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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-256

No. COA20-454

Filed 1 June 2021

Cumberland County, No. 17 CRS 61578

STATE OF NORTH CAROLINA

v.

JACOLBY EMANUEL FLOYD

Appeal by defendant, by writ of certiorari, from judgment entered 6 December 2018 by Judge James Floyd Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 14 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. Mosteller, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Jacolby Emanuel Floyd appeals from a judgment entered upon a jury's verdict finding him guilty of voluntary manslaughter. Defendant argues that the trial court erred in denying his request for a jury instruction on the lesser-included offense of involuntary manslaughter. After careful review, we hold that Defendant received a fair trial, free from error.

Background

¶ 2 The evidence presented at trial, taken in the light most favorable to Defendant, tended to show the following facts:

¶ 3 On 2 September 2017, Defendant was watching television at the home of a friend when Derrick Ervin arrived with Yolanda Curry. Defendant and Mr. Ervin began arguing, and then took the argument outside. An extended physical altercation ensued between the two men, which a bystander recorded with a cell-phone camera.

¶ 4 The video depicts Mr. Ervin picking up a brick and throwing it toward Defendant, who carries a knife. The two men then begin chasing each other through the trailer park. A bystander can be heard saying, "Man, . . . put the knife down and beat him," to which Defendant responds, "He tried to pick something up. Get your bitch ass out of here. He picked up a brick—bitch, I'll kill you." Defendant shouts, "I'm going to stab your ass—hit me. Hit me. Hit me. I'm going to stab the f*** out your ass." Mr. Ervin then picks up a board with nails in it. Mr. Ervin repeatedly yells, "You ready for it?" Defendant responds that he is going to stab Mr. Ervin "on the lip."

¶ 5 The video footage cuts away from the struggle during the final moments, but it shows the men's shadows. Based on the shadows, Mr. Ervin appears to swing the board at Defendant, then Defendant seems to strike Mr. Ervin with the knife. A bystander yells, "Derrick, watch out, he just stabbed you," and blood appears to seep through Mr. Ervin's white shirt as Mr. Ervin repeatedly strikes Defendant with the

board. Defendant then charges at Mr. Ervin, who falls to the ground. As a bystander shouts for an ambulance to be called, Defendant states, "He shouldn't have put his f****** hands on me."

¶ 6 Testimony at trial revealed that Defendant had stabbed Mr. Ervin in the chest once. Although an ambulance transported Mr. Ervin to the hospital, he succumbed to his injury. The medical examiner testified that the cause of death was a wound to Mr. Ervin's coronary artery, between his fifth and sixth ribs. The wound was one and three-quarter inches long and two and three-quarter inches deep.

¶ 7 On 9 October 2017, a Cumberland County grand jury returned an indictment charging Defendant with first-degree murder. The matter came on for trial on 4 December 2018 in Cumberland County Superior Court before the Honorable James Floyd Ammons, Jr. At the charge conference, Defendant requested that the trial court instruct the jury on self-defense, as well as the lesser-included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter. The trial court agreed to deliver all of Defendant's requested instructions except for that of involuntary manslaughter.

¶ 8 On 6 December 2018, the jury returned a verdict of guilty of voluntary manslaughter. The trial court entered judgment upon the verdict and sentenced Defendant to a term of 73 to 100 months in the custody of the North Carolina Division of Adult Correction.

¶ 9 On 31 July 2019, Defendant petitioned this Court to issue its writ of certiorari to review the judgment. This Court allowed Defendant's petition on 14 August 2019.

Discussion

¶ 10 Defendant's sole argument on appeal is that the trial court erred by denying his request for a jury instruction on the lesser-included offense of involuntary manslaughter. We disagree.

I. Standard of Review

¶ 11 A criminal defendant is entitled to an instruction on a lesser-included offense "when, and only when, there is evidence from which the jury could find that such included crime of lesser degree was committed." *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979).

¶ 12 The trial court should deny a requested instruction on a lesser-included offense "when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime." *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (citation and emphasis omitted). Indeed, "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

¶ 13 Conflicts in the evidence giving rise to the necessity of an instruction on a lesser-included offense "may arise from evidence introduced by the State or the defendant[, or t]hey may arise when only the State has introduced evidence." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citations omitted). In reviewing a denied jury-instruction request, we view the evidence in the light most favorable to the defendant. *State v. Matsoake*, 243 N.C. App. 651, 658, 777 S.E.2d 810, 815 (2015), *disc. review denied*, 368 N.C. 685, 781 S.E.2d 485 (2016). We review de novo a trial court's denial of a requested jury instruction on a lesser-included offense. *Id.* at 657, 777 S.E.2d at 814.

II. Analysis

¶ 14 Defendant points to the cell-phone video recording as evidence that he accidentally stabbed Ervin, thus supporting a jury instruction on involuntary manslaughter. He argues that "[a]lthough the camera briefly moves away from the argument, the footage . . . is consistent with [Defendant] trying to block Ervin's attack, knock his weapon aside, or push him away." Defendant further argues that from the footage, the jury could have reasonably found that Defendant swung the knife "to defend himself and in doing this motion unfortunately that knife entered Mr. Ervin's chest." We disagree.

¶ 15 "Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict

serious bodily injury." *State v. Greene*, 314 N.C. 649, 651, 336 S.E.2d 87, 88 (1985) (emphasis omitted). It is a lesser-included offense of second-degree murder and voluntary manslaughter. *Thomas*, 325 N.C. at 591, 386 S.E.2d at 559.

¶ 16 In the instant case, the jury convicted Defendant of voluntary manslaughter, which is defined as "an intentional killing without premeditation, deliberation or malice but done in the heat of passion suddenly aroused by adequate provocation or in the exercise of imperfect self-defense where excessive force under the circumstances was used or where the defendant [was] the aggressor." *State v. Wallace*, 309 N.C. 141, 149, 305 S.E.2d 548, 553 (1983).

¶ 17 Our Supreme Court has made clear that the distinction between voluntary and involuntary manslaughter hinges on intent:

> Involuntary manslaughter is not distinguished from murder or voluntary manslaughter by the presence of an essential element not contained in the greater offenses; it is distinguished from those offenses by the *absence* of elements that are essential to the greater offenses but not to involuntary manslaughter. It is the absence of malice, premeditation, deliberation, intent to kill, and intent to inflict serious bodily injury that separates involuntary manslaughter from murder and voluntary manslaughter.

Greene, 314 N.C. at 651, 336 S.E.2d at 89.

¶ 18 In *State v. Ray*, our Supreme Court described the manner of intent necessary to elevate a homicide from involuntary to voluntary manslaughter:

> In connection with [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 and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. . . . Such an act of assault committed in the heat of passion suddenly aroused by adequate provocation, or in the imperfect exercise of the right of self-defense, is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm.

299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980).

¶ 19 "Thus, for the jury to be given an instruction on involuntary manslaughter, there must have been evidence presented to show that (1) [the] defendant lacked intent," as defined above in *Ray*, "and that (2) the action causing [the victim]'s death either (a) did not amount to a felony and was not ordinarily dangerous to human life, or (b) was the result of culpable negligence." *State v. Epps*, 231 N.C. App. 584, 586, 752 S.E.2d 733, 735 (2014), *aff'd*, 368 N.C. 1, 769 S.E.2d 838 (2015).

¶ 20 Defendant contends that the case at bar is analogous to those of *State v. Drew,* 162 N.C. App. 682, 592 S.E.2d 27, *appeal dismissed and disc. review denied*, 358 N.C. 735, 601 S.E.2d 867 (2004), and *State v. Daniels*, 87 N.C. App. 287, 360 S.E.2d 470 (1987), two cases in which our Court upheld the trial court's decisions to instruct the juries on involuntary manslaughter. Those cases are easily distinguishable from the facts presented here.

¶ 21 In *Daniels*, the defendant testified that after her domestic partner became angry and began assaulting her, he handed her a boning knife and "told her to fight like a man[.]" 87 N.C. App. at 288, 360 S.E.2d at 470. The defendant then "stuck [the boning knife] at him, trying to get him away from" her, and inadvertently stabbed him while trying to "push" at him. *Id.* Based on these facts, the trial court instructed the jury on involuntary manslaughter, and we held that such instructions were not error. *Id.* at 289, 360 S.E.2d at 471.

¶ 22 Similarly, in *Drew*, the defendant told law enforcement that he was surprised to find a man whom he did not immediately recognize in his bathroom, that the man swung at him, and that he reflexively swung back at the man while holding a knife. 162 N.C. App. at 686, 592 S.E.2d at 30. The man later died of a single stab wound to the chest. *Id.* at 687, 592 S.E.2d at 30. Our Court determined that, on these facts, the trial court did not commit plain error in submitting the charge of involuntary manslaughter to the jury. *Id.*

¶ 23 Here, we disagree with Defendant's contention that the evidence in this case, like that in *Daniels* and *Drew*, could support an inference that he accidentally killed Mr. Ervin. Defendant did not testify or present any evidence. The State's evidence tended to show that Mr. Ervin and Defendant engaged in an extended altercation in which Defendant repeatedly threatened to stab and to kill Mr. Ervin. The State's evidence also showed that Defendant did in fact fatally stab Mr. Ervin, inflicting a

wound that was one and three-quarter inches long and two and three-quarter inches deep.

¶ 24 Unlike in *Drew* and *Daniels*, the trial court did not have the benefit of Defendant's own statements regarding his state of mind or intent. *Cf. id.*; *see also Daniels*, 87 N.C. App. at 288, 360 S.E.2d at 470. It did, however, have the benefit of a video recording of the fatal altercation between Defendant and Mr. Ervin. The video shows Defendant chasing Mr. Ervin through the trailer park, repeatedly threatening to stab him, and shows Defendant raise his arm before stabbing downward into Mr. Ervin's chest as Mr. Ervin swings a board at Defendant. Although Defendant maintains on appeal that the video is "ambiguous" as to whether Defendant intentionally stabbed Mr. Ervin, the video reveals that, mere moments after stabbing Mr. Ervin, Defendant stated, "He shouldn't have put his f****** hands on me."

¶ 25 Accordingly, we cannot agree with Defendant's assertion that a rational jury could conclude that Defendant's threats to stab Mr. Ervin—which he then carried out—"were the mere ebullitions of momentary anger" and not "the expressions of a [deliberate] purpose" that he in fact fulfilled. *State v. Johnson*, 23 N.C. 354, 365 (1840).

III. Conclusion

¶ 26 Because we conclude that the evidence presented at trial could not support a rational inference of an unintentional killing, the trial court did not err by denying

Defendant's request for a jury instruction on involuntary manslaughter. Defendant therefore received a fair trial, free from error.

NO ERROR.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).