IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-55

No. COA20-85

Filed 2 March 2021

Union County, No. 16 CRS 51411

STATE OF NORTH CAROLINA

v.

BREANNA REGINA DEZARA MOORE

Appeal by defendant from judgment entered 3 May 2019 by Judge Susan E. Bray in Union County Superior Court. Heard in the Court of Appeals 26 January 2021.

Joshua H. Stein, Attorney General, by Special Deputy Attorney General Mary Carla Babb, for the State.

Kimberly P. Hoppin for defendant.

ARROWOOD, Judge.

¶ 1 Breanna Regina Dezara Moore ("defendant") appeals from final judgment entered 3 May 2019 following her conviction for first-degree murder. For the following reasons, we hold that defendant received a fair trial free of error and affirm the judgment of the trial court.

I. Background

¶ 2 On 1 April 2016, defendant shot and killed her twenty-one-year-old brother Elijah Moore (the "decedent") at his family's home in Marshville, North Carolina. Defendant was nineteen years of age and pregnant at the time.

¶ 3 When the shooting occurred, the decedent lived with defendant's mother, grandmother, and ten-year-old half-sister, "A.J."[1] Defendant resided with her boyfriend, Anthony Blue ("Anthony"), and her two-year-old son, "I.M.," at the time of the events giving rise to this appeal.

¶ 4 Defendant, accompanied by Anthony and I.M., traveled to the decedent's home on 1 April 2016. According to A.J., defendant seemed "upset and mad." Anthony stayed outside while defendant and I.M. went into the home. The decedent then left the house and relocated to a shed behind the house, a place where he would frequently "hang out[.]" Defendant followed the decedent to the shed—Anthony was already in the shed with the decedent. An oral altercation occurred in the shed. Anthony testified that the decedent called defendant a "B****" and told defendant, "I'm going to beat you're a**." A.J., who was on the deck of the decedent's house with I.M., testified that she heard shouting from the shed and that defendant attempted to block the decedent from leaving the shed. A.J. testified that as the decedent attempted to

[1] Initials are used throughout the opinion to protect the identity of the juveniles.

exit the shed, defendant "got in the way . . . of the doorway." A.J. claimed the decedent then "brushed her to the side [sic] where she hit the wall, but not hard."

¶ 5 Defendant exited the shed followed by Anthony and the decedent. Defendant proceeded to her car, which was parked in the decedent's driveway. A.J. testified that while doing so, defendant shouted: "I'm going to stick a bullet up your A." Defendant then retrieved a black bag from her vehicle. The testimony at trial indicated that defendant pulled a handgun from the bag, inserted a magazine, and loaded the weapon. According to A.J., defendant pushed Anthony out of the way, pointed the gun at the decedent, and shot him. Prior to the shooting, A.J. testified that she did not see the decedent with any sort of weapon or deadly object. Defendant herself admitted that she did not see the decedent with any type of weapon at the time of the shooting.

¶ 6 Anthony testified that he and defendant had a disagreement before arriving at the decedent's residence. Anthony claimed that when defendant approached the shed behind the decedent's house, the decedent used derogatory language toward defendant and said he was going to "beat [her] a**." In light of this behavior, Anthony testified that he grabbed the decedent for the safety of defendant and their unborn child. Anthony and the decedent then "tussl[ed]" during which time the decedent requested that Anthony release him and "let [him] beat this b**** a**." At this point, defendant had already proceeded to the rear of her vehicle in the driveway and was

holding a gun. Anthony claimed that once the decedent arrived at defendant's car, the decedent chased defendant around the vehicle, ultimately resulting in a face-to-face confrontation on the same side of the car. Anthony testified that defendant then shot the decedent. Anthony did not see the decedent with a gun or any other weapon at any point prior to the shooting.

¶ 7 After being shot, the decedent took off his sweatshirt and stumbled into the backyard. Anthony took possession of the murder weapon, retrieved I.M. from the residence, and fled the scene with defendant and I.M.; Anthony discarded the weapon miles away from the scene of the killing.

¶ 8 Later, a handgun was found on the top of the decedent's bed in the house. Crime scene investigators also located a nine-millimeter spent cartridge casing in the driveway that the North Carolina State Crime Laboratory ("State Crime Lab") determined was discharged from the murder weapon. An autopsy revealed that the decedent died from a single gunshot wound to the chest.

¶ 9 Law enforcement spoke to Anthony regarding the incident. Anthony agreed to lead officers to the alleged location of the murder weapon. The gun was not located during the search of the first location identified by Anthony, so law enforcement returned and again met with Anthony who identified a second location where police officers ultimately discovered a nine-millimeter firearm. The State Crime Lab determined this was the device that fired the nine-millimeter shell casing found at

the crime scene. Anthony admitted that he had originally provided false information to law enforcement about the location of the firearm after the shooting. He also admitted that he had lied to officers when asked where exactly defendant had retrieved the gun before the shooting.

¶ 10 On 2 April 2016, defendant surrendered to law enforcement in Dillon, South Carolina—Anthony's hometown. Defendant admitted to shooting the decedent. Defendant claimed that the decedent had pushed and threatened her before the shooting. Defendant also stated that the gun she used to shoot the decedent belonged to him and was sitting on top of the trunk of her car in the driveway before the shooting. However, after further interrogation, defendant admitted she retrieved the firearm from inside the vehicle and that she obtained the gun through a theft orchestrated by her and Anthony. Defendant later testified that she and Anthony stole the weapon, along with some money, from one of Anthony's grandmother's neighbors in 2015. Post arrest, defendant did not inform law enforcement of her pregnancy or that she shot the decedent because she feared for the safety of her unborn child. Her pregnancy was not detected until defendant indicated as much on an in-jail questionnaire.

¶ 11 At trial, defendant testified on her own behalf. Defendant stated that when she approached the shed at the decedent's residence, the decedent told her, "B****, don't come in here with that s***" and "B**** . . . Get out of here . . . or, I will whoop

your a**." According to defendant, Anthony then attempted to pacify the decedent at which point the decedent said he was going to "beat this b**** a**. Nobody wants her here anyway."

¶ 12 Defendant stated that after the decedent bypassed Anthony, he followed defendant to her car and blocked her access to the same. The decedent and defendant began "mirroring each other around the car[.]" Defendant claimed that she repeatedly told the decedent to leave her alone, but she knew that he had violent tendencies. Defendant testified that she then used her key chain to open the trunk of her car and grab the murder weapon. She claimed that she kept the gun by her side, hoping that the decedent would leave her alone. Defendant testified that the decedent continued to harass and threaten her. Defendant stated at trial that while she did not want to shoot the decedent, she felt the decedent was acting aggressively and may have been under the influence of drugs. Defendant further testified that as she raised the weapon, the magazine clip kept falling out and would not stay in place, forcing her to insert the clip four or five times.

¶ 13 While defendant claimed she never cocked the weapon, defendant admitted to pulling the trigger while pointing the gun at the decedent. Defendant admitted that the decedent was very close to her when she shot him. Defendant testified that she shot the decedent because she believed it was necessary to protect herself and her unborn child—though she did not offer this justification during post-arrest

interrogation. Defendant testified that she did not see the decedent with a weapon while he chased her around her vehicle. Defendant admitted to knowing that if she shot the decedent, the wound may result in his death.

¶ 14 On 6 June 2016, defendant was indicted for first-degree murder in Union County, North Carolina. Following trial, the jury found defendant guilty of the first-degree murder of the decedent. The verdict sheet included potential verdicts for first-degree murder, second-degree murder, voluntary manslaughter, not guilty, and not guilty by reason of self-defense. Consistent with the verdict, the trial court entered final judgment on 3 May 2019 and sentenced defendant to life imprisonment without the possibility of parole. Defendant appealed.

II. Discussion

¶ 15 Defendant challenges the trial court's admission of character evidence and testimony adduced at trial, as well as its denial of her motion to dismiss the charge of first-degree murder. Defendant also assigns error to the jury instructions given by the trial judge.

A. Character Evidence

¶ 16 Defendant first contends that the trial court erred by admitting irrelevant and unfairly prejudicial character evidence and testimony concerning other crimes or bad acts committed by defendant. Defendant also argues that the superior court erred by allowing the State to inquire about the biological fathers of defendant's children.

Lastly, defendant asserts that the trial court erred by allowing testimony and evidence showing the decedent's good character. We will address each alleged error in the order set forth in defendant's brief.

¶ 17 "Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citation omitted). "Defendant bears the burden of showing that the evidence was erroneously admitted and that he was prejudiced by the error." *Id.* (citations omitted). The decision of a trial court to admit evidence under Rule 403 of the North Carolina Rules of Evidence will only be disturbed upon a showing of an abuse of discretion. *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (citation omitted).

1. Death Threat

¶ 18 Defendant first raises issue with the testimony of her aunt, Tiffany Dixon ("Ms. Dixon"). According to Ms. Dixon, as she attempted to locate defendant following the shooting, Ms. Dixon made a phone call to a third party who told Ms. Dixon that defendant had "threatened to kill her months before that." Defense counsel objected, and the trial court sustained the objection. The trial court thereafter twice instructed the jury to disregard Ms. Dixon's testimony and polled the jurors to confirm their ability to do so. All of the jurors indicated that they would disregard the testimony.

Defendant later moved for a mistrial on the grounds that the prejudice caused by Ms. Dixon's testimony was not curable. The trial court denied the motion.

¶ 19 On appeal, defendant does not challenge the denial of her motion for mistrial but rather argues that the prejudice from Ms. Dixon's testimony was "likely not cured" by the trial judge's instructions. We disagree. Based on the record evidence, the trial court not only sustained defendant's objection to this small portion of Ms. Dixon's testimony, but the trial judge also gave two curative instructions then polled the jurors, and confirmed that all members were willing and able to disregard the testimony. We conclude that defendant failed to show that she suffered substantial and irreparable prejudice as a result of this testimony. *See State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991) ("When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured.") (citing *State v. Walker,* 319 N.C. 651, 655, 356 S.E.2d 344, 346 (1987)); *State v. Morgan*, 164 N.C. App. 298, 302, 595 S.E.2d 804, 808 (2004) (holding that trial court did not abuse its discretion by denying motion for mistrial where jurors indicated they could follow curative instruction to disregard inadmissible evidence elicited by prosecutor). When inadmissible evidence is withdrawn from the jury's consideration and the trial judge instructs the jury not to consider it, any error in its admission is generally cured because "jurors are assumed to possess sufficient intelligence and

character to comply with the cautionary instructions of the trial judge." *State v. McCoy*, 303 N.C. 1, 26, 277 S.E.2d 515, 533 (1981) (citation omitted).

2. Stolen Gun and Money

¶ 20 During her post-arrest interview, defendant claimed that the gun she used to shoot the decedent belonged to the decedent and was sitting on top of her car in the driveway before the shooting. However, after further questioning, defendant admitted that she retrieved the murder weapon from inside the trunk of her car and that she had originally obtained the gun through a theft orchestrated by her and Anthony. Defendant testified that she and Anthony stole the murder weapon and some money from one of Anthony's grandmother's neighbors in 2015. At trial, Union County Sheriff's Department Lieutenant Brian Helms ("Lieutenant Helms") testified regarding the content of defendant's post-arrest statements and confession. The recording of the same was introduced into evidence.

¶ 21 Defendant filed a pre-trial motion to exclude evidence concerning the origins of the firearm and money theft, though it is not clear whether the trial judge expressly ruled on that motion. At trial, defendant objected to the admission of those portions of her statements regarding prior bad acts (*i.e.*, the gun and money theft) and requested a limiting instruction. The objections, which were made outside the presence of the jury, were overruled. When the State subsequently moved to introduce and publish to the jury defendant's statements regarding those prior acts,

defense counsel objected, stating, "Your Honor, subject to our prior objection." The trial judge responded, "Understood." The trial court then allowed the State to admit and publish the evidence, despite defendant's contention that the materials were unfairly prejudicial, irrelevant, and served only to show defendant's bad character. Defendant maintains on appeal that the "evidence about the gun and money theft was irrelevant to the question of whether [defendant] used that firearm to shoot [the decedent]."

¶ 22 Although defense counsel did not state specific grounds for the objection when the statements were tendered before the jury, it is clear from the context that defendant was renewing her earlier objections to the evidence for the reasons stated in defendant's previously filed and served motion to preclude. Thus, we hold that this issue was properly preserved for appellate review. *See State v. Rayfield*, 231 N.C. App. 632, 637, 752 S.E.2d 745, 751 (2014) (holding same under similar circumstances).[2]

¶ 23 Rule 404(b) of the North Carolina Rules of Evidence provides the following: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be

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[2] Defendant argues in the alternative that, if this issue was not properly preserved for appellate review, her trial counsel was ineffective. Because we hold that defendant's trial counsel properly preserved this issue for appeal, we need not address her argument as to ineffective assistance of counsel.

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). Moreover, Rule 404(a) states that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a). However, evidence of a pertinent trait of the accused's character is admissible if "offered by an accused, or by the prosecution to rebut the same[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a)(1). "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "We then review the trial court's Rule 403 determination for abuse of discretion." *Id.*

¶ 24 We hold in this case that the evidence at issue was admissible under Rule 404(b) as it "establishe[d] the chain of circumstances or context of the charged crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (1995) (citing *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990)). Moreover, the evidence concerning the origins and procurement of the murder weapon and money theft "enhance[d] the natural development of the facts" and "complete[d] the story of the charged crime for the jury." *Id.* (citation omitted). The evidence was not admitted to prove defendant acted in conformity with her character. Rather, it is clear from the context that the evidence was admitted under Rule 404(b) of our Rules of Evidence for additional

permissible purposes, including, but not limited to, showing opportunity, intent, preparation, and identity. Because the evidence was admitted for other purposes that are not challenged on appeal, any error in admitting it for an improper purpose was not unfairly prejudicial.

¶ 25 Likewise, evidence about defendant's prior possession and means of procuring the murder weapon was relevant. The evidence indicated that defendant had actual or at least constructive possession of the murder weapon prior to the shooting. Thus, defendant had the opportunity to use the weapon to commit the crime, as of the date she and Anthony stole it from Anthony's grandmother's neighbors in 2015. The facts and circumstances of this incident were relevant and probative of defendant's identification of the weapon. The State was entitled to have the jury know the circumstances of defendant's (and Anthony's) possession of the gun leading up to the shooting so that the jury could judge the credibility of the witness testifying and assign credence to her identification of the gun. *See generally State v. Moses*, 350 N.C. 741, 762, 517 S.E.2d 853, 867 (1999). Furthermore, the evidence showed that defendant misrepresented facts about the origins of the murder weapon during her post-arrest confession, which was relevant to her credibility and also to her relationship with Anthony (and, conversely, his credibility and potential bias toward defendant). *See generally White*, 340 N.C. at 284, 457 S.E.2d at 853; *Moses*, 350 N.C. at 762, 517 S.E.2d at 867. We thus conclude that the trial court did not abuse its

discretion under Rule 403 of the North Carolina Rules of Evidence by concluding that the probative value of the interwoven evidence of defendant's confession regarding the origins of the subject firearm and her involvement in the decedent's murder outweighed any prejudicial effect such evidence might have had against her. *White*, 340 N.C. at 286, 457 S.E.2d at 854 (noting that the decision to exclude relevant but prejudicial evidence under Rule 403 is left to the sound discretion of the trial judge).

3. Defendant's Children

¶ 26 Defendant argues that the trial court erred by allowing the State to inquire about defendant's three children and their biological fathers. Defendant argues that this line of questioning "served no legitimate purpose and instead emphasized to the jury that this young woman had three children born out of wedlock from different fathers."

¶ 27 Defendant objected to one question asked by the prosecutor regarding I.M.'s father, and this objection was lodged after defendant had already disclosed the name of I.M.'s father in response to unobjected-to questions by the State. Defendant did not object to all questions asked and answered along this line of questioning nor did she obtain a ruling on the objection noted above. Moreover, defense counsel did not move to strike defendant's responses to the questions. Thus, the State's inquiry regarding defendant's children is not preserved for appellate review. N.C.R. App. P. 10(a)(1); *State v. Jones,* 347 N.C. 193, 215, 491 S.E.2d 641, 654 (1997). Defendant,

furthermore, is not entitled to plain-error review as she does not contend on appeal that the admission of this testimony amounted to plain error. *See* N.C.R. App. P. 10(a)(4) ("In 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 appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."). Defendant's assignment of error with respect to this testimony is overruled. However, assuming *arguendo* that the objections had been properly made or the arguments preserved, we do not find the admission of the evidence sufficient to support the relief requested by defendant.

4. The Decedent's Good Character

¶ 28 Defendant maintains that the "State improperly introduced irrelevant evidence of [defendant's] bad character, [which was] juxtaposed with the irrelevant evidence of [the decedent's] good character, while also denying the opportunity for [defendant] to thoroughly demonstrate [the decedent's] prior anger and assaultive behavior towards her to establish her reasonable apprehension and fear of death or bodily harm at [the decedent's] hands." Defendant argues that this violated her due process rights to a fair trial.

¶ 29 Defendant claims that inadmissible testimony of the decedent's good character was offered by Ms. Dixon and one of the decedent's neighbors, Amanda Meadows

("Ms. Meadows"). During Ms. Dixon's testimony, the trial court admitted photographs of the decedent with a prom date taken approximately one year before his death. Ms. Dixon testified that the decedent invited the female in the picture to the prom because she did not have a date and "deserve[d] to go." Defendant did not object to Ms. Dixon's testimony nor to the admission of the photographs.

¶ 30 Ms. Meadows, in turn, testified that she knew the decedent because he "would be walking by" and offer to help her with yard work. Defendant objected twice to Ms. Meadows' testimony on the grounds that it was irrelevant; the trial judge overruled both objections.

¶ 31 First, defendant waived her challenge to Ms. Dixon's testimony and to the admission of the prom photograph as she failed to object to this testimony and evidence at trial. N.C.R. App. P. 10(a)(1). Second, defendant waived appellate review of the admission of Ms. Meadows' testimony because she did not object to the admission of the testimony on the grounds that the testimony violated her constitutional rights. *Id.* ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Nor does defendant contend that the admission of the aforementioned testimony amounted to plain error. *See* N.C.R. App. P. 10(a)(4); *see also State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012). In

sum, this Court has reviewed the record as a whole and after comparing the overwhelming evidence of defendant's guilt with the scintilla of evidence improperly admitted, we conclude that even taken together these errors did not deprive defendant of her due process right to a fair trial. *See State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009). This assignment of error is overruled.

B. Motion to Dismiss

¶ 32 Defendant next maintains that the trial court erred by denying her motion to dismiss the charge of first-degree murder as the State's evidence was insufficient to establish that she did not act in self-defense and that she acted with premeditation, deliberation, and malice. We disagree.

¶ 33 "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citation omitted). Substantial evidence has been defined by our North Carolina Supreme Court as "evidence which a reasonable mind could accept as adequate to support a conclusion." *State v. Lee,* 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick,* 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). In reviewing

the trial court's decision on appeal, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

¶ 34 In order to be submitted to the jury for determination of defendant's guilt, the evidence "need only give rise to a reasonable inference of guilt." *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citing *State v. Stone,* 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). This is true regardless of whether the evidence is direct or circumstantial. *State v. Trull,* 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted). When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)).

¶ 35 " 'Premeditation means that the act was thought over beforehand for some length of time, however short. Deliberation means an intent to kill, carried out in a cool state of blood, . . . and not under the influence of a violent passion or a sufficient

legal provocation.' " *State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008) (quoting *State v. Leazer*, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000)). Premeditation and deliberation are often proven by circumstantial evidence. *Id.* (citation omitted).

¶ 36 First-degree murder "is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Laws*, 345 N.C. 585, 593, 481 S.E.2d 641, 645 (1997) (citation omitted). "Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 892 (1963) (citations omitted). North Carolina recognizes at least three theories of establishing the essential element of malice. *See*, *e.g.*, *State v. Mosley*, 256 N.C. App. 148, 150-51, 806 S.E.2d 365, 367 (2017) (describing theories). One theory, depraved-heart malice, may be presumed where it is shown that the accused intentionally assaulted and caused the death of another by use of a deadly weapon. *State v. Lail*, 251 N.C. App. 463, 474, 795 S.E.2d 401, 409-10 (2016) (citation omitted). Malice can also be implied where "an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life." *State v. Trott*, 190 N.C. 674, 679, 130 S.E. 627, 629 (1925).

¶ 37 Self-defense excuses a killing altogether if, at the time of the killing, the following four elements existed:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was 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; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981) (citations omitted). "The burden is upon the State to prove beyond a reasonable doubt that the defendant did not act in self-defense when there is some evidence in the case that he did." *State v. Herbin*, 298 N.C. 441, 445, 259 S.E.2d 263, 267 (1979) (citation omitted).

¶ 38 Here, the State presented substantial evidence of each essential element of the first-degree murder charge for which defendant was ultimately convicted as well as adequate evidence establishing that defendant was the perpetrator of the crime. Moreover, the State presented substantial evidence that defendant did not act in self-defense and that she acted with premeditation, deliberation, and malice. A.J., an eyewitness to the crime, testified that after defendant told the decedent, "I'm going to stick a bullet up your A[,]" she retrieved a weapon from her car, loaded the weapon,

pointed it at the decedent, and fired. Defendant then fled the scene without rendering aid to the decedent and subsequently provided false information to law enforcement regarding the incident. Anthony also testified that defendant shot the decedent. Defendant herself admitted that she did not see the decedent with a gun or any other weapon immediately before the shooting. Defendant, moreover, originally purported that the gun she used to shoot the decedent was sitting on top of the trunk of her car in the driveway and belonged to the decedent. However, defendant later changed her story and admitted that she retrieved the firearm from inside the vehicle and obtained the gun through a theft orchestrated by her and Anthony. Defendant further testified that she used the car's key fob to open the trunk and grab the weapon used to shoot the decedent. She stated that she kept the gun by her side, hoping the decedent would leave her alone. Defendant testified that as she raised the weapon, the magazine kept falling out and would not stay in place, forcing her to put the clip in the gun four or five times. While defendant claimed she never cocked the weapon, defendant admitted to pulling the trigger while pointing the gun at the decedent. Defendant admitted that the decedent was very close to her when she shot him. Defendant stated that she shot the decedent because she believed it was necessary to protect her and her unborn child; however, post arrest, defendant did not say anything to law enforcement to suggest she was pregnant or that she shot the decedent because she feared for the safety of her unborn child. Lastly, defendant

testified that she did not see the decedent with a weapon while he chased her around her vehicle immediately before the shooting.

¶ 39 In sum, the evidence taken as a whole is sufficient to show that defendant acted intentionally with malice, premeditation, and deliberation at the time she shot and unlawfully killed the decedent. *Taylor*, 362 N.C. at 531, 669 S.E.2d at 256. The State also presented sufficient, uncontradicted evidence to establish malice in that defendant committed the unlawful killing by intentionally using a deadly weapon, and defendant never specifically rebutted this deadly-weapon implied malice theory. *Lail*, 251 N.C. App. at 474, 795 S.E.2d at 410. Lastly, the State met its burden of proving beyond a reasonable doubt that defendant did not act in self-defense. *Herbin*, 298 N.C. at 445, 259 S.E.2d at 267. As recognized by defendant, "[o]ur Supreme Court has held that mere words or insulting language, no matter how abusive, can never be adequate provocation and can never reduce murder to manslaughter under the 'heat of passion' doctrine." *See generally State v. McCray*, 312 N.C. 519, 534, 324 S.E.2d 606, 616 (1985).

¶ 40 As noted *supra*, when ruling on a motion to dismiss, the only question before this Court is whether "the evidence [wa]s sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652 (citing *McNeil*, 280 N.C. at 162, 185 S.E.2d at 157). The State's evidence in this case concerning the charge of first-degree murder, as well as its

evidence refuting defendant's self-defense claim, was sufficient to get these issues to the jury and for the same to conclude that defendant is guilty of first-degree murder. It is not this Court's duty to second guess the weight assigned to this evidence by the members of the jury.

C. Jury Instructions

¶ 41 Finally, defendant contends that the trial court erred in failing to modify the self-defense instruction and in declining to instruct the jury on involuntary manslaughter. We disagree.

1. Self-Defense Instruction

¶ 42 At the close of the evidence, any party may tender written instructions and when a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance. *State v. Augustine*, 359 N.C. 709, 729, 616 S.E.2d 515, 529 (2005) (citing *State v. Jones,* 337 N.C. 198, 206, 446 S.E.2d 32, 36 (1994)). However, such requested special instructions "should be submitted in writing to the trial judge at or before the jury instruction conference." *Id.* (internal quotation marks and citation omitted). Accordingly, this Court has held that a trial court did not err where it declined to give requested instructions that had not been submitted in writing. *See State v. McNeill,* 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997); *State v. Martin,* 322 N.C. 229, 237, 367 S.E.2d 618, 623 (1988).

¶ 43 In this case, during the charge conference, defendant orally requested a modification of the applicable pattern instruction on self-defense and defense of others to specifically include an instruction on defense of an unborn child. Defendant did not submit a written request for a modified instruction. Because defendant did not submit a written request, the trial court did not err in declining to give the requested instruction.

2. Involuntary Manslaughter Instruction

¶ 44 We review the trial court's denial of the request for an instruction on a lesser included offense *de novo*. *State v. Laurean*, 220 N.C. App. 342, 345, 724 S.E.2d 657, 660 (2012). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citation omitted). "Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *Id.* at 562, 572 S.E.2d at 772 (citation omitted). An involuntary manslaughter jury instruction is appropriate when the unintentional, but reckless or culpably negligent, discharge of a firearm results in an unintentional killing. *State v. Hinnant*, 238 N.C. App. 493, 498, 768 S.E.2d 317, 321 (2014) (citation omitted). "Where death results from the

intentional use of a firearm or other deadly weapon as such, malice is presumed." *Id.* (citation omitted).

¶ 45 In this case, there was substantial evidence to support each element of the first-degree murder charge. Defendant testified that she was intentionally trying to pull the trigger while she pointed the gun at the decedent. Although the firearms expert testified that it was "theoretically possible" for the firearm to misfire without the trigger being pulled, the firearm used during testing never fired without the trigger being pulled. The evidence presented at trial, including defendant's own testimony, supports the conclusion that defendant fired the weapon intentionally. Accordingly, the trial court did not err in denying defendant's request to instruct the jury on involuntary manslaughter.

III. Conclusion

¶ 46 For the foregoing reasons, we hold that defendant received a fair trial free of error and affirm the judgment of the trial court.

NO ERROR.

Judges DIETZ and WOOD concur.

Report per Rule 30(e).