished cases: *State v. Freeman*, No. COA17-469, 2018 WL 2648447 (N.C. Ct. App. June 5, 2018) (unpublished) and *State v. Hollifield*, No. COA18-63, 2018 WL 4440595 (N.C. Ct. App. Sept. 18, 2018) (unpublished). However, “An unpublished opinion ‘establishe[s] no precedent and is not binding authority[.]’” *Long v. Harris*, 137 N.C. App. 461, 470, 528 S.E.2d 633, 639 (2000) (alterations in original) (citation omitted). These cases are not controlling authority and they are readily distinguishable on their facts.

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Gineman. Defendant's actions were not inadvertent or reckless; rather, they were intentional. *See Lail*, 251 N.C. App. at 473, 795 S.E.2d at 409 ("The 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."). Moreover, Defendant did not specifically rebut the State's theory of malice or argue that his actions were unintentional, reckless, or negligent.

"[A]lthough the jury was not instructed to answer under what malice theory it convicted defendant of second-degree murder, it is 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 475, 795 S.E.2d at 410. Accordingly, the trial court properly sentenced Defendant as a Class B1 felon.

Conclusion

The trial court did not err in sentencing Defendant for second-degree murder as a Class B1 offense.

NO ERROR.

Judges STROUD and COLLINS concur.

Report per Rule 30(e).