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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-903

Filed 02 May 2023

Pitt County, No. 19CRS54443

STATE OF NORTH CAROLINA

v.

SANTOS ANSELMO, Defendant.

Appeal by defendant from judgment entered 28 October 2021 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 21 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State-appellee.

Law Office of Mark L. Hayes, by Mark L. Hayes, for defendant-appellant.

GORE, Judge.

Defendant Santos Anselmo appeals his conviction of attempted first degree murder after the jury returned a guilty verdict. Defendant was sentenced to 157 months to 201 months imprisonment. On appeal, defendant argues the trial court erred as a matter of law by refusing to instruct the jury on a voluntary intoxication instruction. Alternatively, defendant argues the trial court plainly erred by failing

to provide this instruction despite defendant's failure to request this instruction. Upon review of the parties' briefs and the record, we determine defendant received a trial free from plain error.

I.

Defendant was in a dating relationship and lived with the victim, Francisca Jimenez-Osorio for multiple years, until their relationship ended in January 2019. Despite moving out and the relationship ending, defendant and Francisca continued to see one another intermittently on the weekends when defendant was not working as a field hand. On 23 June 2019, defendant went to Francisca's house and found her in her car with another man, whom he recognized as Eloy De La Luz-Cholula, another field hand. Defendant learned Eloy was now living with Francisca. According to defendant's testimony, he returned casserole dishes to Francisca and left. According to Francisca's and Eloy's testimony, defendant was very angry, began insulting Francisca, and would not leave until Francisca threatened to call the police. At this point defendant testified he went home and drank twenty-four beers throughout the afternoon.

Defendant testified he then returned to Francisca's house around 6:00 PM to gather some of his things. Upon defendant's arrival, Eloy testified defendant threatened to kill him, left the house, and then returned five minutes later. Eloy testified he saw defendant in the van holding a machete and that defendant climbed out of the van and chased after Eloy. Eloy barricaded himself in the house, while

Francisca ran toward the neighbor's house. Defendant then chased Francisca who tripped and fell. When Francisca fell, defendant caught up to her and began hitting her with the machete, which caused significant injuries to her hands and face. Eloy attempted to stop defendant by hitting him on the head with a bottle, but then ran back to the house when defendant started chasing Eloy with the machete. Defendant once again pursued Francisca, but by this time she had crawled to and hid in her neighbor's house. The neighbor, Emma Zarza, testified defendant threatened to kill her if she protected Francisca. Eloy then shouted at defendant he was calling the police, and defendant responded, "that's what I want," but then climbed into his van and sped away.

Defendant continued to flee until he lost control of his vehicle and crashed causing his van to catch on fire. Defendant then fled on foot and hid in an abandoned home until he was discovered and arrested a day later.

Conversely, defendant testified that when he returned to Francisca's house, Eloy was "com[ing] right at [him]" and he grabbed his machete because he was "intimidated." Defendant testified he kept machetes in his vehicle because he worked as a field hand. Defendant testified Francisca came towards him, tried to take the machete from him, and that her actions caused them to fight over the machete, which is how Francisca was injured. According to defendant, he never threatened Francisca, Eloy, or Emma; Eloy never hit him on the head with a bottle; Francisca

only fell because of the struggle over the machete; and once Francisca went to the neighbor's house, defendant drove away in his vehicle.

At the jury trial, defendant did not request a voluntary intoxication instruction, nor did he object to the lack of such instruction by the trial judge. Upon the returned verdict and subsequent conviction, defendant timely appealed the judgment.

II.

Defendant appeals of right under section 7A-27(b)(1). N.C. Gen. Stat. § 7A-27(b)(1) (2022). Defendant argues the trial court erred by not instructing the jury on a voluntary intoxication instruction, despite defendant's failure to request such instruction. In arguing this, defendant claims the issue is preserved because the trial court has a duty to provide this instruction because it is an affirmative defense like self-defense. In the alternative, defendant seeks plain error review for the unrequested voluntary intoxication instruction.

Defendant relies on multiple North Carolina Supreme Court cases for the proposition the trial court is required to give a jury instruction where there is competent evidence to support it even when the defendant does not request it. However, almost every case he relies upon, specifically involves a self-defense instruction. *See State v. Greenfield*, 375 N.C. 434, 847 S.E.2d 749 (2020), *State v. Lee*, 370 N.C. 671, 811 S.E.2d 563 (2018), *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), *State v. Marsh*, 293 N.C. 353, 237 S.E.2d 745 (1977), *State v. Todd*, 264 N.C.

524, 142 S.E.2d 154 (1965). Defendant attempts to build a bridge between self-defense instructions and the voluntary intoxication instruction by pointing to the fact both are affirmative defenses. However, our Supreme Court stated self-defense “is a substantial and essential feature of the case,” *State v. Coley*, 375 N.C. 156, 159, 846 S.E.2d 455, 457 (2020) (citation omitted), whereas just recently in *State v. Meader*, the Court stated, “[T]he doctrine [of voluntary intoxication] should be applied with great caution.” 377 N.C. 157, 162, 856 S.E.2d 533, 537 (2021) (alteration in original) (citation omitted).

Defendant boldly and inaccurately suggests that *Greenfield* and these other Supreme Court cases, “stand[] for the proposition that if a defendant presents competent evidence of an affirmative defense, the trial judge must instruct on that defense even if the defendant does not specifically request it.” This is an inaccurate statement of the law. Our Supreme Court in each case specifies it is a self-defense instruction that “is a substantial and essential feature of the case,” which triggers the trial court’s action rather than any affirmative defense. *Coley*, 375 N.C. at 159, 846 S.E.2d at 457. Since defendant failed to request the voluntary intoxication instruction and gave no objection regarding this defense, we consider defendant’s claim under plain error review.

The plain error standard provides a criminal defendant with an avenue for appellate review “to alleviate the potential harshness of preservation rules.” *State v. Lawrence*, 365 N.C. 506, 514, 723 S.E.2d 326, 332 (2012). In such situations, this

Court reviews the issue to determine if “the error in the trial court’s jury instructions [is] so fundamental as to amount to a miscarriage of justice or [one] which probably resulted in the jury reaching a different verdict than it otherwise would have reached.” *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (internal quotation marks and citations omitted).

Our Supreme Court previously defined what a defendant must produce for a trial court to give a voluntary intoxication instruction. It stated:

A defendant must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form the specific intent The evidence must show that at the time of the crime the defendant’s mind and reason were so completely intoxicated and overthrown as to render his utterly incapable of forming specific intent. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. There must be some evidence tending to show that the defendant’s mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan. A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol . . . has the burden of producing evidence, or relying on evidence produced by the State, of his intoxication. Evidence of mere intoxication . . . is not enough to meet defendant’s burden of production.

Meador, 377 N.C. at 162, 856 S.E.2d at 537 (cleaned up). Consistent with this cautionary application, the trial court should not offer the voluntary intoxication instruction even when the defendant is “excited, intoxicated and emotionally upset, [because they could] have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree.” *State v. Vaughn*, 324 N.C. 301, 308, 377 S.E.2d 738, 742 (1989).

A review of the evidence on the record suggests defendant was bold and impulsive in his attack and flight, and it is very possible intoxication inspired the events that took place. But defendant failed to show drinking 24 beers over a period of hours caused him to be so intoxicated it made him “utterly incapable of forming specific intent.” *Meador*, 377 N.C. at 162, 856 S.E.2d at 537. Defendant made threats to kill Eloy multiple times when he returned to the house, drove away in his car, and returned five minutes later. Eloy testified he saw defendant in the van with the machete when he arrived, as did the neighbor in her testimony. The neighbor’s testimony corroborates with Eloy’s and Francisca’s testimonies. While defendant’s testimony varies, his memory of the incident is detailed enough to suggest his mind was not overcome by intoxication.

While it is undoubtedly possible alcohol may have played a role in the rage defendant displayed, the controlled manner in which defendant attacked Francisca and Eloy, the multiple times defendant left and returned, and defendant’s threats to kill them, reveal a man consumed with anger who had not “lost [his] capacity to think and plan.” *Meador*, 377 N.C. at 162, 856 S.E.2d at 537. Reviewing the evidence on the record, the jury’s quick return of a verdict, and the high threshold for the inclusion of a voluntary intoxication instruction, we conclude a reasonable jury would not have returned a different verdict with the additional instructions. *See Id.* at 165–66, 856 S.E.2d at 539 (Hudson, J., dissenting) (discussing the facts presented that she believed were substantial for the inclusion of a voluntary intoxication instruction, yet

the majority still determined the trial court did not err in refusing to give the voluntary intoxication instruction); *State v. Hunt*, 345 N.C. 720, 727–28, 483 S.E.2d 417, 422 (1997) (discussing how defendant drank multiple half cases of beer, liquor, and smoked marijuana, yet the Court determined although defendant was intoxicated, he could still form a “deliberate and premeditated purpose to kill”).

The trial court did not err by failing to *sua sponte* include a voluntary intoxication instruction. Accordingly, we discern no error.

III.

For the foregoing reasons, we determine the trial court did not err in its omission of the voluntary intoxication instruction to the jury. Accordingly, defendant received a trial free from plain error.

NO ERROR.

Chief Judge STROUD and Judge HAMPSON concur.

Report per Rule 30(e).