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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1022

Filed: 3 November 2020

Mecklenburg County, No. 16 CRS 236159-60

STATE OF NORTH CAROLINA

v.

RAYQUAN JAMAL BORUM

Appeal by defendant from judgment entered 8 March 2019 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 October 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Daniel T. Wilkes, for the State.*

*Meghan Adelle Jones for defendant-appellant.*

TYSON, Judge.

Rayquan Jamal Borum (“Defendant”) appeals from judgments entered after a jury returned verdicts finding him guilty of second-degree murder and possession of a firearm by a felon. Defendant further seeks this Court’s ruling on his motion to strike the State’s supplemental record. We deny the motion to strike and find no error in the jury’s verdicts. We remand for resentencing.

I. Background

On 21 September 2016, several hundred people had gathered to protest the shooting of Keith Scott. At approximately 8:30 p.m., a gunshot was fired. Justin Carr, a protester, was shot and killed. Detectives identified two suspects, one of which was Defendant.

Defendant was arrested on 23 September 2016 around 6:30 a.m. Defendant's interrogation was recorded and began at 7:53 a.m. Defendant was provided *Miranda* warnings and waived and initialed each in writing prior to questioning by Charlotte-Mecklenburg Police Detectives, Franchot Pack and Richard Jones.

On two occasions, Defendant inquired about or requested an attorney, but continued to speak after the detectives' questioning had ceased. Defendant initiated and resumed conversations with the detectives without an attorney and made incriminating statements. Defendant was indicted for second degree murder and possession of a firearm by a felon on 3 October 2016.

On 1 February 2019, Defendant filed his motion to suppress with an accompanying unsigned and undated affidavit.

The trial court heard and ruled upon Defendant's motion on 11 February 2019:

After considering the testimony presented and the evidence presented, and the review of the file, and a study of the applicable case law that's been tendered to the Court, a reading of both the Motion to Suppress and the response

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to the Motion to Suppress, and the arguments of the attorneys, the end result will be a [sic] the end result will be an appropriate order with appropriate findings of fact and conclusions of law, which [Assistant District Attorney], I'm going to ask you to draft a rough draft of. I will make appropriate changes to that, but if you'll draft a rough draft of the order *denying the Motion to Suppress filed February the 1, 2019*. [sic] For various reasons, this is an oral entry I'm making now . . . I note at the start that each party very, very adequately and appropriately presented their case and their issues. It is a very complex issue; it's one of those types of things that I take very seriously. I take it very seriously in every case, but it's one of those issues where I can see both sides on each issue. I come down on the side of denying the Motion to Suppress for several reasons, but they really do have to do with a totality of the circumstances. (emphasis supplied).

After trial and deliberations, the jury returned their verdicts finding Defendant guilty of second-degree murder and possession of a firearm by a felon on 6 March 2019. Defendant timely entered oral notice of appeal.

Defendant served the proposed record on appeal on the State on 4 October 2019. Defendant filed and served a certificate of settlement on the proposed record on appeal on 4 November 2019 after the State failed to respond. Defendant filed his brief on 19 December 2019. The State requested and was allowed three extensions to extend and filed their brief on 8 June 2020.

Prior to filing their brief, the State filed a Rule 9(b)(5) supplement to the printed record on appeal on 19 March 2020. This supplement contains a document entitled Order Denying Defendant's Motion to Suppress. The order was signed 2

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April 2019 and is file stamped 26 April 2019. Defendant asks this Court to deny the State's motion to supplement the record and strike all references thereto.

II. Jurisdiction

Appeal from a final judgment entered in the superior court upon conviction lies of right directly with this Court. N.C. Gen. Stat. §§ 7A-2(b), 15A-1444(a) (2019).

III. Motion to Strike

Defendant moves this Court pursuant to Rules 25(b), 34(b)(3), and 37(a) of the North Carolina Rules of Appellate Procedure to strike the State's Rule 9(b)(5) supplement to the printed record on appeal and all references to the supplement in the State's brief. Defendant asserts he was unaware of the order denying his motion until the State filed their Rule 9(b)(5) motion to supplement the record.

The Order Denying Defendant's Motion to Suppress is file stamped 26 April 2019. The State filed the supplemental record and served it on Defendant on 19 March 2020. Defendant failed to object to the amendment of the record within thirty (30) days pursuant to N.C. R. App. P. Rule 11(c). Defendant also failed to move to strike within thirty (30) days thereafter pursuant to N.C. R. Civ. P. Rule 12(f). The proper response to challenge a proposed supplemental record on appeal is by written objection from the opposing party or a petition to the court for settlement. N.C. R. App. P. Rule 11(c).

A. Subsequent Written Order

Defendant seeks to circumvent and expel the written order and asserts the date of its entry is unclear, it is unverified, and contains no affidavit from the issuing court. The file stamp upon the written order legibly shows the date of 26 April 2019. That stamp is sufficient as the date of entry, and the presiding judge's signature is present on the order.

The trial court orally denied the motion to suppress at the 11 February 2019 hearing. The court directed the State to draft the order reflecting the denial.

Where the trial judge makes the determination [on a motion to suppress] after a hearing . . . he must set forth in the record his findings of fact and conclusions of law . . . The statute does not require that the findings be made in writing at the time of the ruling.

*State v. Lippard*, 152 N.C. App. 564, 571-572, 568 S.E.2d 657, 662-63 (2002)

(citations omitted). In *Lippard*, this Court held “a delay in the entry of findings of fact and conclusions of law does not amount to prejudicial error.” *Id.*

Defendant acknowledges the trial court's oral denial of his motion to suppress in his appellant brief and in his motion to strike. The transcript clearly reveals the trial court's reasoned and considered decision to deny Defendant's motion to suppress. Neither party has explained why the signed, filed, and stamped order denying Defendant's motion was not included in the record on appeal filed by Defendant on 4 November 2019, and which was not responded to by the State.

#### B. Divested of Jurisdiction

Defendant argues the trial court was divested of jurisdiction to enter the written denial of his motion to suppress. N.C. Gen. Stat. § 15A-1448(a)(3) (2019). This Court cited the rare exception to N.C. Gen. Stat. § 15A-1448(a)(3) in *State v. Davis*:

The general rule is that the jurisdiction of the trial court is divested when notice of appeal is given, except that the trial court retains jurisdiction for matters ancillary to the appeal, including settling the record on appeal. In addition, a court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein. In doing so, however, the court is only authorized to make the record correspond to the actual facts and cannot, under the guise of an amendment of its records, correct a judicial error or incorporate anything in the minutes except a recital of what actually occurred.

123 N.C. App. 240, 242-43, 472 S.E.2d 392, 393-94 (1996) (citations omitted).

In the record before us, the trial court's oral rendition at the suppression hearing is virtually identical to the signed written order entered and filed 26 April 2019. This order is an example of the "record correspondence" the exception exists to correct. *Id.* The State's Rule 9(b)(5) supplement is simply an administrative correction of pertinent procedural and consistent documentation.

The motion fails to follow any procedural rules and guidelines and is properly denied. The proper method of procedure is a Rule 11(c) objection, which fails here for lack of timeliness. Defendant's motion to strike the entire supplemental record is without merit.

Defendant asks this Court to consider his motion to strike as timely, but he offers no justification for this argument or any prejudice suffered from the denial. The trial court retained jurisdiction to file and enter the written order; that is consistent with the oral rendition denying Defendant's motion to suppress in accordance with N.C. Gen. Stat. § 15A-1448(a)(2). The State's Rule 9(b)(5) supplement is properly in the record before this Court.

#### IV. Motion to Suppress

Our standard of review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

##### A. Competent Evidence

"Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Armstrong*, 203 N.C. App. 399, 416-417, 691 S.E.2d 433, 445 (2010) (citations and internal quotation marks omitted). Here, the trial court stated it had "consider[ed] the testimony presented, the evidence

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presented, and the review of the file.” The court indicated it would deny the motion to suppress for several reasons, based upon “a totality of the circumstances.”

In the written order denying the motion to suppress, the trial court found Defendant was arrested after being positively identified from collected videos of the protest and shooting. Defendant was placed into an interview room at 7:53 a.m. with his hands uncuffed. Defendant was offered drinks, food, cigarettes, and bathroom breaks while detained. Detective Pack and Jones were polite to Defendant.

Detective Pack read through the *Miranda* rights waiver with Defendant, who initialed each of his rights and agreed to waive them. The trial court found Defendant made two later requests for an attorney, but the first request was not heard by detectives. Defendant made the audible request for an attorney at 10:17 a.m. Once detectives heard Defendant’s request for an attorney, they turned their chairs and began to close their notebooks.

At 10:17:30 a.m., Detective Pack said, “If you change your mind, we’ll be right outside, just let me know. . . but this is your chance to write your narrative, ok? Tell your story, tell what happened.” The trial court found these statements were not a plan to elicit incriminating responses from Defendant after invoking his right to counsel. The trial court further found the detectives’ statements were unplanned and not malicious.



The trial court also found Defendant was twice told of his right to stop speaking and of his right to an attorney, in addition to his signed and initialed written waiver. At 9:46 a.m., and again at 10:18:16 a.m., Defendant asked Detective Jones, “So y’all not going to be able to show me no proof?” Detective Jones replied, “Once you request an attorney, we can’t talk to you anymore unless you tell us that you don’t want to talk to an attorney anymore and you want to tell us, you know, what happened.”

The trial court found Defendant was reconsidering his request for an attorney when he asked, “How long I gotta [sic] sit right here for?” Detective Jones replied, “Ah, it’ll be a while.” Detective Jones explained the process of what would happen next and told Defendant, “Once we finished up all the paperwork . . . you’ll be taken across the street [to jail].” Defendant replied, “Just come back in here in five minutes and I’ll let you know.”

The trial court found Defendant had re-initiated contact with the detectives after his request for an attorney. The detectives returned at 10:28:16 a.m. and asked, “What would you like to do?” Detective Pack said, “Do you want to keep talking, take this leap together, want to keep talking, work through this together?” Defendant replied, “I’m trying but I don’t know I don’t see no evidence.”

The trial court found Defendant made a clear, free, voluntary, knowing, intelligent decision to re-initiate and resume talking. Detective Jones then asked, “Do you want to talk?” Defendant responded, “Yeah we can keep on talking.”

“I want to see the evidence,” “I want to see the proof,” and “I want to see the video” were statements made by Defendant leading the trial court to find Defendant was not ambiguous in his desire to keep talking, and he wanted to be shown and learn what the detectives knew. Defendant admitted he had possessed a gun and had fired it during the protest.

The trial judge watched the video of the interrogation, carefully considered the testimony, evidence, and the arguments of counsel prior to issuing his ruling. The trial court’s findings are supported by competent evidence a reasonable mind could accept as adequate to support a finding that Defendant’s statements were freely and voluntarily given. Defendant’s arguments are overruled.

#### B. Factual Findings Support Conclusion

Defendant is entitled to “procedural safeguards effective to secure the privilege against self-incrimination.” *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966). The trial court found and concluded Defendant was given his *Miranda* rights and had waived them.

“If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.” *Id.* at 474, 16 L. Ed. 2d 723. A valid waiver of counsel occurs only if the individual initiates the conversation and the waiver was knowingly and intelligently made. *State v. Quick*, 226 N.C. App. 541, 544, 739 S.E.2d 608, 611 (2013). The trial court found the detectives had properly ceased questioning

when Defendant requested an attorney, and he re-initiated questioning because of his curiosity.

An officer may not badger an individual into waiving his *Miranda* rights by continuing to question him. *State v. Jordan*, 216 N.C. App. 112, 117, 716 S.E.3d 242, 245 (2011). Questioning includes “any words or actions by police which they should know are likely to elicit an incriminating response.” *Quick*, 226 N.C. App. at 544, 739 S.E.2d at 611 (internal quotation marks and citations omitted). “The test is whether the police should have known their comments were likely to elicit an incriminating response.” *Id.*

Defendant argues he requested an attorney twice, but the trial court found only one request was raised and heard by the officers to be effective. When the detectives clearly heard and understood Defendant’s request, the trial court found, they immediately ceased questioning.

The trial court found Detective Pack’s statement post-Defendant’s request, “this is your chance to write your narrative” was “right up to the line of a violation.” The court determined the violation was cured by Defendant’s re-initiating the interview, and relied upon *State v. Hicks*, 333 N.C. 467, 428 S.E.2d 167 (1993), *abrogated on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). In *Hicks*, the defendant made two incriminating statements as he was being questioned by police and admitted shooting the victim. *Id.* at 477, 428 S.E.2d at 172.

Our Supreme Court found the defendant's first statement should be suppressed, but his second statement was a voluntary waiver of his rights after he had received them. *Id.* at 483, 428 S.E.2d at 176. *Hicks* has little bearing on the facts before us.

Defendant was provided and read his *Miranda* rights in writing and specifically initialed each one and waived them before any questioning began. The trial court found Defendant had knowingly, voluntarily, and intelligently waived his rights. Further, the trial court found Defendant did request an attorney, but he had re-initiated the questioning after the officers had ceased the interview and left the room.

Competent evidence supports the trial court's finding Defendant's *Miranda* rights were not violated. Those findings support the trial court's conclusion to deny Defendant's motion. The motion to suppress was properly denied.

### C. Harmless Error

The State argues in the alternative, even if the admission of the video statements was improper, any error was harmless beyond a reasonable doubt due to the overwhelming evidence of Defendant's guilt. A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. "The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443 (2019).

This other evidence includes eyewitnesses' testimony that Defendant had aimed his gun at police officers to fire, but the gun had failed. The same witness testified Defendant fired the gun toward the crowd and police. A journalist testified he saw a man fitting Defendant's description holding a raised gun after a gunshot was heard.

Officers collected bullet casings, which matched the brand and caliber of bullets found in Defendant's car and home. The medical examiner testified the victim was killed by a bullet of that same caliber. Other competent and overwhelming evidence was admitted to support the jury's verdicts.

V. Defendant's Right to Present a Defense

The State filed a motion *in limine* requesting the trial court to preclude on relevancy grounds any questioning by Defendant regarding the possibility that someone else had killed Justin Carr, unless it did more than create some inference. Defendant's assertion must be supported by competent evidence that pointed to another's guilt and contradicted Defendant's guilt.

The trial court conditionally allowed the State's motion unless or until Defendant was able to establish the relevance of proposed testimony during trial. The trial court ruled consistently when the issue was raised during jury selection and again maintained its ruling when Defendant sought to elicit testimony during cross examination at trial, after conducting *voir dire* to make an offer of proof.

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The trial court sustained the State's objection to the defense's questioning of Detective Pack regarding whether "there was an allegation by people present" at the protest that the shooting was officer-involved. Defendant never made an offer of proof tending to show the shooting and murder of Justin Carr was officer-involved or what those present may have said to officers on the topic.

Where the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt.

*State v. May*, 354 N.C. 172, 176, 552 S.E.2d 151, 154 (2001) (alterations and citations omitted).

A. Standard of Review

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citations omitted). An abuse of discretion results when the court's ruling is manifestly unsupported by reason or arbitrary so that it could not have been the result of a reasoned decision." *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015) (citation and quotation marks omitted).

B. No Abuse of Discretion

No competent evidence was presented to the jury, and no offer of proof was made tending to show Justin Carr was killed by any other person. Defendant failed

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to make an offer of proof beyond “mere conjecture” or to present evidence to support his claim that a police officer or anyone else had shot Justin Carr. *May*, 354 N.C. at 176, 552 S.E.2d at 154. The trial court, in the exercise of its discretion, properly excluded these matters as minimally relevant and potentially confusing to the jury. Defendant has shown no abuse of discretion in the trial court’s ruling. Defendant’s arguments are overruled.

VI. Error in Sentencing

A. Issues

Defendant asserts the trial court failed to instruct the jury on the applicable theories of malice of second degree murder. Defendant also claims the trial court erred by sentencing as though the jury had unanimously found the State had proved a Class B1 offense.

B. Standard of Review

We review alleged sentencing errors for “whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.” *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (citation omitted). “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).

C. Analysis

The trial court instructed the jury on the malice theories during their instructions on first-degree murder. The trial court did not re-instruct on the malice theories during the jury instructions on second degree murder. The verdict sheet presented the three theories of malice for second degree murder.

Prior to reading the jury instructions, the trial court engaged in a lengthy discussion with counsel regarding the malice element of second-degree murder. Defendant did not challenge the jury instructions on malice. The jury foreman checked all three theories of malice boxes on the signed verdict sheet. The jury's form did not include a section determining a Class B1 or Class B2 level offense. Defendant's assertion alleging improper jury instructions is overruled.

#### D. Unanimous Verdict

Defendant argues the jury's verdict was not unanimous. The trial court submitted a verdict sheet with theories of second-degree murder. The language on the form states: "WE, THE JURY, UNANIMOUSLY FIND THE DEFENDANT." Under heading 2, the jury marked "yes" to second degree murder. The form reads: "IF YOU FIND THE DEFENDANT GUILTY OF SECOND DEGREE MURDER YOU MUST UNANIMOUSLY FIND ONE OR MORE OF A,B,C BELOW." The form then describes the three theories of malice:

A. IS IT MALICE MEANING HATRED, ILL WILL. OR  
SPITE

B. IS IT MALICE DEFINED AS A CONDITION OF MIND



WHICH PROMPTS A PERSON TO TAKE THE LIFE OF ANOTHER INTENTIONALLY OR TO INTENTIONALLY INFLICT SERIOUS BODILY HARM WHICH PROXIMATELY RESULTS IN ANOTHER'S DEATH, WITHOUT JUST CAUSE, EXCUSE OR JUSTIFICATION?

C. IS IT MALICE THAT ARISES WHEN AN ACT WHICH IS INHERENTLY DANGEROUS TO HARM LIFE IS INTENTIONALLY DONE SO RECKLESSLY AND WANTONLY AS TO MANIFEST A MIND UTTERLY WITHOUT REGARD FOR HUMAN LIFE AND SOCIAL DUTY AND DELIBERATELY BENT ON MISCHIEF?

Each of the three theories contains an “Answer” section with space for the jury’s finding.

The jury marked “yes” for each of the three malice theories. The State asserts this argument is moot, as the trial court explained the jury’s duty to make a unanimous decision throughout the jury instructions.

In *Lail*, the defendant challenged his conviction as a Class B1 felon due to his general jury verdict form. *Lail*, 251 N.C. App. at 471, 795 S.E.2d at 408. “Under our State’s previous murder statute, all second-degree murders were B2 felonies. Under an applicable amendment to that statute, second-degree murder was reclassified as a B1 or a B2 felony based, in part, on whether depraved-heart malice supported the conviction.” *Id.* at 464, 795 S.E.2d at 404.

This Court held:

Where . . . the jury is presented with both B2 depraved-

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heart malice and a B1 malice theory, a general verdict would be ambiguous and a B2 sentence would be proper. In this situation, trial judges for sentencing purposes should frame a special verdict requiring the jury to specify which malice theory supported its second-degree murder verdict.

*Id.* This Court concluded the trial judge had correctly sentenced defendant as a Class B1 felon because no evidence supported a depraved-heart malice finding or instruction for a B2 felony. *Id.* at 476, 795 S.E.2d at 411.

In *State v. Mosley*, the issue before this Court was whether evidence presented to the jury could lead the jury to find depraved-heart malice to convict defendant of a Class B2 second-degree murder. The verdict was “silent on whether the second degree murder was a Class B1 or a Class B2 offense.” 256 N.C. App. 148, 152, 806 S.E.2d 365, 368 (2017).

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.

*Id.* at 153, 806 S.E.2d at 369 (citations omitted).

This Court held even though evidence supported Class B1 murder, the trial court was not free to speculate on the evidence to support the verdict. *Id.* Any

ambiguity in the verdict was to be construed in favor of the defendant. *Id.* This Court vacated the sentence and remanded for resentencing for Class B2 murder. *Id.*

Unlike *Lail*, the evidence presented at trial in the facts before us supports Class B1 and B2 convictions. Like in *Mosely*, the jury found multiple malice theories applied. Some evidence tended to show Defendant did not aim a gun, but rather, “swung his arm back. Didn’t look, didn’t aim, just went in one direction and swung his arm back with the gun.” One State’s witness described it as a “wild shot.”

Defendant’s counsel argued in closing the “State may have proved” Class B2 malice and urged that verdict. Defendant argues there was an ambiguity in the facts before us. The trial court anticipated this ambiguity and stated in the trial transcript:

[I]t’s my understanding that if they find C as the malice for the second-degree murder, that C is a B-2 felony. If they find A or B, that’s a B-1 felony . . . if they decide it is a second-degree murder and then checks box A, B and C, I wouldn’t know whether to punish as a B-1 or a B-2 felony. So I’m going to have to -- there’s got to be some way for me to tweak this so that if they answer to 2C, I don’t know if that’s what they intended or not to -- I don’t know. I’m just afraid if they answer yes to all of them, I wouldn’t know how to proceed.

Evidence was properly admitted, which would have supported a verdict on second degree murder on all theories of malice. The jury found all three bases of malice, leaving the trial court dismayed over whether the B1 or B2 felony conviction applies.

This Court stated in *Mosley*, “[w]hen a verdict is ambiguous, neither we nor

the trial court is free to speculate as to the basis of a jury's verdict.” *Id.* at 153, 806 S.E.2d at 369 (citations omitted). This Court vacated the judgment for second-degree murder as a Class B1 offense and remanded for resentencing for second-degree murder a Class B2 felony offense. *Id.* at 154, 806 S.E.2d at 369.

We are bound by this Court’s holding in *Mosely*. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

The State presented evidence tending to show multiple malice theories. As in *Mosley*, evidence presented could support a Class B1 or Class B2 level felony. Also, as in *Mosely*, the jury’s verdict was ambiguous because the theories supported different levels of felonies.

The State argues Defendant has not preserved instructional errors because Defendant failed to distinctly assert the instruction amounted to plain error on appeal. “When a trial court acts contrary to a statutory mandate, the defendant’s right to appeal is preserved despite the defendant’s failure to object during trial.” *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000) (citations omitted).

N.C. Gen. Stat. § 14-17(b) (2019) requires a defendant convicted of second-degree murder to be punished as a Class B1 felon. The statute required second degree-murder to be punished as a Class B2 felon where: “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).

This language matches the language on the jury instruction form. Any ambiguity must be resolved “in favor of the defendant.” *Mosley*, 256 N.C. App. at 153, 806 S.E.2d at 369 (citations omitted). Here, the verdict form is ambiguous, and the finding is not consistent with the language of the statute. Consistent with our holding in *Mosley*, ambiguities in the verdict should be construed in favor of Defendant. We remand for resentencing Defendant for a B2 level offense.

#### VII. Conclusion

The trial court did not err in denying Defendant’s motion to suppress. The trial court’s findings of fact are supported by competent evidence. Defendant was not prohibited from presenting evidence and has shown no abuse of discretion in the trial court’s order. The State’s objections to Defendant’s unsubstantiated defense was properly denied in the trial court’s discretionary judgment. Both of those rulings are affirmed.

We find no error in Defendants convictions for second degree murder and for possession of a firearm by a felon. The statutes and precedents require this Court to review Defendant’s sentence. The trial court’s sentence in the face of ambiguity in

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the jury's verdict sheet was error. We vacate the sentence and remand for resentencing Defendant for his second-degree murder conviction as a Class B2 felon.

*It is so ordered.*

NO ERROR AT TRIAL, REMANDED FOR RESENTENCING.

Judges BRYANT and COLLINS concur.

Report per Rule 30(e).