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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-255

No. COA20-725

Filed 5 April 2022

Craven County No. 18 CRS 50355

STATE OF NORTH CAROLINA

v.

SHARON WHITFORD, Defendant.

Appeal by Defendant from judgment entered 19 September 2019 by Judge R. Kent Harrell in Craven County Superior Court. Heard in the Court of Appeals 18 November 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

M. Gordon Widenhouse, Jr., for defendant-appellant.

MURPHY, Judge.

¶ 1 Where a statute sets out circumstances under which a person is immune from liability but does not further specify she is immune from prosecution, we have previously held that the General Assembly did not intend she be immune from prosecution. Here, where the statute under which Defendant claimed immunity indicated only that she was "immune from civil or criminal liability," we are bound to

hold she was not immune from prosecution and, therefore, not entitled to a pretrial determination of immunity.

¶ 2 Furthermore, when the State presents evidence that a defendant did not act in self-defense, the evidence, taken in the light most favorable to the State, must be adequate to convince a rational trier of fact she did not act in self-defense. As the State presented more than a scintilla of physical evidence that Defendant had gained aggressor status at the time she shot the deceased, as well as a variety of other evidence negating Defendant's account of how she killed her husband, the trial court did not err in denying Defendant's motions to dismiss the charge of first-degree murder and all lesser-included crimes.

¶ 3 Additionally, although the trial court referenced excessive force on several occasions without explicitly stating the State's burden of proof on the issue, it instructed the jury using the North Carolina Pattern Jury Instructions and correctly referred to the State's burden of proof concerning excessive force on multiple other occasions. The trial court's references omitting the State's burden of proof did not rise to the level of plain error.

¶ 4 Finally, based on the facts and issues for the jury's determination, the trial court did not abuse its discretion under Rule 403 by allowing the State to admit evidence of Defendant's extramarital affair potentially demonstrating her state of mind at the times she shot her husband, especially where that evidence was not

confusing, repetitive, or excessive.

BACKGROUND

¶ 5 On 30 December 2017, Defendant Sharon Taylor Whitford shot and killed her husband, Jimmy Lee Whitford ("Husband"). The shooting arose out of a confrontation in the couple's home over Defendant's extramarital affair.

¶ 6 On the evening of the shooting, Husband read text messages on Defendant's phone while she was in the shower, revealing her amorous relationship with another man. Husband called the man with whom Defendant had been texting while waiting for Defendant to exit the shower. When Defendant exited the shower, Husband confronted her about the affair and pushed her multiple times. During the confrontation, Husband retrieved a shotgun, and Defendant and Husband struggled over control of the weapon. Defendant ran into the living room, grabbed a loaded rifle, and returned to the master bedroom. Husband fired the shotgun in Defendant's direction, causing pellets to hit her right eye and shoulder, and Defendant fired at Husband multiple times.[1] Defendant's shots hit Husband in the abdomen, right hip, and left knee; he was unconscious by the time medical personnel arrived and died of his wounds thereafter.

[1] Some of the shots fired by Defendant were lodged in the wall outside the bedroom such that they appear to have been fired from outside; others appear to have been fired from within the bedroom itself.

¶ 7 Defendant was indicted for first-degree murder. Prior to trial, Defendant filed a *Motion for Declaration of Immunity and Dismissal and Incorporated Memorandum of Law*, arguing she was immune from criminal liability under N.C.G.S. § 14-51.3(a)(1) and (b) and seeking a pretrial determination of immunity from the trial court. The trial court orally denied the motion at a pretrial hearing on 23 July 2019. The trial court reasoned the statute's "legislative history [does not indicate] an intent on the part of the General Assembly that . . . [the trial court make] a pretrial determination [as] to the issue of immunity under the self-defense statute[,]" reserving the issue of immunity for a "hearing once the evidence in the case has been developed."

¶ 8 At trial, Defendant again maintained she acted in self-defense and shot Husband because she "was afraid he was going to kill [her]." Defendant claimed that, upon discovering text message evidence of the affair, Husband grabbed her by the hair, kicked her, and pushed her, and that this assault continued throughout the bedroom, kitchen, laundry room, and living room. Defendant suffered injuries to her head, neck, chest, back, and face, including shotgun pellets in her eye. Defendant claimed Husband retrieved the shotgun in the bedroom, which Defendant then grabbed to keep him from potentially shooting her or himself. In response, she ran to the living room, obtained a rifle, and returned to the bedroom, where Husband fired the shotgun at her, striking her in the eye, shoulder, arm, and head.

¶ 9 Conversely, the State presented evidence that Defendant shot downward at Husband's abdomen in a manner consistent with Husband lying in the fetal position on the bedroom floor; under the State's theory, Defendant left the room and returned to the bedroom to reinitiate the altercation, firing at Husband while she was returning to the room and he was hiding. The State also presented DNA evidence obtained from fluid swabs present in various areas of the house to contradict Defendant's self-defense claim, calling attention to the lack of Husband's DNA from collections in locations other than the bedroom and the presence of Defendant's DNA in the living room, laundry room, and kitchen. Additionally, it presented evidence of Husband's DNA, but not Defendant's DNA, on the shotgun—which, if believed by the jury, contradicted Defendant's claim she grabbed the shotgun in a struggle for control of the gun.

¶ 10 Alongside this physical evidence, the State introduced evidence of Defendant's interactions with her lover in order to demonstrate her then-existing state of mind during the shots. Among the items the State presented were a log of text messages with her lover, including sexually explicit texts and declarations of their desires to be together exchanged on the night of the killing; records of calls between the two; testimony from Defendant's lover describing his relationship with Defendant, "including . . . times they [were] intimate"; and the voicemail Defendant's lover received from Husband after Husband discovered the affair.

¶ 11 At the close of the State's evidence, Defendant renewed her pretrial motion to dismiss based on immunity under N.C.G.S. § 14-51.3 and made a general motion to dismiss for insufficiency of the evidence. The trial court denied Defendant's motion to dismiss on both grounds. After Defendant presented her evidence, she moved to dismiss based on statutory immunity and insufficiency of the evidence, which the trial court again denied. The jury found Defendant guilty of second-degree murder, and the trial court imposed an active sentence of 240 to 300 months. Defendant timely appealed.

ANALYSIS

¶ 12 On appeal, Defendant argues the trial court erred in refusing to grant her pretrial motion to dismiss the charges on the basis of statutory immunity under N.C.G.S. § 14-51.3 and claims N.C.G.S. § 15A-954(a)(9) required such a pretrial determination by the trial court. Alternatively, Defendant argues the trial court did not make sufficient findings to support its conclusion she was not entitled to immunity and the case should be remanded.

¶ 13 Defendant also argues the trial court erred in not dismissing the charge when the evidence showed she acted in self-defense against Husband's attack; and, furthermore, that the trial court plainly erred in its instructions regarding whether Defendant used excessive force. Finally, Defendant argues the trial court abused its discretion under North Carolina Rule of Evidence 403 when it allowed the State to

present "excessive evidence" regarding Defendant's affair.

¶ 14 However, for the reasons detailed below, none of Defendant's arguments are meritorious, and the trial court did not err.

A. Statutory Immunity

¶ 15 Defendant first argues that N.C.G.S. § 14-51.3 grants her complete immunity from prosecution when acting in self-defense in a manner authorized by law. The relevant statutory language is as follows:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> . . . .
>
> (b) A person who uses force as permitted by this section is justified in using such force *and is immune from civil or criminal liability for the use of such force*, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.

N.C.G.S. § 14-51.3 (2021) (emphasis added). Defendant argues that, pursuant to N.C.G.S. § 15A-954(a)(9), immunity under N.C.G.S. § 14-51.3 prevented her from being prosecuted at all and that, as a result, the trial court was required to dismiss her charges before trial. *See* N.C.G.S. § 15A-954(a)(9) (2021) ("The [trial] court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that . . . [t]he defendant has been granted immunity by law from prosecution.").

¶ 16 However, we recently interpreted identical language with respect to the "castle doctrine," a specialized form of self-defense, in *State v. Austin*.[2] 2021-NCCOA-494; *see* N.C.G.S. § 14-51.2(e) (2021) ("A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force . . . ."). There, we held that immunity "from civil or criminal liability," absent further clarifying language, did not grant the defendant immunity from prosecution:

> Austin's argument turns on the specific language in the operative portion of the castle doctrine statute, which provides that a person satisfying the castle doctrine criteria "is immune from civil or criminal liability." [N.C.G.S.] § 14-51.2(e). Austin argues that the use of the word "immunity" means that this is a question that must be resolved by the judge, not the jury.

[2] The defendant in *Austin* has filed a *Petition for Discretionary Review* before our Supreme Court, which, as of this opinion's filing date, is still pending.

The flaw in this argument is that the word "immunity" has different legal meanings depending on the context and, here, the context indicates that this is not a traditional immunity from prosecution that must be resolved by the court before trial. A traditional immunity is "not merely an affirmative defense to claims; it is a complete immunity from being sued in court." *Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605 (2018). In other words, it creates not merely an assurance that no judgment can be entered against the person, but a right not to be forced into court to defend oneself. *Id.*

In the criminal context, the General Assembly signals a grant of this type of immunity by referring to it as "immunity from prosecution." So, for example, the statute requiring trial courts to resolve an immunity issue pre-trial applies when the defendant "has been granted immunity by law from prosecution." [N.C.G.S.] § 15A-954(a)(9). This type of immunity often arises when the government seeks to compel a person to testify who might otherwise assert the right against self-incrimination. *See generally* N.C. Gen. Stat. § 15A-1051 *et seq.*

Our General Statutes use the phrase "immunity from prosecution" repeatedly when describing this type of immunity in the criminal context. *See*, *e.g.*, [N.C.G.S.] § 14-205.1 (granting "immunity from prosecution" to minors involved in soliciting prostitution); [N.C.G.S.] § 75-11 (granting "full immunity from criminal prosecution and criminal punishment" to persons compelled to testify against a corporation in certain consumer cases); [N.C.G.S.] § 90-96.2 (granting "limited immunity from prosecution" in the context of reporting drug overdoses); [N.C.G.S.] § 90-113.27 (granting "immunity from prosecution" to certain participants in needle exchange programs).

Here, by contrast, the castle doctrine provides immunity from "criminal liability." In this context, the immunity is from a conviction and judgment, not the prosecution itself.

> This conclusion is further supported by the distinction between traditional immunities from prosecution, which typically involve little or no fact determination, and the castle doctrine defense, which . . . can involve deeply fact-intensive questions. Accordingly, we reject Austin's argument that the castle doctrine statute granted her "the right to have a judge, rather than a jury, evaluate the evidence to determine whether she was immune under the statute." Where, as here, the trial court determined that there were fact questions concerning the applicability of the castle doctrine defense, the trial court properly permitted the case to proceed to trial so that a jury can resolve those disputed facts.

Austin, 2021-NCCOA-494, at ¶¶ 17-21.

¶ 17 As there is no reason to believe the legislature intended N.C.G.S. § 14-51.3 to provide different immunity than it did through the identically worded provision in N.C.G.S. § 14-51.2, we see no reason to distinguish this case from *Austin*.

¶ 18 Defendant also cites *State v. Phillips*, 300 N.C. 678, 268 S.E.2d 452 (1980), *inter alia*, for her alternative argument that the trial court was required to make additional findings of fact and conclusions of law on the issue of immunity to clarify its reasoning for our review. However, for the reasons explained in *Austin*, Defendant was not entitled to a pretrial judicial determination of immunity; thus, the trial court was not obligated to make any additional findings of fact or conclusions of law with respect to that issue. *See Austin*, 2021-NCCOA-494, at ¶¶ 17-21. Defendant was not entitled to a judicial determination of immunity, pretrial or otherwise, under N.C.G.S. § 14-51.3, and the trial court did not err in refusing to make such a

determination.

B. Motion to Dismiss Murder Charge

¶ 19 Defendant next argues the trial court erred in denying her motion to dismiss for insufficient evidence. We review the trial court's denial of Defendant's motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

¶ 20 "When ruling on a defendant's motion to dismiss, the trial court must determine whether [the State presented sufficient] evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.*; *see* N.C.G.S. § 15A-1227 (2021). When self-defense is at issue, "[t]he 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 [or she] did." *State v. Herbin*, 298 N.C. 441, 445, 259 S.E.2d 263, 267 (1979). "The test on a motion to dismiss is whether the State has presented [sufficient] evidence which, when taken in the light most favorable to the State, would be sufficient to convince a rational trier of fact that the defendant did not act in self-defense." *State v. Presson*, 229 N.C. App. 325, 329, 747 S.E.2d 651, 655, *disc. rev. denied*, 367 N.C. 274, 752 S.E.2d 150 (2013). "As always, [in our review of a ruling on] a motion to dismiss, we must view the evidence in the light most favorable to the [S]tate and allow the [S]tate every reasonable inference that may arise upon the evidence, regardless of whether it is circumstantial, direct, or both." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d

923, 925, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980). If there is "more than a scintilla of evidence" to support the convictions, "the motion [to dismiss for insufficient evidence] is properly denied." *State v. Tucker*, 2022-NCSC-15, ¶ 10, 867 S.E.2d 924.

¶ 21 "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).

> [M]alice, as it is ordinarily understood, means not only hatred, ill will, or spite, but also that condition of mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life.

State v. Crawford, 329 N.C. 466, 481, 406 S.E.2d 579, 587 (1991). A defendant's use of a deadly weapon on a victim may create an inference of malice for purposes of second-degree murder. *State v. Holder*, 331 N.C. 462, 486-87, 418 S.E.2d 197, 210-11 (1992) (citing *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982)).

¶ 22 The State presented the following evidence at trial: Defendant shot Husband; Defendant admitted she used deadly force against Husband; Defendant shot Husband in the abdomen at a downward trajectory in a manner consistent with Husband being in the fetal position on the floor of the bedroom, and not standing; Defendant left the room and returned; and Defendant fired at Husband while returning to the room and while he was hiding.

¶ 23 The State also presented evidence to contradict Defendant's claim of self-defense, including the absence of DNA evidence outside the bedroom to support Defendant's claim that Husband beat her throughout the house in the living room, laundry room, and kitchen and the absence of DNA evidence to support Defendant's claim that she grabbed the shotgun. Moreover, the State presented evidence that conflicted with Defendant's characterization of events, indicating that Husband was crouching when Defendant shot him rather than standing; that Defendant shot Husband from a different location than she reported; and that a bullet hole was found in the living room wall that entered the master bedroom from outside the bedroom, although Defendant stated she shot at Husband *after* she saw the flash from the shotgun while entering the bedroom.

¶ 24 This evidence of the manner in which Defendant killed Husband and evidence contradicting Defendant's testimony must be viewed in the light most favorable to the State. *See Presson*, 229 N.C. App. at 329, 747 S.E.2d at 655. The State's evidence that Defendant shot Husband while he was in a fetal position on the floor after she left and returned to the bedroom, taken together with the absence of Husband's DNA elsewhere in the house indicating he never left the bedroom, "would be sufficient to convince a rational trier of fact that [D]efendant did not act in self-defense," instead having become the aggressor upon her return to the bedroom armed with a rifle. *Id.* This evidence was "sufficient to convince a rational trier of fact that [D]efendant did

not act in self-defense." *Id.*

¶ 25 Having settled the self-defense issue, we conclude the State otherwise presented evidence adequate for a jury to convict Defendant of second-degree murder. That Defendant killed Husband is undisputed, and the State's evidence that she killed Husband out of a desire to be with her lover and do away with Husband was enough for a jury to infer the requisite malice. See *State v. Roberts*, 268 N.C. App. 272, 281, 836 S.E.2d 287, 295 (2019) (defining second-degree murder as "the unlawful killing of another human being with malice but without premeditation or deliberation" and malice, in relevant part, as "express hatred, ill-will or spite"), *disc. rev. denied*, 374 N.C. 271, 839 S.E.2d 350 (2020). Accordingly, the trial court did not err in denying Defendant's motion to dismiss for insufficient evidence.

C. Plain Error in Jury Instruction

¶ 26 Defendant admits she did not object to the trial court's instruction regarding the reasonableness of force, but argues "the trial court plainly erred by instructing the jury simply to decide if [Defendant] used excessive force without requiring the State to prove it beyond a reasonable doubt."

> Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure states that a party may not [allege] any portion of the jury charge or omission therefrom [was erroneous] unless he objects thereto before the jury retires to consider its verdict. Because [the] defendant concedes that he did not object to any portion of the trial court's instructions, our review of these contentions is limited to plain error.

State v. Morgan, 359 N.C. 131, 162, 604 S.E.2d 886, 905 (2004) (citations omitted), *cert. denied*, 546 U.S. 830, 126 S. Ct. 47 (2005).

¶ 27 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire [R]ecord, the error had a probable impact on the jury's finding" of the defendant's guilt. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted). "Plain error is applied only in exceptional cases where a review of the entire record establishes that the erroneous instructions probably had an effect on the jury's finding of guilt." *Morgan*, 359 N.C. at 162-63, 604 S.E.2d at 905.

¶ 28 Defendant argues the trial court improperly instructed the jury on the State's burden to prove Defendant used excessive force. Defendant emphasizes the portions of the instructions where the trial court stated "[Defendant] would not be guilty of murder or manslaughter if she acted in self-defense and did not use excessive force under the circumstances," as well as "[i]t is for you, the jury, to determine the reasonableness of the force used by [Defendant] under all of the circumstances as they appeared to [Defendant] at the time" and "a defendant would not be excused if the defendant used excessive force." According to Defendant, the trial court's instructions did not adequately inform the jury that the State bore the burden of proving excessive force, thereby lowering the evidentiary threshold required to

convict her.

¶ 29 However, the State correctly notes that the trial court's "instructions track, almost precisely, the language of the North Carolina Pattern Jury Instruction, N.C.P.I.—Crim. 206.10." *See* N.C.P.I.—Crim. 206.10 2, 4 (2020). The trial court instructed the jury regarding excessive force as follows:

> [Defendant] would be excused of first degree murder and second degree murder on the ground of self-defense if first [Defendant] believed the use of deadly force against [Husband] was necessary to prevent imminent death or great bodily harm to herself.
>
> And second, the circumstances as they appeared to [Defendant] at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.
>
> In determining the reasonableness of her belief, you should consider the circumstances as you find them to have existed from the evidence, including the size and strength of [Defendant], as compared to [Husband]; the fierceness of the assault, if any, upon [Defendant]; whether [Husband] had a weapon in his possession; and the reputation, if any, of [Husband] for danger or violence.
>
> [Defendant] would not be guilty of murder or manslaughter if she acted in self-defense and did not use excessive force under the circumstances.
>
> A defendant does not have the right to use excessive force. A defendant uses excessive force if the defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing.
>
> *It is for you, the jury, to determine the reasonableness of the force used by [D]efendant under all of the circumstances as they appeared to [D]efendant at the time.*

> Furthermore a defendant has no duty to retreat in a place where the defendant has a lawful right to be.
>
> [D]efendant would have a lawful right to be in [D]efendant's place of residence. [D]efendant could stand the defendant's ground and repel force with force regardless of the character of the assault made upon [D]efendant.
>
> However, [D]efendant would not be excused if the defendant used excessive force. *Therefore*, in order for you to find [Defendant] guilty of first degree murder, or second degree murder, *the State must prove beyond a reasonable doubt*, among other things, *that she did not act in self-defense*.
>
> If the State fails to prove that [Defendant] did not act in self-defense, you may not convict [Defendant] of either first or second degree murder. However you may convict [Defendant] of voluntary manslaughter *if the State proves that she used excessive force*.

(Emphases added).

¶ 30 After this, the trial court consistently stated the State bore the burden of proving its case beyond a reasonable doubt, emphasizing to the jury that "if the State proves beyond a reasonable doubt that [Defendant], though otherwise acting in self-defense used excessive force, [Defendant] would be guilty of voluntary manslaughter." The trial court unmistakably instructed the jury on which party bore the burden of proof—the State—as well as the burden of proof—beyond a reasonable doubt. As we "presume[] that jurors follow the trial court's instructions," the trial court did not err in omitting mention of the State's burden of proof on several

occasions amid the numerous times it clearly and correctly explained the State's burden to the jury. *State v. Steen*, 352 N.C. 227, 249, 536 S.E.2d 1, 14 (2000), *cert. denied*, 531 U.S. 1167, 121 S. Ct. 1131 (2001). Especially in light of the fact that our "preferred method [of jury instruction] is the approved guidelines of the North Carolina Pattern Jury Instructions," the trial court did not err—let alone plainly err—in instructing the jury. *State v. Bethea*, 71 N.C. App. 125, 127, 321 S.E.2d 520, 522 (1984).

D. Rule 403

¶ 31 Finally, Defendant argues the evidence presented at trial of her extramarital relationship "was cumulative and excessive, [and] served mainly to inflame the passions of the jury against [her]" under Rule 403.[3] Defendant's objections to this evidence during trial preserved the issue for our review. *See State v. Baldwin*, 240 N.C. App. 413, 417, 770 S.E.2d 167, 171 (2015); N.C. R. App. P. 10(a)(1) (2021) ("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

[3] Defendant admits evidence regarding her sexual relationship with a man other than Husband was relevant under Rule 401. *See* N.C.G.S. § 8C-1, Rule 401 (2019) ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

from the context.”).

¶ 32 “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” under Rule 403. N.C.G.S. § 8C-1, Rule 403 (2021).

> Rule 403 determinations are discretionary, and a trial court’s decision on motions made pursuant to Rule 403 are binding on appeal, unless the dissatisfied party shows that the trial court abused its discretion. Abuse of discretion occurs when the trial court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

State v. Holmes, 263 N.C. App. 289, 302-03, 822 S.E.2d 708, 720 (2018) (marks and citations omitted), *disc. rev. denied*, 372 N.C. 97, 824 S.E.2d 415 (2019). “Even if evidence is admissible . . . it must also be scrutinized under Rule 403 . . . . In each case, the burden is on the defendant to show that there was *no* proper purpose for which the evidence could be admitted.” *State v. Mangum*, 242 N.C. App. 202, 207-08, 773 S.E.2d 555, 561 (emphasis added) (marks omitted), *disc. rev. denied*, 368 N.C. 601, 780 S.E.2d 564 (2015).

¶ 33 Defendant argues “the [S]tate exceeded its leeway as the extensive evidence used here tended ‘solely to inflame the jurors.’” In support of this contention, she cites *State v. Hembree*, in which the State presented gruesome pictures of a murder victim to the jury for “seven of the eight days” of a trial for the murder of an unrelated victim. *State v. Hembree*, 368 N.C. 2, 14, 770 S.E.2d 77, 86 (2015). There, our

Supreme Court held the admission of evidence that

> add[s] nothing in the way of probative value but tend[s] solely to inflame the jurors . . . [is error] when the probative value of the sum total of that evidence was substantially outweighed by the risks that it would confuse the issues before the jury, or lead the jury to convict [the] defendant based on evidence of a crime not actually before it.

Id. at 16, 770 S.E.2d at 87.

¶ 34 Here, the concerns in *Hembree*—most notably, the risk that Defendant will be convicted of a crime other than the one for which she stood trial—are not present; evidence of the affair implicated Defendant in no other crime and would not confuse the jury as to the issues. To the contrary, the probative value of the evidence was to establish Defendant's motive in the *present* crime and convince the jury that she acted with malice by revealing a potentially prominent influence on her mental state. Moreover, unlike in *Hembree*, where the evidence the State presented was detailed, repetitive, and gruesome, the evidence the State presented of Defendant's affair in this case was relatively modest, consisting primarily of simple questions to Defendant's lover that neither sought excessive detail nor lingered repeatedly on any aspect of their relationship.

¶ 35 Defendant maintains "[t]he motivation for the shooting was [Husband's] violent assault on [Defendant] that 'precipitated the whole thing,' not her relationship with [her lover]," rendering the evidence offered regarding her affair with her lover

improper under Rule 403. However, the State's evidence that Defendant wanted to be with her lover more and her expressions of love for him, in addition to the other evidence that she returned to the bedroom with a gun after going to the living room alone, pointed to a possible motive for Defendant to kill that was different than Defendant's version of the events. We cannot say the trial court abused its discretion in determining that the value of evidence with the potential to show Defendant's motive in killing Husband outweighed the risk of inflaming the jury with the details of her affair.

CONCLUSION

¶ 36 The trial court did not err in refusing Defendant a pretrial determination of immunity under N.C.G.S. § 15A-954(a)(9) where the underlying statute specified only that she was immune from liability. Furthermore, the trial court properly denied Defendant's motion to dismiss and instructed the jury on the State's burden to prove excessive force, and it did not abuse its discretion in allowing evidence of her affair under Rule 403. As no error occurred at trial, we uphold the result.

NO ERROR.

Judges DIETZ and JACKSON concur.

Report per Rule 30(e).