NO. 22-970 DISTRICT 2

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Hyde County
	)	17CRS50135-36
ALFORNIA LEE ANDERSON, JR.,	)	
Defendant.	)	

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DEFENDANT-APPELLANT'S REPLY BRIEF

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DEFENDANT-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING MR. ANDERSON'S MOTION TO DISMISS.

Throughout its response to Mr. Anderson's brief, the State asserts "[t]o escape responsibility based on an intervening cause, the defendant must show that the intervening act was the sole cause of death." State's brief, p. 15 (quoting *State v. Welch*, 135 N.C. App. 499, 503 (1999)). If an act breaks the chain of causation, it becomes the "sole cause" of the death.

In *State v. Jones*, 290 N.C. 292, 297-98 (1976), the defendant moved to dismiss because the evidence did not establish "a causal relation between the victim's death and the gunshot wounds" inflicted by the defendant because the victim died from an infection. Our Supreme Court explained even improper treatment would not "excuse a wrongdoer unless the treatment or

neglect was *the sole cause of death*." *Jones*, 290 N.C. at 299 (emphasis in original). Our Supreme Court recognized, "[c]riminal responsibility arises only if [a defendant's] act caused or directly contributed to the death. The act of the accused need not be the immediate cause of the death. He is legally accountable if the direct cause is a natural result of the criminal act." *Jones*, 290 N.C. at 298 (cleaned up). Because the gunshot wound caused the injury that became infected, it directly contributed to the victim's death.

Likewise, in *Welch*, this Court held there was sufficient evidence defendant's stabbing of the victim was a proximate cause of death even though the victim died after refusing a potentially lifesaving blood transfusion. *Welch*, 135 N.C. App. at 500-501. This Court found it "clear from the evidence" that the victim declining a blood transfusion "was not 'the sole cause of death.'" *Id*. This Court explained, "all of [the victim's] injuries resulted from the stabbing inflicted by defendant. Thus, but for defendant's act, [the victim] would not have been in need of a blood transfusion." *Id*. at 503.

In both *Jones* and *Welch*, the defendant's act directly caused an injury that required medical treatment. The situation is significantly different here. Mr. Anderson's actions were followed by numerous actions taken by other people over which he had no control. His sale of drugs to Tiffany did not naturally and directly lead to Ryan and Sarah's deaths.

The State compares this case to *State v. Parlee*, 209 N.C. App. 144 (2011), but ignores a significant difference between this case and *Parlee*. State's Brief, p. 17. In *Parlee*, the defendant sold an Oxymorphone pill to Nate while Matt was standing next to Nate. *Id.* at 145. Defendant told Nate "not to take a whole pill at once." *Id.* "Nate split the Oxymorphone pill in half, ingested his half, and gave the other half to Matt." *Id.* Matt died from an acute Oxymorphone overdose. *Id.* at 146.

On appeal, the defendant argued "'the intervening cause and infliction of mortal wounds are the actions of Nate' because he split the Oxymorphone pill in half and handed half of it to Matt." *Parlee*, 209 N.C. App. at 148. After recognizing that "[t]he act of the accused need not be the immediate cause of death" if it "caused or directly contributed" to it, this Court found there was sufficient evidence to submit the proximate cause question to the jury. *Parlee*, 209 N.C. App. at 148.

In *Parlee*, the defendant *directly* sold the drugs to the Matt and Nate and Matt and Nate specifically asked for those drugs. Moreover, Nate's actions are simply not comparable to Tiffany's actions in this case. Here Tiffany arranged the sale. Tiffany actively deceived Ryan and Sarah after obtaining drugs. The State ignores that Mr. Anderson had no direct interaction with Ryan or Sarah. He did not tell them how to use the drugs because he did not tell them anything. He sold the drugs to Tiffany, an

experienced drug user and sometimes drug dealer. The State asserts Mr. Anderson "gave the drugs to Tiffany without telling her what was in the drugs or how strong they were." State's brief, p. 18. There is no question that Tiffany knew what the drugs were and how potent they were because she had used them just hours before. Mr. Anderson did not need to tell Tiffany what she already knew.

Unlike in *Parlee*, Tiffany's decision to take drugs from Mr. Anderson that she knew were not cocaine and to then give them to Ryan and Sarah while actively representing that the drugs were cocaine was an intervening act. Tiffany's act of giving Ryan and Sarah drugs different than they asked her for was sufficient to break the chain of causation. The trial court should have dismissed the second-degree murder charges because the State failed to prove proximate cause.

II. ALTERNATIVELY, THE TRIAL COURT PLAINLY ERRED BY NOT INSTRUCTING THE JURY ON INTERVENING ACTS OF OTHERS.

"[W]here the negligence of one or more persons combines or concurs in causing injury to another, the question of whether the intervening negligence of another tort-feasor will operate to insulate the negligence of the original tort-feasor is ordinarily a question for the jury." *State v. Tioran*, 65 N.C. App. 122, 125 (1983); *see also State v. Harrington*, 260 N.C. 663, 666 (1963). In *Tioran*, the defendant was charged with death by vehicle. *Id.* at 123. This

Court stated, "[t]here was evidence in the trial tending to show that [another's] negligence followed defendant's negligence. Under such circumstances, it was for the jury to determine whether [another's] negligence was such as to break the causal connection between defendant's negligence and thus become the proximate cause of the victim's death, and defendant was entitled to have the jury so instructed." *Id.* at 125; *see also Harrington*, 260 N.C. at 666 ("[t]he defendant is entitled to have the jury consider, on the question of proximate cause, whether the conduct of [another driver and the victims], or both together, was the proximate cause of the death.").

Nothing in *Tioran* states that a defendant must show that his actions in no way contributed to the death for the jury to be instructed on the intervening acts of others. As succinctly stated in the pattern jury instruction, "A natural and continuous sequence of causation may be interrupted or broken by the negligence of a second person. … Under such circumstances, the negligence of the second person, not reasonably foreseeable by the first person, insulates the negligence of the first person and *would be the sole proximate cause* of the [injury]." N.C. P.J.I. – Civil 102.65 (emphasis added). In *Tioran*, there was no dispute that the defendant's actions contributed to the victim's death since the victim was struck by the defendant's car.

The State's reliance on *State v. Welch*, 135 N.C. App. 499 (1999), and *State v. Bethea*, 167 N.C. App. 215 (2004), to defeat Mr. Anderson's argument that the jury should have been instructed on intervening causes is misplaced. State's brief, pp. 22-23. *Welch* addressed only the sufficiency of the evidence supporting the murder conviction which is distinct from the question of whether the evidence supports a jury instruction. 135 N.C. App. at 502. Indeed, in *Welch*, the court instructed on "intervening agency and insulating acts" related to proximate cause. *Id*. In *Bethea*, this Court concluded there was no evidence from which a "reasonable person" could conclude that another's decisions and actions "so entirely intervened in or superseded the operation of defendant's reckless flight and wanton traffic violations as to constitute the sole cause of the victim's death." *Bethea*, 167 N.C. App. at 222.

Unlike *Bethea*, the evidence in the present case does support such an instruction. Here, the jury heard uncontested evidence from Tiffany that Ryan asked her for cocaine, that she gave him what she knew was heroin, and that she did not tell him it was heroin because she wanted to steal some of it for her own personal use. Tiffany had the opportunity to be honest with Ryan about what she gave him when he questioned why he got so little for the price he paid. But she said nothing. There was also evidence that Ryan and Sarah did not use heroin and the jury could have reasonably inferred that they would not have taken the drugs if Tiffany had told them it was

heroin. Based on this evidence, a reasonable juror could have concluded that Tiffany's actions intervened and entirely superseded Mr. Anderson's act of selling Tiffany drugs.

The State mistakenly asserts Mr. Anderson "does not argue that the evidence supported an instruction that another act other than his own was the 'sole cause of death' which he acknowledges is the controlling standard." State's Brief, pp. 22-23 (citing Defendant's Brief, p. 16). Mr. Anderson argued that Tiffany, Ryan, and Sarah's actions were proximate, intervening causes of Ryan and Sarah's deaths. Defendant's Brief, pp. 15-16. When another's act intervenes, it becomes the sole proximate cause of death. Whether Mr. Anderson's alleged act of selling drugs to Tiffany was a proximate cause of Ryan and Sarah's deaths or whether the intervening acts of Tiffany, Ryan, and Sarah, or some combination thereof, became the sole cause proximate cause for Ryan and Sarah's deaths was a question for a properly instructed jury.

III. THE TRIAL COURT PLAINLY ERRED BY NOT INSTRUCTING ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER WHEN THE EVIDENCE OF MALICE WAS IN CONFLICT.

The State argues that no instruction on involuntary manslaughter was necessary. Because the evidence supported the instruction on the lesser included offense, the instruction should have been given.

First, the State asserts "there was no conflict" on the evidence of malice. State's Brief, p. 23. This is not correct. When assessing the evidence in support of an instruction all evidence must be taken in the light most favorable to Mr. Anderson. *State v. Brichikov*, 382 N.C. 543, 553 (2022). All reasonable inferences from that evidence must be drawn in his favor. *Cf. State v. Chevallier*, 264 N.C. App. 204, 214 (2019) ("In determining whether the trial evidence adduced was sufficient to instruct on a particular theory of criminal liability, we review the evidence and any reasonable inference from that evidence in the light most favorable to the State.").

The State contends, "there is no dispute that [Mr. Anderson] watched Kendrick almost die from using these drugs mere hours before selling them to Tiffany to give to Ryan." State's Brief, pp. 26-27. But Thomas testified he saw Tiffany at Joanne's house *before* Kendrick overdosed. He stated he did not see her any more after that. Tpp. 633-34. Tiffany said Kendrick was "in the chair passed out" the second time she went to buy heroin. Tpp. 508-09. There was a conflict in the evidence regarding the timing of the overdose and the timing of the sale to Tiffany.

The jury could have believed that Mr. Anderson sold Tiffany the drugs she gave to Ryan before Kendrick overdosed. "The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial -- determination of the truth." *State v. Chul Yun Kim*, 318 N.C.

614, 621 (1986). "[T]he jury need not accept all or none of either the state's or the defendant's evidence. It may believe only part of the evidence on either or both sides." *State v. Jones*, 304 N.C. 323, 331 (1981). "[T]he court should instruct the jury with regard to any lesser included offense *supported by any version of the evidence*." *Id.* (emphasis in original). The jury could have believed that Mr. Anderson sold the drugs to Tiffany before Kendrick overdosed.

Relatedly, in seeking to distinguish *State v. Barnes*, 226 N.C. App. 318 (2013), which was discussed in Mr. Anderson's brief, the State points out that "*Barnes* also mentions no evidence the fatal overdose was caused by the same batch of drugs." State's Brief, p. 28. Here, there was no testimony that the drugs Kendrick ingested came from the same bag, the same package, or the same "batch" as the drugs sold to Tiffany. Rather than distinguishing *Barnes*, such evidence is also lacking here. Further, the jury was told that even if the drugs had come from the same batch, they might not have had the same potency. The toxicologist explained adulterated fentanyl sold on the streets is a "bumpy material … not … mixed thoroughly. It's not like they blend it, mix it with a kitchen aid mixer, to make sure they're all evenly mixed." Tp. 341. Taking the evidence in the light most favorable to Mr. Anderson, it did not show that Kendrick ingested the "same" drugs that Tiffany gave to Ryan.

The State further argues, "the evidence is uncontroverted that [Mr. Anderson] knew he was giving a completely different drug to Ryan without warning him about it." State's Brief, p. 26. But this argument ignores the uncontradicted evidence that Mr. Anderson had no direct contact with Ryan. Tiffany arranged the sale and communicated with Ryan. The uncontradicted evidence also showed that Tiffany knew the drug she sold to Ryan was not cocaine. While the jury could have concluded Mr. Anderson should have known he was selling a dangerous drug *to Tiffany*, who demanded that Mr. Anderson give her "the dope," they also could have concluded that Tiffany's failure to tell Ryan she was giving him heroin did not reflect Mr. Anderson's state of mind when he gave the drugs *to Tiffany*. The evidence that Mr. Anderson may have knowingly sold something other than cocaine *to Tiffany* does not show that Mr. Anderson knew Tiffany would not tell Ryan that the drugs were not cocaine. From the evidence, the jury could have inferred that Mr. Anderson acted with "thoughtless disregard of consequences or a heedless indifference to the safety and rights of others," *State v. Weston*, 273 N.C. 275, 280 (1968), because he knew Tiffany was going to pass the drugs on to Ryan even though he had no control over whether Tiffany would tell Ryan she brought him something other than cocaine.

"The distinction between recklessness indicative of murder and recklessness associated with manslaughter is one of degree rather than

kind." *State v. Rich*, 351 N.C. 386, 393 (2000) (citation, quotation omitted). While the State contends the evidence "went beyond 'heedless indifference' to the safety of others," it was the province of a properly instructed jury to determine if Mr. Anderson's actions rose to the degree of recklessness required to convict him of second-degree murder. *See Barnes*, 226 N.C. App. at 330 ("Such a distinction [in degree] is properly left to the jury to decide.").

The State next argues that Mr. Anderson's closing argument limited the "the jury's decision … to a factual determination of whether Ryan and Sarah ingested Defendant's provided drugs and whether those drugs, and not alcohol and cocaine, caused their deaths." State's Brief, p. 27. But this argument reflects a fundamental misunderstanding of how trials work. The State bears the burden of proof on each element of the offense. *In re Winship*, 397 U.S. 358, 361-62 (1970). An argument by defense counsel that only addresses some facts in dispute cannot limit the jury's consideration of all facts in the case and cannot relieve the State of its burden. *Cf. State v. Golder*, 374 N.C. 238, 246 (2020) (appellate court must consider if there is substantial evidence for "every element of each charge" even if the defense only argued about one element at trial).

The State's reliance on *State v. Brewer*, 325 N.C. 550 (1989) for its argument that an "all or nothing" defense limits the jury's factual determinations is misplaced. State's Brief, pp. 25, 27. In *Brewer*, the

defendant was convicted of first-degree murder under a felony murder theory with discharging a weapon into occupied property as the underlying felony. *Id.* at 554, 574. The defendant presented an alibi defense where he denied being in the area of the fatal shooting but admitted to shooting at stop signs in another area around the time of the killing. *Id.* at 557-58.

On appeal, the defendant argued that the trial court erred by denying his request for an instruction on involuntary manslaughter. *Id.* at 574. The defendant argued "that since the jury could have believed the State's assertion that he was at the [victim's] residence on the night of 17 March 1987, but also could have believed that portion of his testimony that he was intending to shoot only at street signs (although in an entirely different location), he is entitled to an instruction on involuntary manslaughter." *Id.* at 576. Our Supreme Court disagreed and stated there was "no evidence to support the submission of involuntary manslaughter." *Id.*

Our Supreme Court explained that "where a defendant's sole defense is one of alibi, he is not entitled to have the jury consider a lesser offense on the theory that jurors may take bits and pieces of the State's evidence and bits and pieces of defendant's evidence and thus find him guilty of a lesser offense not positively supported by the evidence." *Brewer*, 325 N.C. at 576-77. Applying that rule to the facts of the case, the Court stated, "[b]ecause defendant limited himself to the defense that he was not in Rural Hill [where

the victim lived] at any time that night, the jury's decision was limited to a factual determination of whether defendant was in Rural Hall shooting into houses, as the State contends, or whether he was in the vicinity between Winston-Salem and Kernersville shooting at street signs, as defendant asserts." *Id.* at 578.

The State relies solely on *Brewer* for the idea that in "an all or nothing circumstance, an instruction on involuntary manslaughter is not supported by the evidence and the sole issue for the jury is whether the defendant did the act, not whether he committed it in a way that makes him guilty of a lesser offense." State's Brief, pp. 25. Relying solely on *Brewer*, the State asserts, that based on Mr. Anderson's closing argument, "the jury's decision was limited to a factual determination of whether Ryan and Sarah ingested [Mr. Anderson's] provided drugs and whether those drugs, and not alcohol and cocaine, caused their deaths." State's Brief, p. 27. This argument simply does not flow from *Brewer* given that there is no alibi defense here. The argument that *the evidence* did not show Ryan and Sarah ingested the drugs they got from Tiffany did not preclude the jury from considering if *the evidence* demonstrated malice when there was conflicting evidence on that element of second-degree murder.

Based on the State's own argument, Mr. Anderson's defense was that Sarah and Ryan had not ingested the drugs—not that he did not sell the

drugs to Tiffany. This was not an all or nothing defense. The jury was told it had to find Mr. Anderson acted with malice when "his unlawful distribution of that heroin and fentanyl" caused Ryan and Sarah's deaths and that "[m]alice arises when an act that is inherently dangerous to human life 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." Tpp. 795, 797. Mr. Anderson's state of mind when he sold the drugs was not clearly and unequivocally established by the State for the reasons discussed above. Since there was conflicting evidence on malice, the jury should have been instructed that if it did not find recklessness rising to the level of malice, it could consider if Mr. Anderson was guilty of involuntary manslaughter.

IV. THE TRIAL COURT ERRED BY FAILING TO INTERVENE IN THE STATE'S CLOSING ARGUMENT ABOUT SENDING A MESSAGE TO OTHER "PEDDLERS OF THIS POISON."

The State asserts, "Asking the jury to send a message to the community is not equivalent to arguing that the jury should convict defendant because of the effect his conviction would have on others." State's Brief, p. 32. Yet the prosecutor directly asked the jury to consider the effect a guilty verdict would have not only on Mr. Anderson but also on other alleged drug dealers:

> [S]end a message to the other three or four names of people or more that sell drugs in this county that came from this witness stand: If you continue to do that and somebody dies, then the State is coming after you because they can.

Tpp. 773-75. "[T]he prosecution may not argue the effect of defendant's conviction on others, *i.e.*, general deterrence[.]" *State v. Abraham*, 338 N.C. 315, 339 (1994). General deterrence is "a goal of criminal law generally, or of a specific conviction and sentence, to discourage people from committing crimes." BLACK'S LAW DICTIONARY 460 (7th ed. 1999). The prosecutor's argument neatly falls into an argument for general deterrence under this definition. He asked for a conviction not only based on the evidence and the law, but also on the effect the conviction would have on others.

For the reasons argued in the opening brief, the prosecutor's remarks render the convictions fundamentally unfair.

CONCLUSION

Mr. Anderson requests that this Court vacate his convictions. In the alternative, Mr. Anderson requests that this Court remand for a new trial.

Respectfully submitted, this the 19th day of June, 2023.

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CERTIFICATE OF COMPLIANCE WITH RULE 28

I certify Defendant-Appellant's Brief complies with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure as it is printed in thirteen-point Century Schoolbook and the body of the brief, including footnotes and citations, contains no more than 3,750 words as indicated by the word-processing program used to prepare the brief.

This the 19th day of June, 2023.

Electronically Submitted
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CERTIFICATE OF FILING AND SERVICE

I certify Defendant-Appellant's Reply Brief has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify Defendant-Appellant's Reply Brief has been served on Kristin J. Uicker, Special Deputy Attorney General, North Carolina Department of Justice, by electronic means by emailing it to kuicker@ncdoj.gov.

This the 19th day of June, 2023.

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