An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-825

No. COA21-735

Filed 6 December 2022

Brunswick County, No. 17 CRS 56065

STATE OF NORTH CAROLINA,

v.

EUGENE ANTHWON POWELL, Defendant.

Appeal by Defendant from judgment entered 26 April 2021 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 6 September 2022.

Attorney General, Joshua H. Stein by Assistant Attorney General, Nicholas R. Sanders, for the State of North Carolina.

Christopher J. Heaney, for the Defendant-Appellant.

DILLON, Judge.

¶ 1 Defendant Eugene Anthwon Powell appeals from a judgment sentencing him to life without parole based on a jury verdict convicting him of first-degree murder.

I. Background

¶ 2 This case arises out of a shooting which occurred on 8 December 2017 following a drug deal gone wrong. The evidence at trial tended to show as follows:

¶ 3 The victim was a drug user. Defendant was his drug dealer. On one occasion, the victim did not fully pay for drugs he had purchased from Defendant. The victim apparently shorted Defendant because the victim felt he had been shorted in the quantity of drugs Defendant had provided him in two prior transactions. In any event, shortly after the victim shorted Defendant, the victim was found shot dead.

¶ 4 Defendant was charged with, tried for, and convicted of first-degree murder for the victim's death and was sentenced to life without parole. Defendant appeals.

II. Analysis

¶ 5 Defendant raises two arguments on appeal, which we address in turn.

A. Voluntariness of Defendant's Confession

¶ 6 Defendant argues that testimony concerning a confession to the crime he made during police interrogation shortly after his arrest should not have been admitted into evidence. He contends that his confession was not voluntary. We disagree.

¶ 7 Defendant was interrogated by police in three stages, over a period of 7 1/2 hours, briefly summarized as follows:

¶ 8 During the first stage, Defendant admitted being angry at the victim but denied killing the victim. He admitted being in the area, hearing a shot, and driving off after hearing the shot. The officers encouraged Defendant to be truthful, with one officer stating that he was Defendant's "best friend cause [he was] the only one that can help him." A little later during this first stage, Defendant stated that cooperating

would "do [him] no good." One officer then told Defendant that "whenever it goes to the DA's office, it's gonna help [a defendant] out" to cooperate.

¶ 9 After a break, the second stage began, during which Defendant underwent a polygraph. During the polygraph, Defendant reiterated that he was innocent and that he did not kill the victim. A short time after the polygraph concluded, officers informed Defendant that he failed the test. Sometime later during this second stage, Defendant stated that confessing would not help him and that a murder conviction would result in "25 years, that's life." One officer responded to Defendant that he "could be" correct in his assessment but that he had "seen all kinds of scales." Another officer told Defendant that confessing to the shooting would show that he was remorseful. The officer then said the following:

> But this front, that you've been sticking with and that denial of what your role was, Eugene, every juror in that stand will sit here and think that you're a cold-blooded killer without a heart. And that you deserve to be put to death, and guess what, they're wrong. If you don't think that I won't be the first one or Kip won't be the first one to tell the DA's office that you're not a cold-blooded killer. That you didn't pre-meditate this, that this is something that happened and that you regret it you're remorseful for it, you're sorry for it. You wish it never would have happened things could have been handled differently. But you can't take that back, you can only own up to the responsibility. So, nobody else, not me, not David [], not Kip, not April [] who was sitting here earlier could tell your story for you, only you can. So, how do you want to tell it? It needs to be the truth.

The third stage occurred after over six hours of interrogation. During this stage, the officers spoke about differences (including possible prison sentences) among first-degree murder, second-degree murder, and manslaughter. The same officer who previously told Defendant he risked the death penalty if he did not confess also said:

> I can't promise you nothing. All I can promise you is that your honesty and if you're truly, truly remorseful and sorry for what happened, needs to be said by you, so that we can present it in that way. Otherwise, it's gonna be presented exactly how it is, you set in here lying to us for hours.

Defendant then confessed to shooting the victim. He stated that he and the other drug dealers set up the victim for Defendant to shoot him, that Defendant only intended his shot to scare the victim, but that the shot was fatal.

¶ 10 After this last stage of the interrogation, a warrant was issued, charging Defendant with first-degree murder.

¶ 11 Where there is no dispute as to what was said during the interrogation, as is the case here, the voluntariness of a defendant's confession "is a question of law and is fully reviewable on appeal." *State v. Barden*, 356 N.C. 316, 339, 572 S.E.2d 108, 124 (2002). Specifically, whether certain conduct and language by interrogating officers "amounted to such threats or promises or influenced the defendant by hope and fear as to render [his] subsequent confession involuntary" is reviewed *de novo* on appeal, as a question of law. *State v. Richardson*, 316 N.C. 594, 601, 342 S.E.2d 823, 828 (1986); *see State v. Rook*, 304 N.C. 201, 216, 283 S.E.2d 732, 742 (1981) (holding

that where a defendant is influenced by hope and fear, the subsequent confession is involuntary).

¶ 12 It has been the law of this State from its beginning that "an extrajudicial confession of guilt by an accused is admissible against him *only when it is voluntary*." *State v. Fox*, 274 N.C. 277, 292, 163 S.E.2d 492, 502 (1968) (emphasis added). Our Supreme Court has generally held that a confession which was induced by some promise or hope is involuntary and, therefore, inadmissible. *State v. Roberts*, 12 N.C. 259, 260 (1827). However, our Supreme Court has also generally held that a confession motivated by some *hope* of leniency, in and of itself, does not render a confession involuntary. Rather, a reviewing court "looks at the totality of the circumstances." *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983). And where a "defendant's will [i]s not overborne [by hope]," his confession can still be said to be "made freely and voluntarily with full knowledge of the consequences." *State v. Richardson*, 316 N.C. 594, 604, 342 S.E.2d 823, 831 (1986) (instructing that a reviewing court look at the totality of circumstances to determine whether a confession induced in part by hope is voluntary).

¶ 13 Our Supreme Court has held that although law enforcement officers acted inappropriately in suggesting to a defendant that "it could possibly be of some help if he talked," the resulting confession was still voluntary because the interrogator's statement did not cause the defendant to confess. *State v. Hayes*, 314 N.C. 460, 476,

334 S.E.2d 741, 750-51 (1985). Similarly, the Supreme Court has held that a statement to the defendant "that things would go better with him if he told the truth" was not enough to render the defendant's confession involuntary because, "at no time during the defendant's testimony did he say that any statement to him by [the officer] . . . caused him to hope to gain in any way by confessing the crimes under investigation." *State v. Corley,* 310 N.C. 40, 52-53, 311 S.E.2d 540, 547-48 (1984).

¶ 14 But our Supreme Court has recognized that a single statement to the defendant "[t]hat if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative [,]" was sufficient to render a confession involuntary because it was made "by a person in authority . . . which gave defendant a hope for lighter punishment." *State v. Fuqua,* 269 N.C. 223, 228, 152 S.E.2d 68, 72 (1967). However, in a different case, our Supreme Court held that a similar statement made to a defendant did not render that defendant's confession involuntary. *State v. McCullers*, 341 N.C. 19, 28, 460 S.E.2d 163, 168 (1995). Though these decisions seem contradictory, the totality of the circumstances in the cases differed.

¶ 15 In the case at bar, based on the totality of circumstances and our understanding of Supreme Court precedent, we conclude Defendant's confession was voluntary. Although the interrogating officers discussed the kinds of sentences Defendant might receive for various homicide crimes, Defendant was also told if he wanted to talk, he could; that the officers had no control over the sentence he

ultimately received; and that he needed to tell the truth as a matter of conscience. While the officers used common interrogation techniques to elicit a confession from Defendant, such as appealing to his emotions, bringing up his family members and God, and pleading with him to tell the truth, Defendant ultimately chose to confess on his own accord after he failed the polygraph test that he voluntarily took.

¶ 16 For the foregoing reasons, we conclude after reviewing the entirety of the interrogation that Defendant's confession was voluntary.

B. Jury Instructions

¶ 17 Defendant argues that the trial court erred by not instructing the jury on second-degree murder as a lesser included offense. We disagree.

¶ 18 Our Supreme Court has held that "a lesser offense instruction [must] be given [only] if the evidence would permit the jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater." *State v. Strickland,* 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983). The test is whether there "is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). In other words, "[w]here 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." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (emphasis added).

¶ 19 Here, the State's principal witness testified there was a prior drug transaction where Defendant was shorted money by the victim. Based on this interaction, Defendant sent the victim threatening text messages. Because Defendant sent the victim threatening text messages days prior to the shooting, the jury determined that there was sufficient evidence to meet the first-degree murder elements of premeditation and deliberation. The State also found a firearm thrown over a drawbridge as the principal witness had suggested. Furthermore, Defendant's best friend also testified that Defendant had done it. There was no other testimony, so either the jury believed Defendant did it and had adequate basis for premeditation and deliberation or believed that Defendant was not guilty.

¶ 20 In addition to the State presenting evidence that was positive as to each element of the offense charged, Defendant introduced no contradictory evidence relating to any element of first-degree murder. Other than saying he did not commit the crime, Defendant offered nothing to rebut the State's evidence at trial. Nor did he suggest another person shot the victim. In view of the evidence supporting the element of premeditation, and in the absence of any contradictory evidence, the trial court did not err by not instructing the jury on second-degree murder.

III. Conclusion

¶ 21 Defendant's confession in this case was voluntarily made. And the trial court did not err by not instructing the jury on second-degree murder. Accordingly, we

conclude that Defendant received a fair trial, free of reversible error.

NO ERROR.

Judge MURPHY concurs.

Judge INMAN concurs in result only.

Report per Rule 30(e).