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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-836

Filed 4 June 2024

Harnett County, No. 18CRS53832

STATE OF NORTH CAROLINA

v.

TOBY MITCHELL MCDUFFIE, JR., Defendant.

Appeal by defendant from judgment entered 14 October 2022 by Judge Charles W. Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 14 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco J. Benzoni, for the State-appellee.

Jarvis John Edgerton, IV for defendant-appellant.

GORE, Judge.

Defendant, Toby Mitchell McDuffie, Jr., appeals his second-degree murder conviction. Defendant was sentenced to 317 months minimum and 393 months maximum imprisonment. Defendant argues the trial court erred by refusing to include a jury instruction for the lesser included offense of involuntary manslaughter. Upon review of the briefs and the record, we conclude the trial court did not err.

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I.

On 24 October 2018, Desmond Dowdy (“decedent”) was living with his girlfriend, Brandy America (“America”) in her mobile home at the Shady Grove Mobile Home Park. America previously dated and had a child with Marque Smith (“Smith”). Defendant also lived in the same mobile home park and was familiar with decedent, America, and Smith. The night prior to the date of the incident, America testified that decedent assaulted her. America testified that Smith was made aware of this assault and possibly defendant as well.

On the day of the incident, America’s mother, Violet Reed (“Reed”) drove with America and picked up Smith to bring him to America’s mobile home. Soon after, both women drove decedent to the mobile home where Smith was waiting. America testified at trial she thought decedent “might’ve needed his ass whooped for putting his hands on [her]” in response to a question about bringing decedent to be confronted by her ex-boyfriend. Decedent ran from the mobile home upon encountering Smith, and Smith chased him to a field within the mobile home park. Smith testified he and decedent began fighting in the field. The testimony varies at this point as to how and when defendant appeared, but at some point, defendant began beating up decedent. America and Reed testified they saw defendant beating decedent by punching him, kicking him, and placing him in a headlock.

There were multiple versions of the details surrounding the incident as to who left in vehicles, or on foot, and when they returned. However, the compilation of

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reports of defendant's attack against decedent overlapped and included: defendant slamming decedent around; decedent covered in blood and a lot of blood everywhere; Smith telling defendant, "this is extreme"; defendant grabbing decedent by the face and dragging him; defendant slamming decedent to the ground and jumping on him; defendant hitting and kicking decedent in the head and chest; multiple eyewitnesses shouting at defendant to stop because of the beating and concern decedent would be killed; two eyewitnesses testifying they overheard defendant state he was going to kill decedent; and multiple eyewitnesses testifying to defendant beating decedent by punching, kicking, stomping on him, pausing and resuming the aggression.

America testified she sent Smith to break up the fight because of her concern that defendant would kill decedent. America further testified Smith did break up the fight and that as she drove away, she "guessed" defendant left, but she did not know where he went. She last saw decedent knocking on mobile home doors and staggering and falling. America also testified defendant appeared drunk at the time because of his slurred speech, and that he typically appeared drunk when she saw him in the neighborhood. America testified she was also intoxicated that afternoon. Decedent was pronounced dead later that day; the medical examiner testified at trial that decedent died of multiple "blunt force impacts."

Defendant was charged with first-degree murder and conspiracy to commit first-degree murder. The State voluntarily dismissed the charge for conspiracy to commit first-degree murder prior to trial. During the charge conference, defendant

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sought inclusion of an involuntary manslaughter jury instruction, but the trial court denied this request. The trial court instructed the jury on first-degree murder and the lesser-included offense of second-degree murder. The jury returned a guilty verdict for second-degree murder. On 14 October 2022, defendant was convicted of second-degree murder and sentenced to 317 months minimum to 393 months maximum imprisonment. Defendant timely appealed in open court.

II.

Defendant appeals of right pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444(a). Defendant seeks review of the trial court's denial of his requested involuntary manslaughter jury instruction under de novo review or plain error review. Defendant objected and argued extensively for an involuntary manslaughter instruction during the charge conference, but he did not object after the trial court concluded its instructions to the jury. Defendant argues this was sufficient to preserve de novo review, but alternatively seeks plain error review should we determine otherwise. Our Supreme Court previously stated that a request for a specific jury instruction during the charge conference "suffices to preserve a challenge . . . for further consideration by the appellate courts." *State v. Benner*, 380 N.C. 621, 637 (2022). Therefore, defendant properly preserved this issue.

We review a trial court's denial of a request for an involuntary manslaughter "lesser-included offense instruction" de novo. *State v. Matsoake*, 243 N.C. App. 651, 657 (2015).

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A judge must instruct the jury upon a lesser included offense when there is evidence to support it. However, when the State's evidence is clear and positive with respect to each element of the offense charged, and there is no evidence showing the commission of a lesser included offense, the trial judge may refuse to instruct the jury upon that offense.

State v. Brown, 112 N.C. App. 390, 397 (1993), *aff'd*, 339 N.C. 606 (1995) (Mem) (cleaned up). Further, “[a] defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State’s evidence but not all of it.” *State v. Annadale*, 329 N.C. 557, 568 (1991).

Defendant does not argue as to the State’s clear and positive evidence, but instead, argues America’s testimony at trial contradicted evidence presented by the State. On this basis, defendant claims the trial court was required to include a jury instruction for the lesser included offense of involuntary manslaughter. Specifically, defendant relies upon America’s testimony that defendant “voluntarily . . . allowed the decedent to walk away.” We disagree.

Defendant was convicted of second-degree murder. “Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation.” *State v. Wilson*, 385 N.C. 538, 545 (2023) (internal quotation marks and citations omitted). Whereas “involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury.” *State v. Greene*, 314 N.C. 649, 651 (1985) (cleaned up). The distinction between second-degree murder and

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involuntary manslaughter is the existence or absence of malice. *State v. McCollum*, 157 N.C. App. 408, 412 (2003), *aff'd*, 358 N.C. 132 (2004).

Malice exists if the evidence demonstrates either:

(1) actual malice, a positive concept of express hatred, ill-will or spite;
(2) an act inherently dangerous to human life that is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief; or (3) that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

State v. Brichikov, 383 N.C. 543, 555 (2022) (internal quotation marks and citation omitted). To require a jury instruction for involuntary manslaughter, defendant must demonstrate a conflict in the evidence that would allow a rational jury to conclude he acted without malice. *See State v. Wright*, 304 N.C. 349, 351 (1981). Considering the evidence presented and viewing it in the light most favorable to defendant, defendant has not demonstrated a lack of malice in the evidence to justify inclusion of the involuntary manslaughter jury instruction.

The evidence overwhelmingly dispels the argument for an involuntary manslaughter jury instruction. Testimony received into evidence included the following: that defendant repeatedly punched decedent in the face, while held in a headlock; that blood was everywhere; that defendant stomped on decedent and jumped on him at different points; that defendant kicked decedent in the head and chest; that defendant grabbed decedent by the face and dragged him around; that defendant slammed decedent on the ground and dropped his knees down on his chest;

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and that defendant stated he was going to kill decedent. This evidence is indicative of more than one of the various forms of malice and overshadows any contradiction that defendant voluntarily walked away. In fact, review of the record and the specific testimony upon which defendant relies negates any voluntary or accidental claims made. In our review of the transcript—America sent Smith to pull defendant away from decedent to stop the beating. Accordingly, the trial court did not err by its denial of an involuntary manslaughter jury instruction.

III.

For the foregoing reasons, we conclude the trial court did not err by denying defendant's request for an involuntary manslaughter jury instruction.

NO ERROR.

Judges MURPHY and GRIFFIN concur.

Report per Rule 30(e).