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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-319

Filed: 5 May 2020

Cleveland County, No. 18 CRS 1218

STATE OF NORTH CAROLINA

v.

WILLIAM JOSEPH McCULLEN

Appeal by defendant from judgment entered 30 July 2018 by Judge Forrest D. Bridges in Superior Court, Cleveland County. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew J. DeSimone, for defendant-appellant.

STROUD, Judge.

Defendant was found guilty of first degree murder of his three-year-old stepdaughter. Defendant argues that the trial court erred by failing to instruct the jury on involuntary manslaughter and giving an erroneous instruction to the jury on reasonable doubt. Because the evidence does not support an involuntary

manslaughter instruction, and Defendant did not preserve his challenge to the reasonable doubt instruction or argue the trial court committed plain error, we conclude the trial court did not err.

I. Background

The State's evidence tended to show that on 15 August 2016 Defendant called 911 to report his three-year-old stepdaughter, Jessica,¹ missing. Defendant told the responding officers he had placed Jessica and her one-year-old sister down for a nap, and, several hours later, Jessica was missing. Defendant told officers he thought Jessica had walked out of the house because the door was unlocked. Defendant went to the police station to be interviewed and repeated his timeline of Jessica's disappearance.

The search continued for Jessica the next day, and her body was found in the woods approximately 200 yards from Defendant's house. Jessica's body was wrapped in a fitted sheet and had been placed in a hole underneath a log. She had multiple abrasions and bruises on her body. Within hours of finding Jessica's body, police arrested Defendant.

The next day Defendant asked to speak to a detective and waived his rights to have counsel before questioning. He told the detective he had been playfully swinging Jessica by her hands, accidentally threw her, and she hit her head. He said she was

¹ A pseudonym is used to protect the privacy of victim's family and for ease of reading.

still conscious, but when he went to check on her later, she had passed away. Defendant said he then panicked and disposed of her body. Later in the same interview, Defendant admitted he was upset and mad when he swung Jessica and that he lost his temper and punched her in the stomach three times. He also admitted to previously punishing her by hitting her feet with a drumstick. The autopsy report revealed Jessica had significant internal injuries and multiple bruises and abrasions on Jessica's head, arms, and legs. The report concluded, "Based on the history and autopsy findings, it is my opinion that the cause of death in this case is blunt force injuries."

Defendant was indicted on a charge of first degree murder. Defendant submitted a motion to change venue due to pretrial publicity about the case. The trial court granted Defendant's motion, and jurisdiction was moved to Cleveland County. The trial began on 23 July 2018, and Defendant pleaded not guilty. Defendant did not present evidence but following the charge conference conceded he was guilty of second degree murder. The jury found Defendant guilty of first degree murder based on murder by torture and felony murder with child abuse inflicting serious bodily injury as the underlying felony. The trial court sentenced Defendant to life imprisonment without parole. Defendant timely appealed.

II. Involuntary Manslaughter Instruction

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Defendant contends the trial court erred by failing to instruct the jury on involuntary manslaughter as a lesser included offense. “A defendant is entitled to have the jury consider all lesser included offenses supported by the indictment and raised by the evidence.” *State v. Price*, 344 N.C. 583, 589, 476 S.E.2d 317, 320 (1996) (citing *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559-60 (1989)). During the charge conference, Defendant’s counsel requested an instruction on involuntary manslaughter which was denied by the trial court. Defendant argues “the jury could have found that [Jessica] died from the large head wound that was inflicted by culpable negligence, not an intentional assault.”

The jury found Defendant guilty of first degree murder based on two theories: murder by torture and felony murder based upon felony child abuse. “First-degree murder by torture requires the State to prove that the accused ‘intentionally tortured the victim and that such torture was a proximate cause of the victim’s death.’” *State v. Pierce*, 346 N.C. 471, 492, 488 S.E.2d 576, 588 (1997) (quoting *State v. Stroud*, 345 N.C. 106, 112, 478 S.E.2d 476, 479 (1996)).

First degree felony murder is “[a] murder which shall be . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]” In order to prove felony murder on the basis of felony child abuse, the State must “prove that the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon.” “When a strong or mature person makes an attack by

hands alone upon a small child, the jury may infer that the hands were used as deadly weapons.”

State v. Stokes, 150 N.C. App. 211, 224, 565 S.E.2d 196, 205 (2002) (alterations in original) (citations omitted), *rev'd on other grounds*, 357 N.C. 220, 581 S.E.2d 51 (2003).

Defendant’s argument for an instruction on involuntary manslaughter is based primarily upon the theory that Jessica may have died as a result of the head injury sustained when Defendant was swinging her around and accidentally threw her because he “did not intend to hit [Jessica’s] head, did not intend to kill her, and tried to swing her onto the mattress but missed.” Defendant argues the State’s evidence shows “that [she] could have died from the resulting injury that covered a quarter of her head and that potentially had ‘a devastating fatal effect.’” Defendant contends that from this evidence, the jury could have determined Jessica died from the initial head injury, sustained when he was swinging her around, and not from internal bleeding from blunt trauma to her abdomen, and “the jury could have found that [Jessica] died of culpable negligence, rather than an intentional assault or intentional torture.”

Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the performance of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existing at the time, or resulting from a culpably negligent

omission to perform a legal duty.

State v. Davis, 66 N.C. App. 334, 337, 311 S.E.2d 311, 313 (1984) (citing *State v. Redfern*, 291 N.C. 319, 230 S.E.2d 152 (1976)).

An instruction on the lesser-included offense of involuntary manslaughter is not required where “the State’s evidence was sufficient to fully satisfy its burden of proving each element of first-degree murder . . . and there was no other evidence to negate these elements other than defendant’s denial that he committed the offense[.]” *State v. Smith*, 351 N.C. 251, 268, 524 S.E.2d 28, 40 (2000). “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. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991) (citing *State v. Brewer*, 325 N.C. 550, 576, 386 S.E.2d 569, 584 (1989)).

Defendant did not present any evidence at trial. One of detectives who interviewed Defendant testified that Defendant admitted to the following:

Q. Detective Dalton, eventually in your interview does your -- does the defendant tell you about any other injuries that he inflicted on [Jessica] that day on August 15?

A. Yes, he does.

Q. And what does he tell you?

A. He finally tells us that he lost his temper, he threw [Jessica] -- he went over to basically give her a spanking. She was, you know, resisting, squirming, and that he punched her two or three times in the stomach hard.

Q. Did the defendant tell you how [Jessica] reacted to him punching her in the stomach?

A. He said she did not cry, but that she screamed.

Q. And did the defendant tell you why he punched [Jessica]?

A. He said it pissed him off when she would not take a nap or wouldn't eat.

A recording of this interview with Defendant was also played for the jury. Dr. Jonathan Privette performed the autopsy on Jessica and he testified extensively about Jessica's physical condition and her cause of death. He described bruises, abrasions, and other injuries on nearly every part of her body externally, from head to toe, in various stages of development. He also described the injuries to her internal organs. She had a two-and-a-half-inch laceration to her small bowel at the right colon and a laceration of her pancreas. These injuries were consistent with an adult male repeatedly punching a young child in the abdomen. Based upon all of this information and the severity of the internal injuries, he opined Jessica bled to death from the internal abdominal injuries caused by blunt force trauma to her abdomen:

In my opinion the cause of death is -- as I've worded it here is blunt force injuries due to assault. And I think the actual mechanism is blood loss that has occurred due to the tearing of the mesentery and vessels associated with that.²

Defendant focuses on Jessica's head injury, and Dr. Privette testified about Jessica's head injuries. But in Dr. Privette's opinion, Jessica's death was caused by

² As described by Dr. Privette, the mesentery is part of the peritoneum, or lining inside the abdomen which wraps around the internal organs, including the intestines and other organs. Many blood vessels run through the mesentery. The impact tore both the mesentery and the blood vessels within it, and "that is a life-threatening event because essentially what happens is you can bleed to death internally, which is what I believe happened in this case."

the trauma to her abdomen. He noted that the head injury could have caused unconsciousness and a head injury of this sort did have the potential to be fatal, but “[i]n this case I think it’s the abdominal injuries were the cause of death.”

Where the cause of death is obvious based upon common knowledge and experience, expert medical testimony is not always required to show the cause of death in a homicide case. *State v. Cherry*, 141 N.C. App. 642, 645, 541 S.E.2d 205, 207 (2000) (“In homicide cases the cause of death may be established ‘without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character.’” (quoting *State v. Minton*, 234 N.C. 716, 721, 68 S.E.2d 844, 848 (1952))). For example, where the victim was shot several times in the back of the head and died immediately, this Court determined that the victim’s “wounds were obviously lethal in nature to a sufficient degree to render expert medical testimony as to the cause of death unnecessary.” *Id.* at 646, 541 S.E.2d at 207. But in other cases, such as this case, “the cause of death is obscure and beyond the experience and knowledge of the average layman, [so] the prosecution must present expert medical testimony on the cause of death.” *Id.* at 645, 541 S.E.2d at 207 (quoting *Minton*, 234 N.C. at 722, 68 S.E.2d at 848). Here, Dr. Privette testified about many injuries to Jessica and several were very serious injuries, including the head injury, but in his expert medical opinion, she died from internal bleeding in her

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abdomen caused by blunt force injuries. This cause of death was consistent with Defendant's admission of hitting Jessica in the stomach two or three times. Although he acknowledged that her head injury was serious and this type of head injury in general can potentially be fatal, in his expert medical opinion, she did not die from the head injury. Defendant did not present any medical evidence to support his theory that Jessica died from a head injury alone instead of abdominal trauma.

We conclude the State presented evidence to support the elements of the offenses brought against Defendant. There was no evidence which negated these elements other than Defendant's denial he committed the offense. Accordingly, the trial court was not required to submit the involuntary manslaughter instruction. *See State v. Smith*, 351 N.C. at 268, 524 S.E.2d at 40.

In addition, the State argues, "Defendant's argument is foreclosed by the Supreme Court's decision in *State v. Price*, 344 N.C. 583, 590, 476 S.E.2d 317, 321 (1996)." We agree and find *Price* to be controlling on this issue. In *Price*, the defendant got into a confrontation with a man having a conversation with his girlfriend. 344 N.C. at 586, 476 S.E.2d at 319. After knocking the man unconscious with a pistol, the defendant struck a second man in the head with his gun. *Id.* The gun went off and the second man died. *Id.* The defendant argued the trial court erred by failing to submit an instruction on the lesser included offense of voluntary

manslaughter. *Id.* at 589, 476 S.E.2d at 320. Our Supreme Court determined any potential error was harmless:

Our law states that when the court improperly fails to submit a lesser included offense of the offense charged, and the jury had only two options in reaching a verdict—guilty of the offense charged and not guilty—then a verdict of guilty of the offense charged is not reliable, and a new trial must be granted. In *State v. Thomas*, where the court improperly failed to submit involuntary manslaughter, the jury was given two options: guilty of first-degree murder based on felony murder and not guilty. The jury found the defendant guilty of first-degree murder based on felony murder. This Court ordered a new trial. The decision was based on the following reasoning:

in a case in which “one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction” despite the existing doubt, because “the jury was presented with only two options: convicting the defendant . . . or acquitting him outright.”

However, the reasoning explained in *Keeble v. United States*, and relied on in *State v. Thomas*, is not applicable to the facts of this case. Here, defendant was convicted of first-degree murder based on felony murder following submission by the court of four options for the jury to consider: (1) guilty of first-degree murder based on felony murder, (2) guilty of first-degree murder based on premeditation and deliberation, (3) guilty of second-degree murder, or (4) not guilty.

This Court has adopted the rule that when the trial court submits to the jury the possible verdicts of first-degree murder based on premeditation and deliberation, second-degree murder, and not guilty, a verdict of first-degree murder based on premeditation and deliberation renders harmless the trial court’s improper failure to submit voluntary or involuntary manslaughter. Our case

law has explained two different rationales for this rule. One rationale is that in finding the defendant guilty beyond a reasonable doubt of first-degree murder based on premeditation and deliberation and rejecting second-degree murder, the jury necessarily rejected, beyond a reasonable doubt, the possibilities that the defendant acted in the heat of passion or in imperfect self-defense (voluntary manslaughter) or that the killing was unintentional (involuntary manslaughter). . . .

The second rationale has been explained as follows:

“A verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of his guilt of the greater offense. The failure to instruct them that they could convict of manslaughter therefore could not have harmed the defendant.”

This rationale focuses on the United States Supreme Court’s concern in *Keeble* that a jury should not be coerced into a verdict because of a lack of a lesser included offense alternative which better fits the evidence.

Id. at 589-91, 476 S.E.2d at 320-21 (citations omitted) (first alteration in original).

Here, the trial court instructed the jury it could find Defendant (1) guilty of first degree murder by torture (2) guilty of first degree felony murder with child abuse inflicting serious bodily injury as the underlying felony (3) guilty of second degree murder or (4) not guilty. We are unpersuaded by Defendant’s argument that failing to give the jury the option of involuntary manslaughter

deprived him of his right to use a defense strategy that fit the facts in the light most favorable to him—a concession of guilt to involuntary manslaughter—and forced him to rely exclusively upon a strategy that did not fit those facts—a concession of guilt to second-degree murder with

malice.

“[I]n finding the defendant guilty beyond a reasonable doubt of first-degree murder . . . and rejecting second-degree murder, the jury necessarily rejected, beyond a reasonable doubt, the possibilit[y] that . . . the killing was unintentional (involuntary manslaughter).” *Id.* at 590, 476 S.E.2d at 321. The logic of *Price* applies even more strongly in this case, where the jury also found defendant guilty of first degree murder *by torture*, which required them to determine that he “intentionally tortured the victim and that such torture was a proximate cause of the victim’s death.” *Pierce*, 346 N.C. at 492, 488 S.E.2d at 588. Even if Jessica sustained the head injury when Defendant was “playfully” swinging her around and accidentally threw her, this was just one of the incidents Defendant described. Jessica sustained many other injuries, all over her body, in addition to the head injury. Dr. Privette testified most of these injuries would have been painful, and many were serious. We conclude the trial court did not err by declining to instruct the jury on involuntary manslaughter. This argument is overruled.

III. Reasonable Doubt Instruction

Defendant argues, “[t]he trial court erred by giving an erroneous reasonable doubt instruction that lowered the State’s burden of proof.” Defendant’s standard of review in his brief states, “As to both issues, this Court ‘reviews a trial court’s decisions regarding jury instructions *de novo*.’” *State v. Jenkins*, 202 N.C. App. 291,

296, 688 S.E.2d 101, 105 (2010).” *State v. Jenkins* cites to *State v. Osorio* which states, “Assignments of error challenging the trial court’s decisions regarding jury instructions are reviewed *de novo*, by this Court.” 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). But Defendant did not preserve this issue for *de novo* review on appeal by making a timely objection to the trial court’s instruction. Nor has Defendant “specifically and distinctly” argued plain error on appeal.

After the instruction was given and the jury was excused for deliberations, the trial court asked whether there were any objections to the instructions as delivered. Defendant did not object to the premeditation and deliberation portion of the instruction to which he now assigns error. He thus failed to preserve this issue for appellate review. Further, Rule 10(c)(4) provides:

Assigning Plain Error. In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error *where the judicial action questioned is specifically and distinctly contended to amount to plain error.*

Defendant has failed specifically and distinctly to contend that the trial court’s instruction on first- and second-degree murder constituted plain error. Accordingly, he has waived his right to appellate review of this issue.

State v. Truesdale, 340 N.C. 229, 232-33, 456 S.E.2d 299, 301 (1995) (citations omitted).

Defendant requested the trial court give the pattern jury instruction defining the burden of proof and reasonable doubt, and the trial court gave the requested

instruction but included two additional sentences not in the pattern jury instruction further defining reasonable doubt.³ After giving the instructions to the jury, the trial court asked counsel if they wished to “point out any errors or omissions from that charge.” Defendant’s counsel had no objection to the charge as given. Defendant did not object to the trial court’s instruction at trial and has not asked this Court to engage in plain error review. *See* N.C. R. App. P. 10(a)(4). Accordingly, this issue was not preserved for appellate review and is dismissed.

IV. Conclusion

The State presented evidence of every element of the charged offenses, and Defendant presented no evidence to negate these elements. Defendant was not entitled to an instruction on involuntary manslaughter. Defendant did not preserve his challenge to the reasonable doubt instruction or argue the trial court committed plain error. Defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges DILLON and BERGER concur.

Report per Rule 30(e).

³ The trial court is not limited to an “exact formula” when defining reasonable doubt. *See State v. Shaw*, 284 N.C. 366, 374, 200 S.E.2d 585, 590 (1973).