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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1010

Filed 19 September 2023

Transylvania County, Nos. 19 CRS 214, 19 CRS 216, 19 CRS 217, 19 CRS 51397

STATE OF NORTH CAROLINA

v.

DAVIEYON DEVALL HOPKINS, JR.

Appeal by Defendant from judgments entered 4 April 2022 by Judge Joseph N. Crosswhite in Transylvania County Superior Court. Heard in the Court of Appeals 9 August 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Thomas Spangler, for the State.*

*Mark L. Hayes, for the Defendant.*

WOOD, Judge.

Davieyon Devall Hopkins, Jr. (“Defendant”) appeals from a judgment finding him guilty of attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, attempted first-degree murder, and first-degree murder. For the foregoing reasons, we hold there was no plain error committed in the trial court’s jury instructions and no error in the trial court’s verdict sheet for

first-degree murder.

### **I. Factual and Procedural Background**

Ebony Wynn (“Ms. Wynn”) and Montarius Winn (“Mr. Winn”) devised a scheme to rob the owners of a restaurant where Ms. Wynn worked. The pair recruited Defendant, half-brother to Mr. Winn, to carry out their plan. As Mr. and Mrs. Shelton, the elderly owners of the restaurant, walked out of the restaurant on the night of 17 August 2018 with the day’s receipts, Defendant approached the couple, wielded a gun, and yelled three times, “give me your money!” Defendant was wearing dark skinny pants, a dark hoodie, and tennis shoes. Appearing not to hear Defendant, Mr. Shelton responded by saying, “what?” In response, Defendant fired three shots, hitting Mr. Shelton once in the abdomen and narrowly missing Mrs. Shelton’s head. Defendant ran away without taking the bag containing the day’s receipts and jumped into a vehicle driven by Mr. Winn.

Severely injured, Mr. Shelton was evacuated by helicopter to a hospital. Mr. Shelton underwent surgery, was placed in a medically induced coma and on a ventilator. Approximately one month later, Mr. Shelton was transferred to hospice care, where he died within a few days of his arrival without ever regaining consciousness.

On 10 June 2019, Defendant was indicted for attempted first-degree murder, robbery with a dangerous weapon, felony conspiracy to commit robbery with a dangerous weapon, and first-degree murder. On 29 March 2022, Defendant was tried

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by a jury in superior court in Transylvania County. During trial, Ms. Wynn and Mr. Winn both testified for the State, along with a third alleged conspirator, Kaitlin Hall (“Ms. Hall”). The witnesses testified Mr. Winn and Ms. Hall drove with Defendant to the restaurant. Ms. Hall testified they dropped off Defendant near the restaurant, drove around the area, and then returned to the drop-off point after they heard gunshots. Mr. Winn testified Defendant got into the car and said, “I shot. I shot[,]” then, “I shot him. I had to.”

During the jury instructions charge conference, the court asked defense counsel if he had reviewed “the verdict sheet for the murder charge.” The court stated that on the verdict sheet “[i]t will be guilty of first-degree murder either under malice murder or under the felony murder rule. The second choice for the jury is going to be guilty of second-degree murder. The third choice is going to be not guilty.” The trial court specifically asked defense counsel: “Are you satisfied with the verdict sheets for that?” Defense counsel responded: “As to the charges, yes. I would object under *State versus Maze*<sup>1</sup> that the jury is required to acquit on first-degree before they consider second-degree.” In response, the trial court stated: “I believe what we have used here is we just used the pattern jury instruction as given to us from the form. If you find

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<sup>1</sup> Both parties agree that the transcript includes an error: there is no case captioned *State v. Maze*. Both parties agree that defense counsel was referring to *State v. Mays*, 158 N.C. App. 563, 582 S.E.2d 360 (2003), which is cited herein.

the defendant guilty of first-degree murder, stop here.” Defense counsel then acquiesced to a verdict sheet consistent with the court’s ruling.

When reviewing the proposed jury instructions during the charge conference, the trial court noted that for the substantive charges, “I have 206.14 [pattern jury instructions], first-degree murder to include second-degree murder. And then we have the final mandate on that.” After reviewing the final edition of the jury instructions, defense counsel stated for the record that he was satisfied with those charges. Defendant did not object to any other portion of the jury instructions.

On 4 April 2022, the jury found Defendant guilty of attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, attempted first-degree murder, and first-degree murder. For the attempted first-degree murder conviction, Defendant was sentenced to 144 months to 185 months, which would begin at the expiration of the sentence imposed for felony conspiracy. The court arrested judgment on the attempted robbery and conspiracy to commit robbery convictions and consolidated both with the first-degree murder sentence for life imprisonment without parole. Defendant gave oral notice of appeal in open court after sentencing.

## **II. Analysis**

On appeal, Defendant argues the trial court erred in instructing the jury it could not consider second-degree murder until it passed on first-degree murder. According to Defendant, a jury must be allowed to consider second-degree murder

independent of and prior to its consideration of first-degree murder. Defendant contends the jury was not permitted to properly consider a verdict of second-degree murder in his present case. We disagree.

Normally, jury instructions, when properly objected to, “are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). However, Defendant only objected to the verdict sheets for the charge of first-degree murder and its lesser included charges. Defendant did not object to any other portion of the jury instructions. Consequently, we review the contested jury instructions, not including the verdict sheet for first-degree murder, under the plain error standard. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983); N.C. R. App. P. 10(a)(4).

For error to constitute plain error, a defendant must show:

a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (cleaned up).

Defendant argues the trial court erred by instructing the jury they must first acquit him of first-degree murder before moving to the charge of second-degree murder because the facts in his case are similar to *State v. Mays*. In *Mays*, this Court interpreted N.C. Gen. Stat. § 15A-1237(e), which states that “[i]f there are two or

more offenses for which the jury could return a verdict, it may return a verdict with respect to any offense, including a lesser included offense on which the judge charged, as to which it agrees.” *Mays*, 158 N.C. App. at 569, 582 S.E.2d at 364. Defendant argues the trial court erred in *Mays* when it instructed the jury:

[y]ou would not reach the question of whether or not the defendant is guilty of murder in the second[-]degree until all twelve of you agree and are so satisfied that the answers to the first two issues [whether defendant is guilty of premeditated murder or felony murder] are no and the State has failed to prove beyond a reasonable doubt the defendant is in fact guilty of murder in the first[-]degree.

*Id.* This Court held such language constituted an “acquit first” instruction and was erroneous. *Id.* at 575, 582 S.E.2d at 368.

In the present case, the court instructed the jury: “[i]f you do not find the defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation and if you do not so find the defendant guilty of first-degree murder under the felony murder rule, you must determine whether the defendant is guilty of second-degree murder.” Defendant argues “[t]he use of the conditional word ‘if’ made it clear that the jury would only address second-degree murder ‘if’ it first acquitted on first-degree murder.”

The State aptly argues Defendant has failed to preserve this error on appeal because there is no record evidence of Defendant having objected to this instruction at trial. We agree. Therefore, our review is limited to whether the trial court’s jury instruction constituted plain error.

We first note the trial court's jury instruction follows the language in pattern jury instructions 206.14. The use of the word "if" serves the administrative purpose of informing the jury that if Defendant is found not guilty of the first-degree murder offense, they next are to determine whether Defendant is guilty of a lesser-included offense. In fact, *Mays* addresses this sentence of the pattern jury instructions. There, this Court determined such an instruction "simply directs a jury to consider the primary charge first before continuing onto the lesser included offense. It does not mandate that the jury unanimously find the defendant not guilty with respect to first[-]degree murder before turning to second[-]degree murder." *Id.* Thus, the trial court's use of the word "if" in the jury instruction did not constitute error, much less fundamental error.

Defendant further argues the first-degree murder verdict sheet contained an erroneous instruction so that the jury was instructed to "consider second-degree if it first acquitted as to first-degree. It was also corralled into that order of consideration by the verdict sheet." Defendant contends with the organization of the verdict sheet:

[i]t includes selections for guilty verdicts on first-degree murder based on malice/premeditation/deliberation and/or under the first-degree felony murder rule. Just below the first-degree murder section, [and] before the second-degree murder section, the verdict sheet includes this line: 'If you find the Defendant Guilty of First-Degree Murder STOP here.'

Defendant objects to the court's instruction to "STOP here" if it returned a verdict on first-degree murder, because he contends the jury interpreted it as an acquit first

instruction. We disagree.

Again, we note the pattern jury instructions pertaining to first-degree murder, 206.14, contains the contested verdict sheet. The verdict sheet used in Defendant's trial for first-degree murder was identical to the verdict sheet contained in the pattern jury instructions, 206.14, for first-degree murder. The trial court did not deviate from or modify the language used in the present case. We agree with the State's argument the verdict sheet "does not tell the jury where to start their deliberation, instead, it helps the jury foreperson avoid making a clerical mistake by indicating a finding of guilt for more than one crime for the same alleged actions."

While the verdict sheet indicates the jury returned a verdict of guilty of first-degree murder by answering "yes" to a guilty verdict under the first-degree felony murder rule but left blank a verdict on the basis of malice, premeditation, and deliberation, we can infer the jury found Defendant guilty of first-degree murder beyond a reasonable doubt on the basis of felony murder. The jury followed the trial court's instructions by determining Defendant guilty of first-degree murder beyond a reasonable doubt; therefore, it was proper for the jury to leave blank the verdict section for "guilty of second-degree murder."

### **III. Conclusion**

Accordingly, for the foregoing reasons we conclude the trial court did not commit plain error by charging the jury utilizing 206.14 patterned jury instructions for first-degree murder and did not err by utilizing the verdict sheet for first-degree



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murder under the 206.14 patterned jury instructions. Therefore, we hold Defendant received a fair trial free from error.

NO ERROR.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).