IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-547

No. COA20-691

Filed 5 October 2021

Wake County, No. 16CRS220542

STATE OF NORTH CAROLINA

v.

MARCUS L. ALSTON, Defendant.

Appeal by Defendant from judgment entered on 8 October 2019 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jeffrey B. Welty, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for the Defendant.

JACKSON, Judge.

¶ 1 Marcus L. Alston ("Defendant") appeals from judgment entered upon a jury verdict finding him guilty of first-degree murder by reason of felony murder, with felonious child abuse serving as the underlying felony, a violation of N.C. Gen. Stat. § 14-17(a). On appeal, Defendant argues (1) the trial court erred in denying his motion to dismiss because there was insufficient evidence that a deadly weapon was

used; (2) the trial court erred by failing to instruct the jury on second-degree murder; and (3) the trial court lacked jurisdiction because the indictment was fatally defective for failing to name the victim. We hold that Defendant has failed to demonstrate any error in this matter.

I. Factual and Procedural Background

¶ 2 On 16 October 2016, Marcus L. Alston ("Defendant") was living in Raleigh, North Carolina, with his girlfriend, Laura Price, and her two 10-month-old children, Laine and Nathan Price.[1] Defendant was not the biological father of the children. He and Ms. Price met a few months prior after connecting on social media. After dating for a few weeks, Defendant moved into Ms. Price's apartment and shortly thereafter began watching her children while she worked.

¶ 3 On the afternoon of 16 October, sometime between 12:00 p.m. and 1:45 p.m., Ms. Price took the bus to work, leaving the children under Defendant's supervision. At the time she left for her 2:00 p.m. shift at Dunkin' Donuts, both children appeared healthy and were behaving normally.

¶ 4 Hours after Ms. Price left, J. Garrido ("Ms. Garrido"), whom Defendant was also in a romantic relationship with, came over to Ms. Price's apartment. Ms. Price did not know about Ms. Garrido, and Ms. Garrido believed that Defendant was living

[1] Pseudonyms are used for the names of the juveniles and their mother to protect their privacy.

with Ms. Price to help provide childcare. Ms. Garrido arrived shortly before 6:00 p.m. and left around 7:17 p.m. While she was there, Ms. Garrido and Defendant checked on the babies in their respective rooms and both appeared to be fine.

¶ 5 At 8:11 p.m., Defendant called Ms. Garrido in a panic because Laine was not breathing. Ms. Garrido told Defendant to call 911, and that she would come over to take the baby to the hospital if needed. At 8:12 p.m., Defendant attempted to call Ms. Price. When she did not pick up, he texted her the word, "Emergency," with many exclamation points. Ms. Price called Defendant back and he explained that Laine was not breathing. She told Defendant to call 911. At 8:15 p.m., Defendant called 911. The 911 operator instructed Defendant on how to perform CPR while he waited for emergency medical services.

¶ 6 At 8:21 p.m., the fire department and police arrived at the apartment. Defendant was in the bathroom of the apartment with Laine. Defendant told emergency medical personnel that he had given Nathan, Laine's brother, a bath and left Laine alone in her room around 7:30 p.m. According to Defendant, when he went to check on her, she was unconscious in her highchair. When he picked her up, her head rolled backwards, and he noticed she was not breathing. Defendant told first responders that he brought her to the bathroom to pour water on her face and try to wake her up.

¶ 7 Immediately after arriving, firefighters removed Laine from the bathroom and placed her on the floor in the living room where they would have more room to administer CPR. Laine was dry, wearing only a diaper, and warm to the touch, but she was unresponsive and had no pulse. First responders removed her diaper while treating her and observed that it was extremely soiled with urine and blood was coming from her rectum. Shortly after the fire department's arrival, the paramedics also arrived. Firefighters administered CPR to Laine for almost half an hour while the paramedics jointly attempted advanced lifesaving measures. During that time, Laine was unresponsive, her blood sugar was low, she was not breathing on her own, and her limbs began to stiffen. At 8:49 p.m., Laine was pronounced dead on the scene.

¶ 8 On the night of Laine's death, a neighbor who lived in the apartment below Ms. Price told police that he heard an unusual amount of noise from Ms. Price's apartment around 5:00 or 6:00 p.m. He later testified that he heard crying and a man's voice repeatedly saying, "shut up" about 20 to 30 minutes before police arrived. Another neighbor who lived on the floor above Ms. Price also testified to hearing a loud "thumping" noise and a baby crying about half an hour to an hour before police arrived.

¶ 9 After conducting an autopsy of Laine's body, the medical examiner observed extensive injuries, mostly internal. Externally, Laine had faint bruising on her abdomen, flank, and back. Internally, Laine suffered broken ribs, her liver was

lacerated and hemorrhaging, the soft tissue of her bowel was hemorrhaging, her right kidney was lacerated, her psoas muscle within her pelvis was crushed, and she was bleeding internally, with 20 percent of her blood volume loose in her abdominal cavity. The examiner determined that the injuries were fatal and inflicted shortly before her death. Because the injuries could not have been accidental or caused by CPR, the examiner concluded that the manner of Laine's death was a homicide, and the cause of death was blunt force trauma to her torso. In addition to the medical examiner, two other expert medical witnesses testified and agreed with the medical examiner's conclusions about the manner and cause of Laine's death.

¶ 10 The State's evidence also showed that up until the day of her death, Laine was a healthy baby. According to her pediatrician, Laine was normal and very healthy at her four-month, six-month, and nine-month check-ups. She weighed 19 pounds the day she died, in the 50th percentile for her age.

¶ 11 Defendant was arrested and charged with felony child abuse and murder. The child abuse charge was dismissed after Defendant was indicted for murder. At trial, after the close of the State's evidence, Defendant moved to dismiss the charges for insufficient evidence. This motion was denied by the trial judge. At the close of all the evidence, Defendant renewed this motion to dismiss which was again denied by the trial court. The trial court instructed the jury on felony murder, denying Defendant's oral request for a second-degree murder instruction. The jury returned

a verdict of guilty. The trial court sentenced Defendant to life in prison without parole.

¶ 12 Defendant gave notice of appeal in open court.

II. Analysis

A. Deadly Weapon Requirement for Felony Murder

¶ 13 "The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). Evidence is sufficient "when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense[.]" *Id*. (internal marks and citations omitted).

¶ 14 "First-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon." *State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997) (internal quotation and citation omitted). *See* N.C. Gen. Stat. § 14-17(a) (2019). Because child abuse is not one of the statute's enumerated felonies, a felony murder charge predicated on felonious child abuse requires proof of a "deadly weapon" used in the commission or attempted commission of the felony. *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589.

¶ 15 Defendant argues that (1) an external weapon is needed to meet this statutory requirement and, in the alternative, (2) there is insufficient evidence to prove he used any part of his body as a deadly weapon. We disagree.

¶ 16 We previously rejected the first argument in *State v. Steen*, 264 N.C. App. 566, 580, 826 S.E.2d 478, 487 (2019), *aff'd in part, rev'd on other grounds*, 376 N.C. 469, 485, 852 S.E.2d 14, 25 (2020), holding that "the statute governing felony murder[] contains no language suggesting any intent by the General Assembly to limit the possible types of weapons that can qualify as 'deadly weapons' for purposes of the felony murder rule to external weapons." Likewise, our Supreme Court has held that hands, or other parts of the human body, can be considered deadly weapons under the felony murder statute. *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589.

¶ 17 In determining whether or not a defendant's body was used as a deadly weapon, "[t]he size of both the actor and his victim are important factors[.]" *State v. Krider*, 138 N.C. App. 37, 44, 530 S.E.2d 569, 573 (2000). "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." *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589. Moreover, "[w]here an adult has exclusive custody of a child for a period of time and during such time the child suffers injuries which are neither self-inflicted nor accidental, the evidence is sufficient to create an inference that the adult inflicted an injury." *State v. Perdue*, 320 N.C. 51, 63, 357 S.E.2d 345, 353 (1987).

¶ 18 For example, in *State v. Perry*, 229 N.C. App. 304, 750 S.E.2d 521 (2013), the defendant was found guilty of felony murder predicated on felonious child abuse based on almost entirely circumstantial evidence. We remarked that the victim "was a normal, healthy baby who had no medical problems in the days leading up to her death." *Id.* at 319, 750 S.E.2d at 533. On the day of her death, after the victim's mother left the residence, the defendant was the only adult in the house supervising the victim. *Id.* at 320, 750 S.E.2d at 533. The defendant called the victim's mother and told her the baby was not breathing. *Id.* When EMS arrived, the baby was "unconscious, unresponsive, and barely breathing." *Id.* The baby had unusual bruising on her buttocks, blunt force injury to her ribs, and extensive hemorrhaging in her retinae and brain, suggesting blunt force injury to her head. *Id.* Expert examination concluded that her extensive injuries could not have resulted from the administration of CPR or an accidental fall. *Id.* Though the defendant argued that the evidence was not sufficient to permit the jury to find that he used his hands as deadly weapons, we disagreed, holding that

> [i]n light of the testimony given by the State's expert witnesses that [the victim] suffered severe injuries that were traumatic in origin, that [the victim's] death resulted from these injuries, that the injuries which [the victim] had sustained could have been caused by human hands, and that, until the morning of 7 December 2010, [the victim] was a normal, healthy, and uninjured child, we hold that the record contained sufficient circumstantial evidence to support a determination that Defendant used his hands as

a deadly weapon.

Id. at 321, 750 S.E.2d at 534.

¶ 19 Here, a careful review of the evidence tends to show that Laine was a normal, healthy baby up until the day of her death, and she suffered extensive, non-accidental injuries while under Defendant's supervision. Like the victim in *Perry*, Laine's injuries were severe, including multiple broken ribs, an injured psoas muscle, a lacerated and hemorrhaging liver, a lacerated kidney, and extensive internal bleeding. Again, like *Perry*, expert medical witnesses testified that Laine's cause of death was not accidental, nor could CPR have caused her injuries. Three expert witnesses agreed that her cause of death was blunt force trauma to the torso, and that the manner of her death was a homicide. Additionally, considering the extreme size disparity of Defendant and the victim, like in *Pierce* and *Krider*, the jury could reasonably infer that when Defendant, a 190-pound adult man, used his hands to inflict injury on the 19-pound child, Defendant's hands were thus used as a deadly weapon.

¶ 20 Defendant contends that this evidence amounts to mere suspicion because the circumstances of Laine's injuries were largely unknown. However, neither felony murder nor the underlying felony of child abuse require knowledge of the precise method that harm was inflicted upon the victim. Viewing the evidence in the light most favorable to the State, as we must on review of a motion to dismiss, *Bagley*, 183

N.C. App. at 523, 644 S.E.2d at 621, the evidence was sufficient to support a finding by the jury that Defendant used his hands as a deadly weapon. We therefore hold that the trial court did not err by denying Defendant's motion to dismiss.

B. Second-Degree Murder Instruction

¶ 21 Defendant also argues that the trial court erred by failing to submit an instruction on second-degree murder to the jury. We disagree.

¶ 22 A trial court's decision regarding jury instructions on a lesser-included offense is reviewed *de novo* by this Court. *State v. Allbrooks,* 256 N.C. App. 505, 509, 808 S.E.2d 168, 172 (2017). "To determine whether the evidence supports the submission of a lesser-included offense, courts must consider the evidence in the light most favorable to the defendant." *Id.* (internal quotation and citation omitted). Here, at trial, Defendant requested a second-degree murder instruction, and this argument is thus preserved for our review.

¶ 23 The standard for whether a trial court must instruct the jury on second-degree murder as a lesser-included offense of first-degree murder is as follows:

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983). The standard remains the same when the first-degree murder offense is based on the felony murder doctrine. *See State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) ("It is a well established rule that when the law and evidence justify the use of the felony-murder rule, then . . . the court [is not] required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it.") (internal quotation and citation omitted). "[T]he trial court need not submit lesser included degrees of a crime to the jury 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*." *Id.* at 562, 572 S.E.2d at 772 (internal marks and citations omitted).

¶ 24 As explained *supra*, "[f]elony murder on the basis of felonious child abuse requires the State to 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." *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589. To establish the underlying felony of child abuse, the State must show

> (1) Defendant is a parent or any other person providing care to or supervision of a child less than 16 years of age;
>
> (2) Defendant's willful act or negligent omission in the care of the child showed a reckless disregard for human life; and
>
> (3) the act or omission resulted in serious bodily injury to the child.

State v. Mosher, 235 N.C. App. 513, 517, 761 S.E.2d 204, 206-07 (2014). Moreover, "[w]here an adult has exclusive custody of a child for a period of time and during such time the child suffers injuries which are neither self-inflicted nor accidental, the evidence is sufficient to create an inference that the adult inflicted an injury." *Perdue*, 320 N.C. at 63, 357 S.E.2d at 353. "The State is not required to prove that the defendant specifically intended that the injury be serious." *Perry*, 229 N.C. App. at 319, 750 S.E.2d at 532 (internal marks and citations omitted).

¶ 25 We hold that the State's evidence fully satisfied every element of felonious child abuse, as well as the elements of felony murder, and the evidence did not support a second-degree murder instruction. At the time of her death, Defendant was supervising the victim, Laine, who was less than a year old; he had exclusive custody of her at the time non-accidental injuries resulting in her death occurred;[2] and these injuries resulted in her death. Laine's death occurred during the commission or attempted commission of felonious child abuse, and as described *supra*, Defendant attempted or committed the felony using a deadly weapon, his own body. Therefore, "the evidence [was] sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, . . . and there [was] *no*

[2] Defendant does not argue on appeal that the evidence is conflicting for the underlying felony, specifically as to whether Laine's injuries occurred while she was under Defendant's exclusive care, and therefore we need not address this issue.

evidence to negate these elements other than defendant's denial that he committed the offense[.]" *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658. Accordingly, the trial court did not err in denying Defendant's request for a jury instruction on the lesser-included offense of second-degree murder.

C. Naming the Victim in the Indictment

¶ 26 Lastly, Defendant alleges that the indictment in this case was fatally defective for failing to name the victim. We disagree.

¶ 27 "This Court reviews challenges to the sufficiency of an indictment using a *de novo* standard of review." *State v. Pendergraft*, 238 N.C. App. 516, 521, 767 S.E.2d 674, 679 (2014). "Our Courts have held an indictment is not facially invalid as long as it notifies an accused of the charges against him sufficiently to allow him to prepare an adequate defense and to protect him from double jeopardy." *State v. McKoy*, 196 N.C. App. 650, 656, 675 S.E.2d 406, 411 (2009) (internal marks and citation omitted).

¶ 28 A short form indictment for murder is required to name the victim. N.C. Gen. Stat. § 15-144 (2019) ("[I]t is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed) . . . ."). Naming the victim requires "identify[ing] that person in a way that is unique to that individual and enables others to distinguish between the named person and all other people." *State v. White*, 372 N.C. 248, 252, 827 S.E.2d 80, 82 (2019). Initials suffice to identify a person. *McKoy*, 196 N.C. App.

at 653-54, 675 S.E.2d at 409-10. *See also State v. Shuler*, 263 N.C. App. 366, 368, 822 S.E.2d 737, 738 (2018) ("The indictment need not include the victim's full name as we have held that the use of the victim's initials may satisfy the 'naming' requirement of Section 15-144.2(a).").

¶ 29 Here, the indictment alleged that Defendant "willfully, unlawfully, and feloniously did kill and murder L.P. (date of birth: 11/20/2015) with malice aforethought." Because the victim's initials and date of birth were both included in the indictment, her identity was unambiguous and the naming requirement was satisfied. Therefore, Defendant was provided with sufficient notice of the victim's identity to prepare for his defense and protect him from double jeopardy.

III. Conclusion

¶ 30 In sum, the trial court committed no error because (1) sufficient evidence of a deadly weapon existed, (2) the evidence did not support a second-degree murder instruction, and (3) the victim was adequately named in the indictment.

NO ERROR.

Judges INMAN and WOOD concur.

Report per Rule 30(e).