No. COA 24-492 sixteenth judicial district

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

)

v. ) From Durham County

)

LARRY JOSEPH HARWELL )

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DEFENDANT-APPELLANT’S BRIEF

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**ISSUES PRESENTED**

1. Did the trial court reversibly err by failing to instruct the jury on the lesser-included offense of involuntary manslaughter?
2. Did the trial court, through the clerk, reversibly err in polling the jury by failing to ask two jurors, Foreperson Wanda Parker and Juror #3 Alisha Grimes-Moody, whether the verdict returned in court accurately reflected their verdict as to Mr. Harwell?

**STATEMENT OF THE CASE**

On 5 October 2020, Defendant-Appellant Larry Joseph Harwell was indicted for first-degree murder, conspiracy to commit first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI). On 20 February 2023, the trial court allowed the State’s motion to join the charges against Mr. Harwell with similar charges against one co-defendant, Taylor Jones, while denying that motion as to a second co-defendant, Rashawn Harwell. (R pp 1, 4‑9, 12‑15; T pp 36‑43)

The charges against Mr. Harwell, as well as those against Mr. Jones, came on for trial at the 20 February 2023 Criminal Session of the Superior Court in Durham County before the Honorable Josephine Kerr-Davis, judge presiding. On 1 March 2023, the jury acquitted both Mr. Harwell and Mr. Jones of (1) first-degree murder; (2) conspiracy to commit first-degree murder; (3) Class B1 second-degree murder; and (4) AWDWIKISI. However, the jury found both Mr. Harwell and Mr. Jones guilty of Class B2 second‑degree murder based on a theory of “depraved heart” malice, with the jury writing by hand on the verdict forms that it found malice arising from an act “inherently dangerous to human life . . . [committed] w/o regard to human life[.]” (R pp 77, 79)

That same day, 1 March 2023, the trial court entered judgment on the jury’s verdicts. As to Mr. Harwell, the trial court imposed a presumptive-range sentence of 207 to 261 months of active imprisonment. And as to Mr. Jones, the trial court imposed a presumptive-range sentence of 238 to 298 months of active imprisonment. (R pp 85‑88)

Both Mr. Harwell and Mr. Jones entered oral notice of appeal in open court. (R pp 1, 89-90)

**GROUNDS FOR APPELLATE REVIEW**

Mr. Harwell appeals pursuant to N.C.G.S. §§ 7A-27(b) and 15A‑1444‑ from a final judgment of the Superior Court in Durham County.

**STATEMENT OF THE FACTS**

On 28 February 2023, the second-to-last day of Mr. Harwell’s joint trial with Taylor Jones, the parties met for the charge conference to determine which instructions should be provided to guide the jury’s deliberations and shape its possible verdicts. (T pp 1128-52) Both defendants were facing charges of first-degree murder for the death of Otha Ray Watson; conspiracy to commit that murder; and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) for the shooting of Kia Hatfield during the same incident. (R pp 4‑9; T pp 1139, 1150‑52) After the parties had discussed several other instructions, the trial court turned to the substantive offenses at issue. (T p 1139)

When asked about the submission of any lesser-included offenses, the State requested that the jury be instructed on first- and second-degree murder, but not voluntary or involuntary manslaughter. (T pp 1139-40) To explain its request, the State argued that the underlying incident, in which Mr. Harwell, Mr. Jones, and Rashawn Harwell[[1]](#footnote-2) fired several gunshots at the car occupied by Otha Ray Watson, involved intent and not just recklessness:

[THE STATE]: Let me see—because our perception and our evaluation of the evidence is that he wasn’t reckless—none of the defendants were recklessly discharging a gun. It just does not fit the offense charged. Yes. Their act was unlawful, but this is not just criminal negligence, this is taking a position, aiming at the victim in his car, and shooting, and I think that far surpasses any recklessness, carelessness, negligence and therefore involuntary is not even applicable in this situation. I think it will only confuse the jury and—and it’s not legally applicable to the facts we have.

(T p 1144) Shortly afterward, the State added:

[THE STATE]: And I’ll try to be very brief, Your Honor. . . . [T]here’s no evidence . . . that either defendant was talking to or arguing with or having any interaction directly with the victim which is what you would look for in a type of manslaughter and furthermore . . . . The car drove off and they shot after it. So, I don’t believe that any evidence existed that would substantiate the voluntary or involuntary manslaughter instruction.

(T p 1149)

Both Mr. Harwell and Mr. Jones objected to the trial court’s proposed instruction on only first- and second-degree murder, asking the trial court to instruct the jury on involuntary manslaughter (and at times requesting instructions on voluntary manslaughter as well). (T pp 1142‑51) To explain his request for an instruction on involuntary manslaughter, Mr. Harwell emphasized the fact that many rounds had been fired, but only a small number actually hit the car in which Mr. Watson was sitting:

[MR. HARWELL’S ATTORNEY]: There—it was a spray. Right? Bullet holes in cars across the street, in lamp posts, in it was all over the place. Right? And I think that that’s the whole idea of the unintentional part or the reckless part, that I feel like involuntary is implicated. So I mean—I think [the State’s position] would hold more water if there were 47 bullet holes in the car. There weren’t.

(T p 1145) Shortly afterward, Mr. Harwell’s counsel added:

But I think that just because of the sheer volume of shots that were fired, how many didn’t even—even touch the vehicle, I feel like that’s where we

kind of venture into the possibility that this is more of a careless and reckless act. Because look at where everything else landed, right? In a lamp post, in a sign. The sign is huge. Right? . . . So I think that’s what I would ask that if it is discretionary, the Court despite it not being required still put at least involuntary in there. Because like I said, involuntary would make sense. But that would be my request.

(T pp 1147-48)

The trial court ultimately sided with the State and concluded that it would “give the instructions with respect to first- and second-degree murder,” but that it would “not provide the instructions for voluntary [or] involuntary manslaughter[.]” (T pp 1150-51) The trial court added that both defendants’ objections to its instructions were “noted for the record.” (T p 1151)

In accord with its decision at the charge conference, the trial court went on to instruct the jury on both first- and second-degree murder, while omitting the requested pattern instructions on involuntary manslaughter. (T pp 1220-29) As to the malice required for second‑degree murder, the trial court instructed the jury as follows:

Second-degree murder differs from first‑degree murder, in that neither specific intent to kill, premeditation, nor deliberation are . . . necessary elements. In order for you to find the defendant guilty of second-degree murder, the State must prove beyond a reasonable doubt that the . . . the defendants unlawfully, intentionally, and . . . with malice . . . wounded the victim with a deadly weapon thereby causing the victim’s death.

Malice means not only hatred, ill will or spite . . . as it is ordinarily understood—to be sure, that is malice—but it also means a condition of mind which prompts a person to take the life of another intentionally or intentionally inflict some serious bodily harm, which proximately results in another’s death without justification, without excuse, or without just cause. Malice also arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life . . . and social duty and deliberately bent on mischief.

(T pp 1224-25)

The trial court thus submitted three potential theories of malice as the potential basis (or bases) for second-degree murder: (1) actual malice (“ill will or spite); (2) condition of mind malice (the “condition of mind which prompts a person to take the life of another intentionally”); and (3) depraved‑heart malice (malice inferred from the commission of an intentional “act which is inherently dangerous to human life” and “done so recklessly and wantonly as to manifest a mind utterly without regard for human life”). (T pp 1224-25) The trial court also explained that the jury was required to specify its theory of malice on the verdict sheet:

The verdict forms set out second-degree murder on the basis of the theories of malice. In the event that you should find the defendant guilty of second-degree murder, please have your foreperson indicate which theory or theories of malice you have found. You may find one or more of these theories, but you must do so unanimously.

(T p 1224)

Following the trial court’s initial instructions, the jury retired to deliberate. (T p 1231) After doing so for approximately 20 minutes, the jury asked whether it had to determine “whose bullet and gun actually killed the victim?”[[2]](#footnote-3) (T pp 1231‑33) In response and without objection from the parties, the trial court reinstructed on both first- and second-degree murder, as well as acting in concert. (T pp 1233-42) These instructions once again included all three theories of malice that could support a verdict of second-degree murder, and once again asked the jury to specify the theory (or theories) of malice that supported its verdicts. (T p 1240)

Following the trial court’s additional instructions, an overnight break, and the jury’s additional questions, the jury returned its verdicts. (T p 1259) After nearly a day of deliberations, which started around 3:18 p.m. on 28 February 2023 and concluded around 4:01 p.m. on 1 March 2023 (T pp 1231, 1259-60), the jury acquitted both Mr. Harwell and Mr. Jones of first-degree murder; conspiracy to commit first-degree murder; Class B1 second-degree murder; and AWDWIKISI. (R pp 77‑80) In contrast, the jury found each defendant guilty of second-degree murder based on a theory of depraved-heart malice. On each verdict sheet, the jury handwrote the basis for its verdict, specifying that it found only the existence of malice arising from the commission of an act “inherently dangerous to human life” undertaken “w/o regard for human life[.]” (R pp 77-80)

Once the jury returned its verdicts, and as the trial court was set to move on to sentencing, Mr. Jones asked the trial court to poll the jury and Mr. Harwell joined in the request. (T p 1261) In accordance with N.C.G.S. § 15A-1238, the trial court granted the defendants’ motion and polled the jury. At the start of the poll, the clerk, acting on the trial court’s behalf, questioned foreperson Wanda Parker as follows:

CLERK: Ms. Wanda Parker, you as the foreperson returned for your verdict as the following: The defendant in file number 20-CRS-1537 in the State of North Carolina versus Taylor Jones, verdict not guilty on the first count, not guilty on the second count. Is this your verdict and do you still assent there to?

FOREPERSON: Yes.

CLERK: Ms. Wanda Parker, as—you as the foreperson have returned for the following verdict in the State of North Carolina versus Taylor Jones in the file number of 20-CRS-54995 to be guilty of second-degree murder. Is this your verdict and do you still assent thereto?

(T p 1261) A short time later, the clerk then similarly polled juror Alisha Grimes-Moody:

CLERK: Ms. Grimes-Moody, the defendant, Taylor Jones, file number 20-CRS-1537, count 1, not guilty, count 2 not guilty. Is this your verdict and do you still assent thereto?

JUROR #3: Yes.

CLERK: Ms. Grimes-Moody, your foreperson has

returned for your verdict the defendant Taylor Jones in file number 20-CRS-54995, guilty of second degree—second-degree murder. Is this your verdict and do you still assent thereto?

JUROR #3: Yes.

(T pp 1263-64) The trial court, through the clerk, thus asked both Jurors Parker and Grimes‑Moody to confirm their verdicts concerning Mr. Jones, but did not ask about their verdicts regarding Mr. Harwell. (T pp 1261‑64)

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The charges that led to these proceedings stemmed from a late‑night shooting on 13 September 2020, next to the Cookout located in the 3600 block of Hillsborough Road in Durham, near Duke’s East Campus. (R pp 4‑9; T pp 350‑51)[[3]](#footnote-4) That night, a number of people met up in northern Durham for a recurring event called “Durham Meetz,” which was a type of social event that involved large and sometimes boisterous crowds “meeting up in large parking lots” with their vehicles, “doing donuts,” and “doing tricks,” as well as socializing, playing music, and dancing. (T pp 351, 416, 670, 757-58, 798) After police arrived at the North Durham location, the car meet moved to the parking lot near the Cookout on Hillsborough, where such events had taken place before. (T pp 336-37, 799)

Some time after the event had been relocated, two separate groups showed up to the new location in the Cookout parking lot. In one car, a rented red Dodge Journey, Mr. Watson arrived between 1:40 and 1:45 a.m. with his girlfriend Shamara Lewis‑Watson and several others. (Rule 9(d) Volume II of II, State’s Exhibit 2, 1:41-1:45)[[4]](#footnote-5); (T pp 796-800). Mr. Harwell, Mr. Jones, and Rashawn Harwell arrived separately. (T pp 350-51, 802) Mr. Harwell was wearing a red T-shirt, while Mr. Jones and Rashawn were wearing white. (T p 805)

A short time after both groups had arrived in the parking lot, Mr. Jones and Mr. Harwell walked up to Mr. Watson’s group and conflict arose. (T p 802) According to Ms. Lewis-Watson, Mr. Harwell, Mr. Jones, and Rashawn all wanted to get into a fistfight with Mr. Watson, with Mr. Harwell trying to get them “to come around the corner and fight.” (T pp 806-07) While all three wanted the fight to occur, the only participants who were “supposed to fight” were Rashawn Harwell and Otha Ray Watson. (T pp 807-08)

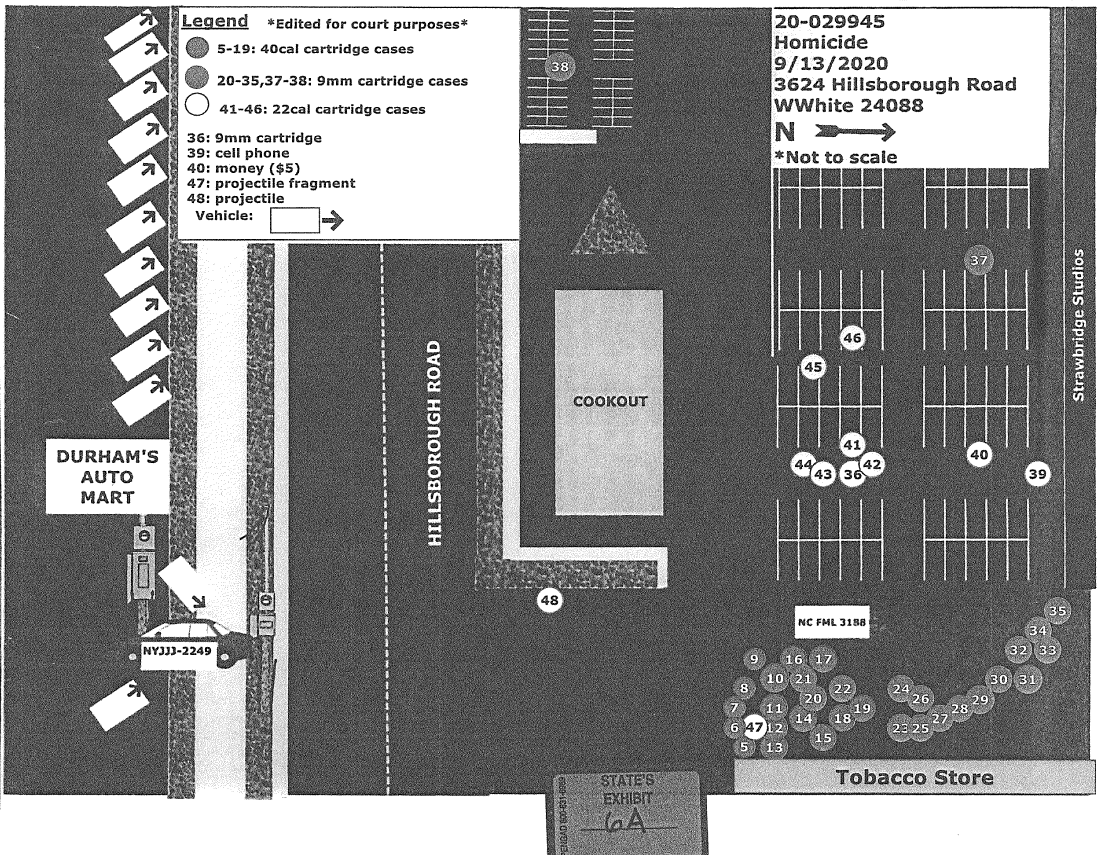
Ms. Lewis-Watson originally opposed their plan to fight, but after she saw Rashawn with a gun, she told Mr. Watson “[t]o get out of the car and fight” because “at this point it . . . was either going to be a fist fight or [a] shooting[.]” (T pp 808‑11) However, instead of getting out of the car to fight, Mr. Watson stepped on the gas and started to drive off in the Journey. (T pp 812-13)

The State described what happened next as “a barrage of gunfire.” (T p 353) Ms. Lewis-Watson heard “two shots go off”—likely fired by Rashawn near the driver’s side door (T pp 353, 1160)—followed by “a lot of shooting going on.” (T p 813) Video-recorded surveillance footage showed Mr. Harwell as one of two shooters standing a few feet behind the red Journey, firing several shots in the direction of the car as it drove off. (Rule 9(d) Volume II of II, State’s Exhibit 2, 2:01-2:02 a.m.)

In response to the initial barrage of gunfire, one or more others in the parking lot started to shoot as well. Mr. Harwell then turned and fired several shots back in that apparent direction before leaving the scene. (T pp 354‑55; Rule 9(d) Volume II of II, State’s Exhibit 2, 2:01‑2:02 a.m.) At some point during all of the shooting, Kia Hatfield, an unrelated bystander at the car meet who had never met Mr. Harwell or Mr. Jones, was struck by a bullet that caused serious and lasting injuries to her leg, hip, and knee. (T pp 355, 758-59, 766, 774) The shooting concluded in less than one minute. (T pp, 681, 1117; Rule 9(d) Volume II of II, State’s Exhibit 2, 2:01-2:02 a.m.)

After being shot, the red Journey continued out of the parking lot, crossed several lanes of Hillsborough Road, and crashed into a number of parked cars in the lot of the car dealership located across the street. (T pp 377, 465) Mr. Watson later died from a single gunshot wound to the back of the head that traveled “rightward and frontward and very slightly upward.” (T pp 864‑66); (Rule 9(d) Volume I of II, State’s Exhibits 45B and C, at 246-47).

In the investigation that followed, police recovered from the scene a large number of spent cartridge casings, bullets, and bullet fragments, more than 40 total. (T pp 511, 559, 966) These materials were recovered from all over the parking lot, not just where Rashawn, Mr. Jones and Mr. Harwell were standing near the tobacco store:



(Rule 9(d) Volume I of II, State’s Exhibit 6a, at 37). The spent cartridge casings and bullets were ultimately linked to seven different guns. (T pp 969-70, 1176-77)

Of the many gunshots fired on the scene and shown in the video, only two or three appeared to have hit the red Journey from the back, and only one hit Mr. Watson, thereby causing his death.[[5]](#footnote-6) (T pp 659-60, 864, 1180‑81) The remainder hit a number of other targets, including a light pole, a sign for a business, a Kia Forte, and at least two other cars, a white Lexus and a Nissan Altima, across the street at the auto dealership. (T pp 465, 476, 484‑87, 628, 631, 645, 662, 675‑76, 1160)

Following the close of the State’s case, the jury retired to deliberate. (T p 1231) After approximately a day of deliberations, the jury found Mr. Harwell and Mr. Jones guilty of second-degree murder based on a theory of depraved-heart malice, but acquitted them of everything else. (T pp 1231, 1259-60; R pp 77‑80) Both Mr. Harwell and Mr. Jones entered oral notice of appeal. (R pp 89‑90)

**ARGUMENT**

**I.** **The trial court reversibly erred by failing to instruct the jury on the lesser-included offense of involuntary manslaughter.**

The trial court is required to submit a lesser‑included offense when the evidence presented would allow the finder of fact to convict the defendant of only that offense. This determination views the evidence presented in the light most favorable to the defense. Accordingly, when there is *any* permissible view of the evidence that would allow the finder of fact to convict of only a lesser‑included offense, it must be given that option.

Here, Mr. Harwell was charged with first-degree murder, and while the trial court did provide instructions on second-degree, it denied his request to instruct the jury on the lesser-included offense of involuntary manslaughter. The trial court’s failure to provide the requested lesser‑included instruction constituted error because the evidence presented at trial, when viewed in the light most favorable to Mr. Harwell, would have allowed the jury to find him guilty of involuntary manslaughter rather than B2 “depraved-heart” murder.

The trial court’s failure to give the jury this option was not cured by the jury’s verdict of guilt for second-degree murder. The central difference between B2 “depraved heart” second-degree murder and involuntary manslaughter is the defendant’s mental state at the time of the homicide. As our Supreme Court has recently reaffirmed, the difference between the two mental states, and thus the two offenses, is a matter of degree rather than one of kind. And here, the jury returned close to the lowest guilty verdict possible—acquitting Mr. Harwell of first-degree murder; B1 second‑degree murder; conspiracy to commit first-degree murder; and AWDWIKISI—while handwriting on the verdict form that its verdict was based on the commission of an inherently dangerous act committed “w/o regard to human life.” The most plausible explanation for this outcome is that the jury determined that Mr. Harwell acted with some degree of recklessness, and not with the intent to kill.

Under these circumstances, the trial court’s error was prejudicial and therefore reversible. Had it been given the option, there is at least a reasonable possibility that at least that one juror would have found Mr. Harwell guilty of involuntary manslaughter, rather than second‑degree “depraved heart” murder. Accordingly, the lower court’s judgment should be vacated, and Mr. Harwell should be awarded a new trial.

1. **Preservation and standard of review.**

At the charge conference, the trial court said it would instruct the jury in line with pattern jury instruction 206.13, but that it “will not include voluntary and involuntary” manslaughter. (T pp 1141‑42) In response, Mr. Harwell specifically and repeatedly asked the trial court to instruct the jury on involuntary manslaughter. (T pp 1142‑43, 1147-48) In the alternative, Mr. Harwell asked the trial court to give the pattern instruction in full, including both voluntary and involuntary manslaughter. (T pp 1142‑43)[[6]](#footnote-7)

After continued discussion, the trial court rejected Mr. Harwell’s request and ruled that it would instruct the jury on first- and second‑degree murder, but not voluntary or involuntary manslaughter. (T pp 1150-51) This sequence of events was sufficient to preserve Mr. Harwell’s claim of instructional error for appellate review. *See, e.g.*, *State v. Benner*, 380 N.C. 621, 637 (2022) (“According to well-established North Carolina law, a party’s decision to request the delivery of a particular instruction during the jury instruction conference suffices to preserve a challenge to the trial court’s refusal to deliver that instruction to the jury for further consideration by the appellate courts regardless of the extent to which the relevant party does or does not lodge a subsequent objection.”); *see also* *State v. McLean*, 2024 N.C. App. LEXIS 627, \*10 (N.C. Ct. App. 6 August 2024) (“During the charge conference, Defendant requested the instruction [on a lesser‑included offense] be given, and thus, properly preserved the issue for review on appeal.”).

Where preserved, “the trial court’s decisions regarding jury instructions are reviewed *de novo* . . . .” *State v. Osorio*, 196 N.C. App. 458, 466 (2009). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Biber*, 365 N.C. 162, 168 (2011) (citation omitted).

1. **The trial court erred by failing to instruct the jury on involuntary manslaughter.**

“For over a century, [our Supreme Court has] held, specifically, that when there is evidence tending to support a verdict of guilty of an included crime of lesser degree than that charged, the trial court must instruct the jury that it is permissible for them to reach such a verdict if it accords with their findings.” *State v. Brichikov*, 383 N.C. 543, 553 (2022) (cleaned up). As a result, the submission to the jury of a lesser‑included offense is required whenever the “evidence presented at trial[, when] viewed in the light most favorable to the defendant, would permit a rational jury to acquit the accused of the greater charge and convict him or her of the lesser offense.” *Id.*

In contrast, “[t]he trial court may refrain from submitting the lesser offense to the jury only where the evidence is clear and positive as to each element of the offense charged and *no* evidence supports a lesser-included offense.” *State v. Lawrence*, 352 N.C. 1, 19 (2000) (cleaned up) (italics added); *accord* *State v. Wright*, 304 N.C. 349, 351 (1981) (explaining the trial court’s duty “requires the judge to charge upon a lesser included offense, even absent a special request therefor, whenever there is *some* evidence to support it” (italics in original)). Moreover, by statute, a jury is permitted to return a verdict for a lesser-included offense even before ruling out guilt of the greater offense. *See* N.C.G.S. § 15A-1237(e) (“If 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.”).

Here, the greater offense at issue is Class B2 second-degree depraved-heart murder, and the lesser-included offense is involuntary manslaughter. *See, e.g.*, *State v. Arrington*, 371 N.C. 518, 523-24 (2018) (explaining the differences between the different types of second-degree murder); *State v. Thomas*, 325 N.C. 583, 591 (1989) (“Involuntary manslaughter is a lesser included offense of second degree murder and voluntary manslaughter.”). “Second-degree murder is defined as (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation.” *Arrington*, 371 N.C. at 523 (cleaned up). “In North Carolina, there are three forms of malice: (1) ‘actual malice,’ meaning hatred, ill-will or spite; (2) that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification, or ‘condition of mind malice;’ and (3) an inherently dangerous act 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 ‘depraved-heart malice.’” *State v. Borum*, 384 N.C. 118, 121 (2023) (cleaned up) (internal quotation marks added).

Involuntary manslaughter is a lesser-included offense of second‑degree murder. *Thomas*, 325 N.C. at 591. That lesser-included offense has been defined as “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. Debiase*, 211 N.C. App. 497, 505 (2011) (cleaned up); *see also* N.C.P.I.-Crim. 206.13 (describing the elements of that offense).

Proving involuntary manslaughter requires proving that the defendant acted with a *mens rea* that exceeds “actionable negligence in the law of torts” and amounts to “such recklessness . . . as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.” *Brichikov*, 383 N.C. at 555 (cleaned up); *see also* N.C.P.I.-Crim. 206.13 (explaining that a defendant can be found guilty of involuntary manslaughter based on either an “unlawful” act, such as “recklessly discharg[ing] a gun,” or for acting “with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others”). “[T]he distinction between recklessness indicative of murder and recklessness associated with manslaughter is one of degree rather than kind.” *Brichikov*, 383 N.C. at 555 (quoting *State v. Rich*, 351 N.C. 386, 393 (2000)) (cleaned up).

Here, when viewed in the light most favorable to Mr. Harwell, the evidence presented at trial permitted the jury to find that Mr. Harwell acted with the recklessness required for involuntary manslaughter—that he “recklessly discharged a gun, killing the victim,” or acted “with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others.” N.C.P.I.-Crim. 206.13. The State’s evidence, particularly the video admitted as State’s Exhibit 2, tended to show that Rashawn Harwell initially fired two shots near the red Journey, after which Mr. Harwell and Mr. Jones stood behind the Journey and fired several more shots in its direction as it drove off. Afterward, police recovered more than 40 spent cartridge casings, bullets, and bullet fragments from the scene of the shooting, and those items were later linked to seven different guns. However, of all the shots fired from just a few feet away—dozens of which are clearly depicted on the video—only two or three actually hit the red Journey, and only one actually hit Mr. Watson. The remainder landed in a number of other locations including a light pole, a large business sign, and other vehicles.

Under these circumstances—where Mr. Harwell and Mr. Jones fired dozens of shots toward a bright red SUV from just a few feet away, but only two or three shots actually hit the vehicle and only one hit Mr. Watson—the jury could have inferred that Mr. Harwell and Mr. Jones did not act with an intent to kill or injure Mr. Watson, but instead acted recklessly in their efforts to frighten or intimidate him, or to damage the rented SUV he used to flee rather than fight. In fact, the jury *already* found that Mr. Harwell acted recklessly: It acquitted him of first‑degree murder, B1 second-degree murder, conspiracy, and AWDWIKISI, while finding him guilty of only Class B2 second-degree murder based on a theory of depraved-heart malice.

The difference between the two offenses is slight and one of degree rather than kind: Second-degree depraved-heart murder requires a finding that the defendant acted “so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief,” while involuntary manslaughter requires a finding that the defendant acted “unlawful[ly],” such as by “recklessly discharg[ing] a gun,” or “with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others.” N.C.P.I.-Crim. 206.13. While these two levels of recklessness are closely factually related, they are legally distinct and tied to different degrees of homicide. Based on the evidence presented, the jury should have been allowed to elect between them. *See*N.C.G.S. § 15A-1237(e). The trial court erred by failing to give the jury that option.

1. **Had the jury been given the option, there is a reasonable possibility that at least one juror would have voted to find Mr. Harwell guilty of only the lesser-included offense.**

“Failure to submit a requested jury instruction on a lesser-included offense when one is warranted is generally reversible error.” *Brichikov*, 383 N.C. at 556. Moreover, such an error “cannot be cured by a verdict finding the defendant guilty of the greater offense.” *State v. Wise*, 269 N.C. App. 105, 107 (2019) (quoting *Lawrence*, 352 N.C. at 19); *accord* *State v. Montgomery*, 341 N.C. 553, 567 (1995) (“[A] trial judge must instruct the jury on all lesser included offenses that are supported by the evidence, even in the absence of a special request for such an instruction, and . . . the failure to do so is reversible error which is not cured by a verdict finding the defendant guilty of the greater offense.”). The reason for this rule is clear and well-established: “Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.” *Keeble v. United States*, 412 U.S. 205, 212‑13 (1973) (italics in original).

As a result, the fact that the jury found Mr. Harwell guilty of Class B2 depraved-heart second-degree murder—even as it acquitted him of everything else—could not cure the problem of failing to submit the lesser‑included offense of involuntary manslaughter. Accordingly, the operative question is whether there is any “‘reasonable possibility’ that had the error not been committed, a different result would have been reached at trial.” *Brichikov*, 383 N.C. 543, 557 (quoting N.C.G.S. § 15A‑1443(a)‑). This question uses a one-juror standard, asking not just whether the jury might have returned a different verdict, but also whether it might have “deadlocked and been unable to return any verdict” at all. *State v. Reber*, 900 S.E.2d 781, 789 (N.C. 2024). It is “a non-exacting inquiry.” *Id.* at 787; *accord* *Brichikov*, 383 N.C. 543, 557.

This case readily meets that “non-exacting” standard. Had the jury been given the option, there is at least a reasonable possibility that at least one juror would have voted to convict Mr. Harwell of involuntary manslaughter, rather than second-degree murder.

First, the two offenses are closely related. Both require proof that there was an unlawful killing, and that the defendant’s actions were a proximate cause of that death. *See* N.C.P.I.-Crim. 206.13 (describing the elements for both offenses). The central difference between the two offenses concerns only the defendant’s state of mind, and that difference is “one of degree rather than kind.” *Brichikov*, 383 N.C. at 555 (cleaned up). A showing of depraved‑heart malice requires proof that the defendant acted “in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.” *Borum*, 384 N.C. at 119. Likewise, the recklessness “required to support a charge of involuntary manslaughter is something more than actionable negligence in the law of torts; it is such recklessness . . . as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.” *Brichikov*, 383 N.C. at 555 (cleaned up). The scant daylight between the two states of mind—“utterly without regard for human life and social duty and deliberately bent on mischief” on the one hand, versus “a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others” on the other—suggests that, in most (if not all) cases where depraved‑heart murder is submitted to the jury, involuntary manslaughter should be submitted as well.

Second, the evidence presented would have readily supported a conviction for involuntary manslaughter. *See Brichikov*, 383 N.C. at 554 (explaining “the analyses for error and prejudice overlap significantly in this area of law”). As Mr. Harwell argued regarding his motion to dismiss, the evidence showed a “spray” of bullets, which the State had earlier described as a “barrage of gunfire.” (T pp 355, 1145) The authorities then collected more than 40 spent cartridge casings, bullets, and fragments and linked them to seven different guns. However, the evidence showed that only two or three of the many shots fired actually hit the Journey, despite the fact that Mr. Harwell and Mr. Jones were shooting from just a few feet away toward a large and bright red target. On this record, at least one juror could have found that Mr. Harwell, either on his own or in concert with others, acted “recklessly” in discharging a gun, or with “a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.”

And third, the verdicts the jury has already returned bear emphasis. As reviewed, the jury acquitted Mr. Harwell of everything else, including every other form of homicide it was asked to consider: first‑degree murder; conspiracy; second-degree B1 (“actual malice” or “condition of mind malice”) murder; and AWDWIKISI. (R pp 77-80) In finding him not guilty of both first-degree murder and both types of B1 second-degree murder, but guilty of B2 second-degree murder, the jury found that Mr. Harwell had acted only with recklessness rather than with a specific intent to kill. Given this outcome, it is reasonably possible that, had it been given the option, at least one member of the jury would have found only the degree of recklessness required for involuntary manslaughter, and not the degree required for second-degree murder.

In short, second-degree depraved-heart murder and involuntary manslaughter are closely related offenses, both in general and on the facts of this case, with each requiring proof of a criminal degree of recklessness. The central difference between the two is the precise degree of recklessness involved. Because the trial court failed to submit involuntary manslaughter, the jury was precluded from deciding, unanimously and beyond a reasonable doubt, just what level of recklessness the evidence showed. Mr. Harwell should receive a new trial, and the jury should have a chance to resolve that question.

**II.** **The trial court, through the clerk, reversibly erred in polling the jury by failing to ask two jurors, Foreperson Wanda Parker and Juror #3 Alisha Grimes-Moody, whether the verdict returned in court accurately reflected their verdict as to Mr. Harwell.**

A North Carolina defendant in a criminal case has both a constitutional and a statutory right to have the jury polled after it returns its verdict but before it disperses. Once a defendant has made a timely request, the trial court, either directly or through the clerk, is required to poll the jury “by asking each juror individually whether the verdict announced is his verdict.” N.C.G.S. § 15A-1238. Because the trial court’s failure to conduct a sufficient poll following a timely request constitutes both statutory and constitutional error, the State bears the burden of showing, beyond a reasonable doubt, that any error in polling the jury was harmless.

The State cannot make that showing. In this case, the jury deliberated over the course of more than a day before returning its verdicts, and in the process, it asked the trial court multiple questions concerning both the evidence presented and the law it was required to apply. Moreover, the strongest argument against a finding of prejudice—that the jury did, in fact, return a guilty verdict for second-degree murder, even as it acquitted of everything else—begs the question. That is, such an argument would depend on the claim that the jury already returned a valid and unanimous verdict when that is precisely what the poll is necessary to prove.

In short, the trial court, acting through the clerk, erred in polling the jury by entirely failing to ask two of the seated jurors about their verdicts as to Mr. Harwell. The State cannot show that this error was harmless beyond a reasonable doubt. Accordingly, this Court should vacate the lower court’s judgment and remand for further proceedings.

1. **Preservation and standard of review.**

When a defendant timely asks the trial court to poll the jury, and the trial court errs in doing so, no additional objection is necessary to preserve the defendant’s claim for appellate review. *See State v. Ramseur*, 338 N.C. 502, 505-07 (1994) (reviewing the defendant’s claim of polling error after the defendant requested such a poll, even though the defendant failed to raise an additional objection “to the manner in which the jurors were polled”). The timely request suffices to preserve the claim for appellate review. Moreover, because N.C.G.S. § 15A-1238 provides that the trial court “must” poll the jury in response to a timely request, it creates a statutory mandate directed toward the trial court. *See In re E.D.*, 372 N.C. 111, 117 (2019) (“When a statute is clearly mandatory, and its mandate is directed to the trial court, the statute automatically preserves statutory violations as issues for appellate review.” (cleaned up)).

Because a claim of polling error is both statutory and constitutional, appellate review is *de novo*. *See, e.g.*, *State v. Shuler*, 378 N.C. 337, 339 (2021) (“It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated.” (cleaned up)). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Biber*, 365 N.C. at 168 (citation omitted).

1. **The trial court, acting through the clerk, reversibly erred in polling the jury where it failed to ask two seated jurors to confirm their verdicts as to Mr. Harwell.**

The North Carolina Constitution guarantees that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . . .” N.C. Const. art. I, § 24. To supplement and safeguard the constitutional promise of unanimity, litigants in North Carolina, including defendants in criminal cases, have long had a corresponding right to poll the jury when it returns its verdicts. *See, e.g.*, *State v. Asbury*, 291 N.C. 164, 169 (1976) (“At least since 1877 our Court has held that a defendant has a constitutional right, upon timely request, to have the jury polled as a corollary to his right to a unanimous verdict.”); *State v. Young*, 77 N.C. 498, 499 (1877) (“[I]t is held in most of our States that either party may claim as of right to have the jury polled, and a denial of this right is an error in the proceedings.” (cleaned up)). “The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered.” *State v. Black*, 328 N.C. 191, 198 (1991); *accord* *Asbury*, 291 N.C. at 169 (“The function of the jury poll is to give *each* juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain *with certainty* that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented.” (cleaned up) (first italics added, second italics in *Asbury*)).

In addition to the North Carolina Constitution, the right to poll the jury is also guaranteed by statute. To that effect, N.C.G.S. § 15A-1238 provides in full:

Upon the motion of any party made after a verdict has been returned and before the jury has dispersed, the jury must be polled. The judge may also upon his own motion require the polling of the jury. The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict. If upon the poll there is not unanimous concurrence, the jury must be directed to retire for further deliberations.

N.C.G.S. § 15A-1238. Accordingly, a defendant’s right to poll the jury, after it returns its verdict but before it disperses, is both constitutional and statutory. *See Black*, 328 N.C. at 197 (“The right to a poll of the jury in criminal actions is firmly established by Article I, Section 24 of the Constitution of North Carolina and by statute.”). The only step required under the plain text of the statute to invoke this right is to request a poll “before the jury has dispersed.” And upon any party doing so, either the trial court or the clerk “must” poll the jury “by asking each juror individually whether the verdict announced is his verdict.” N.C.G.S. § 15A-1238.

Here, the trial court, acting through the clerk, erred in polling the jury after it had returned its verdicts but before it had dispersed. Specifically, upon the request made by Mr. Jones and joined by Mr. Harwell, the trial court asked two jurors, Foreperson Wanda Parker and Juror #3 Alisha Grimes-Moody, to confirm their verdicts regarding *Mr. Jones*, and both jurors did so. (T pp 1261-64) However, the clerk failed to ask those two jurors individually to confirm their verdicts as to *Mr. Harwell*. As a result, the trial court, acting through the clerk, erred by failing to ask “each juror individually whether the verdict announced is his verdict.” N.C.G.S. § 15A-1238.

Because a defendant’s right to have the jury polled before it disperses is both constitutional and statutory, the State bears the burden of showing that any error in conducting that poll was harmless beyond a reasonable doubt. *See, e.g.*, *State v. Baynard*, 79 N.C. App. 559, 563 (1986) (holding that “any error [in polling the jury] was harmless beyond a reasonable doubt” “in light of the trial judge’s own informal poll” of the jury). The State cannot make the required showing.

As reviewed, the jury in this case deliberated over the course of more than a day, from approximately 3:18 p.m. on 28 February 2023 until 4:01 p.m. on 1 March 2023. (T pp 1231, 1259-60) During that period, the jury presented three separate questions to the trial court, asking about both key eyewitness testimony and the law it was required to apply. (Rule 9(d) Volume I of II, Court’s Exhibit 1-3, at 250-55). The jury then returned split verdicts finding Mr. Harwell guilty of second-degree depraved-heart murder, but not guilty of everything else. (R pp 77‑80)

Under these circumstances, the State cannot show beyond a reasonable doubt that the trial court’s error in polling the jury was harmless. The strongest argument against a finding of prejudice would rely on the fact that the jury, after considerable deliberation, *did* return a verdict for second-degree murder. However, such an argument would beg the question by assuming the validity of the initial verdicts when that is exactly what the poll was necessary to prove. Stated differently, because a jury poll is intended to *ensure* that the jury’s verdict was unanimous and reflected the vote of each juror, the State cannot point to the return of a verdict as proof that the poll was unnecessary. It is not possible to know with certainty what Jurors Parker and Grimes-Moody might have said if asked directly and individually; whether defense counsel might have moved for or been granted a mistrial; how events might have unfolded if the jury was sent back for additional deliberations; or in that event what the eventual verdicts might have been.

In short, after Mr. Jones and Mr. Harwell asked the trial court to poll the jury, the trial court erred by failing to ask two of the seated jurors about their verdicts as to Mr. Harwell. Because it is not possible to know with certainty what they might have said if asked directly and individually, or what effect additional deliberations might have had, the State cannot meet the burden of demonstrating, beyond a reasonable doubt, that the trial court’s error was harmless. For that additional reason, Mr. Harwell should receive a new trial.

**CONCLUSION**

For the foregoing reasons, Mr. Harwell requests that this Court vacate the trial court’s judgment and remand for further proceedings.

Respectfully submitted this the 4th day of September, 2024.

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**CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28**

I hereby certify that the Defendant-Appellant’s Brief is in compliance with Rule 28(j) of the North Carolina Rules of Appellate Procedure as it is printed in fourteen-point Century Schoolbook and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by the word-processing program used to prepare the brief.

This the 4th day of September, 2024

By Electronic Submission:

Aaron Thomas Johnson

Assistant Appellate Defender

North Carolina State Bar Number 46157

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that the Defendant-Appellant’s 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 that a copy of the Defendant‑Appellant’s Brief has been duly served upon Mr. Nicholaos G. Vlahos, Special Deputy Attorney General, by electronic means by emailing it to [nvlahos@ncdoj.gov](mailto:nvlahos@ncdoj.gov).

This the 4th day of September, 2024

By Electronic Submission:

Aaron Thomas Johnson

Assistant Appellate Defender

North Carolina State Bar Number 46157

1. Rashawn Harwell was tried separately from Mr. Harwell and Mr. Jones. (T pp 36, 43) [↑](#footnote-ref-2)
2. Copies of the jury’s questions are included in the record on appeal as part of a separate 9(d) volume. (Rule 9(d) Volume I of II at 250‑55, Court’s Exhibits 1-3). [↑](#footnote-ref-3)
3. Diagrams of the scene were admitted as State’s Exhibit 6 and 6a. (T pp 562‑65) (Rule 9(d) Volume I of II, State’s Exhibits 6 and 6a, at 36-37). [↑](#footnote-ref-4)
4. State’s Exhibit 2, a surveillance video taken from a nearby tobacco and vape shop, is included in the record on appeal as part of a separate 9(d) volume. *See* (Rule 9(d) Volume II of II, State’s Exhibit 2). Timestamps are displayed in the upper right-hand corner of the video. [↑](#footnote-ref-5)
5. A cartridge casing recovered inside the red Journey was matched to Rashawn Harwell’s gun. (T pp 717, 1166) However, Brooke Layne, a firearms expert with the Durham Police Department, was not able to match the bullet that killed Otha Ray Watson to any particular firearm. (T pp 920-24, 975) The projectile itself was admitted as State’s Exhibit 46. (R p 47; T pp 893-94) [↑](#footnote-ref-6)
6. Mr. Jones also requested instructions on first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter. During the discussion, Mr. Jones then repeated his specific request for an instruction on involuntary manslaughter. (T pp 1143, 1148‑49) The trial court denied these requests as well. (T pp 1150‑51) [↑](#footnote-ref-7)