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Criminal Procedure - Removing the Third Option from the Jury - *State v. Strickland*

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CRIMINAL PROCEDURE—REMOVING THE THIRD OPTION FROM THE JURY—*State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983).

INTRODUCTION

Prior to the North Carolina Supreme Court's holding in *State v. Strickland*,¹ the rule governing second degree murder jury instructions in a first degree murder case was clear. In all murder cases in which the prosecution relied on the elements of premeditation and deliberation to prove that first degree murder had been committed, the trial judge was required to submit the issue of second degree murder to the jury. This rule came from the Court's unanimous decision in *State v. Harris*.² The Court adhered to this rule in several later cases³ until it heard *Strickland* in 1983.

Apparently motivated by the United States Supreme Court's decision in *Hopper v. Evans*,⁴ the North Carolina Supreme Court reversed its decision in *Harris* and held that a second degree murder instruction is not mandated in every murder case in which premeditation and deliberation are at issue. As a result of the Court's holding in *Strickland*, such an instruction is now required only when there is some evidence that the defendant did not act with premeditation and deliberation. If there is no such evidence, the trial judge is to exclude from jury consideration the option of finding the defendant guilty of second degree murder.⁵

This note will examine the scope of the rule in general, and in particular, the propriety of its application to the facts in *Strickland*.

THE CASE

The defendant, Strickland, was convicted of two counts of kidnapping and one count of first degree murder.⁶ He appealed his

1. 307 N.C. 274, 298 S.E.2d 645 (1983).

2. 290 N.C. 718, 228 S.E.2d 424 (1976).

3. *State v. Poole*, 298 N.C. 254, 258 S.E.2d 339 (1979); *State v. Keller*, 297 N.C. 674, 256 S.E.2d 710 (1979).

4. 456 U.S. 605 (1982).

5. 307 N.C. at 293, 298 S.E.2d at 658.

6. *Id.* at 276, 298 S.E.2d at 648.

convictions on several grounds,⁷ including the trial court's failure to submit the question of his guilt of second degree murder to the jury.⁸

The surviving victim and a co-defendant both testified that Strickland and three other men pursued the victims in a car and forced them at gunpoint into a car occupied by the four men. All four men repeatedly raped the female victim. The male victim was tied to a tree with a rope, and Strickland strangled him with a shirt placed over his head and neck. Strickland also attempted to kill the female victim by choking her, smothering her with his hand and stomping on her neck. She was then left to die in a secluded area but somehow survived and sought help. The four men returned to Strickland's home after committing the crimes.⁹

Strickland testified that he was forced at gunpoint, by a co-defendant, to participate in the crimes. He claimed that he had attempted to aid both victims and to stop his co-defendants' violent acts. His wife also testified that she saw one of the co-defendants pointing a gun at the defendant in their home.¹⁰

On appeal, Strickland assigned as error the trial judge's failure to instruct the jury on a charge of second degree murder. He contended that based on prior decisions of the North Carolina Supreme Court, a trial court judge must instruct the jury on the lesser included offense of second degree murder when the prosecution relies upon the elements of deliberation and premeditation to establish that first degree murder had been committed.¹¹

The North Carolina Supreme Court affirmed Strickland's conviction of first degree murder and ordered a new trial on the kidnapping charges.¹² The Court rejected Strickland's contention that a second degree murder instruction must be given in every case in which the prosecution alleges that a murder was committed with deliberation and premeditation.

7. Strickland also assigned as error the trial judge's failure to require the jury to find that he had acted with malice in order to convict him of murder, the court's error in its instruction on duress as a defense to the kidnapping charges, the court's failure to require that the jury find that Strickland had acted unlawfully in order to convict him of kidnapping and the court's denial of his request for a voir dire examination prior to the admission of an inculpatory statement.

8. 307 N.C. at 277, 298 S.E.2d at 648.

9. *Id.* at 277-79, 298 S.E.2d at 649-50.

10. *Id.* at 279, 298 S.E.2d at 650.

11. *Id.* at 281, 298 S.E.2d at 651.

12. *Id.* at 277, 298 S.E.2d at 648-49.

BACKGROUND

The case law in North Carolina on this point has developed step-by-step. With each case, the North Carolina Supreme Court edged closer toward an absolute requirement of a second degree murder instruction in all first degree murder cases prosecuted on the theory of premeditation and deliberation. The Court finally arrived at that point with its decision in *State v. Harris* but has now retreated from it with its decision in *Strickland*. An early case in North Carolina which began to define the law in this area is *State v. Spivey*.¹³ The defendant, Spivey, was convicted of the first degree murder of his father-in-law. He appealed his conviction on the ground that the trial judge had committed reversible error by refusing to instruct the jury on second degree murder.¹⁴ The North Carolina Supreme Court upheld his conviction and stated that he was not entitled to a second degree murder instruction because the murder was committed by the defendant while lying in wait and during an attempt to commit arson.¹⁵ According to the Court, when the evidence discloses a method of killing which by statute is *per se* murder in the first degree, the defendant's premeditation and deliberation are presumed, and a second degree murder instruction is improper.¹⁶ The Court also stated in *dicta* that if there is any evidence, or if any inference can be reasonably made from the evidence, which tends to show a lower grade of murder, it is then the duty of the trial judge to submit that view to the jury.¹⁷

State v. Newsome,¹⁸ a 1928 case, further defined the law in this area. In that case, the evidence tended to establish that the defendant had killed his victim during an attempted rape or with premeditation and deliberation. Again, the trial judge did not instruct the jury on second degree murder. The North Carolina Supreme Court held that his failure to do so was reversible error and ordered a new trial.¹⁹

The opinion in *Newsome* contained strong language to the effect that the elements of premeditation and deliberation are always matters of fact to be determined by a jury, not matters of law

13. 151 N.C. 676, 65 S.E. 995 (1909).

14. *Id.* at 683, 65 S.E. at 998.

15. *Id.* at 687, 65 S.E. at 1000.

16. *Id.* at 684-85, 65 S.E. at 999.

17. *Id.* at 685-86, 65 S.E. at 999.

18. 195 N.C. 552, 143 S.E. 187 (1928).

19. *Id.* at 564, 143 S.E. at 193.

to be determined by a judge.²⁰ The Court added that if premeditation and deliberation are relied upon by the State as constituting the crime of first degree murder, those elements must be proved by the evidence, beyond a reasonable doubt.²¹ It is for the jury, not the judge, to decide if such a reasonable doubt exists.²²

The Court continued to follow its trend of requiring second degree murder instructions in first degree murder cases in *State v. Perry*.²³ The defendant in *Perry* was convicted of first degree murder and sentenced to die. No eyewitnesses to the homicide testified, and all the evidence against the defendant was circumstantial.²⁴

Once more, the Court held that the judge had erred by not submitting a second degree murder instruction to the jury.²⁵ The Court cited its holdings in *Spivey* and *Newsome* to support its decision granting the defendant a new trial.²⁶

With these decisions, the Court appeared to be leaning toward an absolute requirement of a second degree murder instruction in murder cases which are prosecuted on the theory of premeditation and deliberation. Indeed, this is exactly what the Court held in *State v. Harris*.²⁷ This rule was then followed in *State v. Keller*²⁸ and *State v. Poole*²⁹ and was the law in North Carolina until *State v. Strickland*.

In *Keller*, the North Carolina Supreme Court firmly adopted the rule set out in *Harris*. While the Court conceded that the rule in first degree murder cases with regard to second degree murder instructions differed from the general rule on lesser included offenses, the Court stated that the *Harris* rule was firmly rooted in case law in North Carolina.³⁰ Generally, a trial court judge evaluates the evidence and must only instruct the jury on a lesser in-

20. "Premeditation and deliberation are always matters of fact to be determined by the jury, and not matters of law to be determined by the judge." 195 N.C. at 564, 143 S.E. at 193.

21. *Id.*

22. *Id.*

23. 209 N.C. 604, 184 S.E. 545 (1936).

24. *Id.* at 605, 184 S.E. at 546.

25. *Id.* at 606, 184 S.E. at 546.

26. *Id.* at 606, 184 S.E. at 546.

27. 290 N.C. 718, 228 S.E.2d 424.

28. 297 N.C. 674, 256 S.E.2d 710 (1979).

29. 298 N.C. 254, 258 S.E.2d 339 (1979).

30. 297 N.C. at 677, 256 S.E.2d at 713.

cluded offense if he finds evidence of that lesser included offense.³¹ The Court also emphasized the importance of predictability by the courts as a justification for reaffirming the *Harris* rule.³²

The facts in *Keller* are somewhat similar to those in *Strickland*. Keller and an accomplice forced the murder victim into a van and took him to a secluded area. Keller shot, but did not succeed in killing, the victim. At Keller's direction, his accomplice also shot the victim several times. The men then drove to a carwash to dispose of the body but discovered that the man was still alive. They then slashed his throat with a knife and killed him.³³

At trial, Keller offered no evidence in his defense, and the trial court judge instructed the jury to find the defendant either guilty or not guilty of first degree murder.³⁴

The Court's primary reason for following *Harris* in this case was to provide a consistent approach to first degree murder cases prosecuted on the theory of premeditation and deliberation.³⁵ The Court also stated that the elements of premeditation and deliberation must usually be inferred from circumstantial evidence.³⁶ According to the court, in first degree murder cases it is the jury which must choose to draw or not draw such an inference.³⁷ There were no dissenting opinions in *Keller*.

In *Poole*, the Court again followed the *Harris* rule. The Court simply reaffirmed its decision in *Harris* without elaborating upon its reasons for doing so.³⁸ There was only one dissenting opinion in *Poole*. Justice Huskins stated that he no longer supported the absolute requirement of a second degree murder instruction in first degree murder cases.³⁹ He indicated a preference for such an instruction only when there is evidence to support the lesser included offense.⁴⁰ This is essentially the rule adopted by the Court in *Strickland*.

31. *State v. Armstrong*, 287 N.C. 60, 65, 212 S.E.2d 894, 897 (1975); *State v. Henderson*, 285 N.C. 1, 22, 203 S.E.2d 10, 24 (1974).

32. 297 N.C. at 678, 256 S.E.2d at 713.

33. *Id.* at 675-76, 256 S.E.2d at 711-12.

34. *Id.* at 676, 256 S.E.2d at 712.

35. *Id.* at 677, 256 S.E.2d at 713.

36. *Id.*

37. *Id.* at 677-78, 256 S.E.2d at 713.

38. 298 N.C. at 258, 258 S.E.2d at 342.

39. *Id.* at 260, 258 S.E.2d at 343.

40. *Id.* Justice Huskins had retired from the North Carolina Supreme Court when it considered the *Strickland* case.

ANALYSIS

The North Carolina first degree murder statute separates the crime into four classes. They are:

- I. Murder perpetrated by means of poison, lying in wait, imprisonment, starving or torture;
- II. Murder perpetrated by any other kind of willful, deliberate and premeditated killing;
- III. Murder committed in the perpetration or attempted perpetration of certain enumerated felonies;
- IV. Murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon.⁴¹

In cases in which a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the law conclusively presumes that the murder was committed with premeditation and deliberation.⁴² In such cases, the North Carolina Supreme Court has consistently held that a trial court is not required to instruct the jury on second degree murder.⁴³ This is also the rule in cases in which the evidence tends to show that a murder was committed during the perpetration or attempted perpetration of a felony.⁴⁴ However, if the State prosecutes a case on the theory that the murder was committed with premeditation and deliberation, it has the burden of proving these elements beyond a reasonable doubt.⁴⁵ If the State can prove that an unlawful killing of a human being occurred, but cannot prove beyond a reasonable doubt that the defendant acted with premeditation and deliberation, the defendant is guilty of second degree, rather than first degree murder.⁴⁶

The issue addressed by the North Carolina Supreme Court in *Strickland* was this: when must a trial judge instruct the jury on second degree murder if the defendant is charged with the first degree murder? As noted before, the rule in North Carolina from 1976 until the Court's 1983 decision in *Strickland* left no room for doubt. A defendant prosecuted for first degree murder on the theory that he had acted with premeditation and deliberation was en-

41. N.C. GEN. STAT. § 14-17 (1981).

42. 307 N.C. at 282, 298 S.E.2d at 652.

43. 151 N.C. 676, 65 S.E. 995.

44. 209 N.C. at 605, 184 S.E. at 546.

45. *Id.* at 606, 184 S.E. at 546.

46. *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 892 (1963).

titled to a second degree murder instruction to the jury in every case. There was no need for the trial judge to determine whether there was evidence tending to support a conviction of second degree murder.

In 1983, however, the North Carolina Supreme Court abandoned its unanimous holding to that effect in *Harris*, even though it had explicitly adhered to the rule in *Poole* and *Keller*. The motivation behind the Court's revision of the law in this area seems to lie with the United States Supreme Court's decision in *Hopper v. Evans*.⁴⁷ The majority in *Strickland* repeatedly cited *Hopper* as authority for its change of position.⁴⁸

In *Hopper*, the Court held that no jury instructions on lesser included offenses are required in a capital case in which the defendant's own evidence affirmatively negates the possibility that such an instruction might have been warranted.⁴⁹ However, the majority in *Strickland* read the opinion to mean that it eradicated the rule in *Harris*. It is in this respect that the holding in *Strickland* is incorrect and overly broad.

A better interpretation of *Hopper* is that found in Justice Carlton's dissenting opinion in *Strickland*. He argues that the rule in *Hopper* carves out only a narrow exception to the *Harris* rule. His interpretation is that it is only when the defendant's own evidence affirmatively establishes the elements of premeditation and deliberation that the jury should not be instructed on second degree murder.⁵⁰ The key to this analysis lies in the fact that the Supreme Court explicitly limited its holding in *Hopper* to the facts of that case.⁵¹

The facts in *Hopper* differ significantly from those in *Strickland*. The defendant in *Hopper* made a full confession in which he stated that he had intended to kill his victim and that he would kill again under similar circumstances. He indicated that he felt no remorse.⁵² *Strickland*, however, denied that he had committed a murder with premeditation and deliberation. He did not make a confession of an intent to kill but instead testified that he was forced at gunpoint to participate in the crime. There was also testimony given by his wife tending to support his story. In *Strickland*,

47. 307 N.C. at 288-90, 298 S.E.2d at 655-56.

48. 307 N.C. at 285, 288-90, 298 S.E.2d at 653, 655-56.

49. 456 U.S. at 606.

50. 307 N.C. at 313, 298 S.E.2d at 669.

51. 456 U.S. at 612.

52. *Id.* at 607.

the defendant provided no evidence which affirmatively negated the possibility that he was guilty of a lesser offense.⁵³ In fact, if given the option of convicting Strickland of second degree murder, the jury might have reasonably inferred from the evidence that he had not acted with deliberation and premeditation.

In general, questions of premeditation and deliberation have been left almost entirely to juries and not to judges. Our criminal justice system recognizes that panels of lay-persons are best qualified to determine the state of mind of a defendant when he committed a crime. The jury is the ultimate fact finder, and its members are responsible for determining the credibility of witnesses. The North Carolina Supreme Court has frequently stated that premeditation and deliberation are always matters of fact to be determined by a jury and not matters of law to be determined by a judge.⁵⁴ However, because of the rule established in *Strickland*, judges, rather than jurors, will now have the initial responsibility of determining whether a defendant has killed with premeditation and deliberation. If a trial judge finds that there is not evidence from which he can infer that the defendant did not deliberate and premeditate his crime, he must show exclude the possibility of conviction of second degree murder from the jury. With this rule, the Court has created the real possibility that a jury may not have the third option of finding a defendant guilty of second degree murder when that may be the best verdict.

There is, of course, the argument that the *Strickland* decision merely conforms the rule in first degree murder cases to the rule in all other criminal cases with regard to submitting instructions on lesser included offenses to a jury.⁵⁵ Generally, in other types of criminal cases a trial judge is not required to submit the question of the defendant's guilt of a lesser included offense to the jury when there is no evidence to sustain a verdict of the defendant's guilt of a lesser offense.⁵⁶

While there is logic in this argument, it must be remembered that conviction of first degree murder in North Carolina carries with it a sentence of death or life imprisonment.⁵⁷ It is better in this instance to let the jury alone act as a fact finder and to allow it

53. 307 N.C. at 312, 298 S.E.2d at 668.

54. 195 N.C. at 564, 143 S.E. at 193. See also *State v. Keller*, 297 N.C. 674, 256 S.E.2d 710 (1979); *State v. Stewart*, 226 N.C. 299, 38 S.E.2d 29 (1946).

55. 307 N.C. at 303, 297 S.E.2d at 664.

56. *State v. Shaw*, 305 N.C. 327, 338, 289 S.E.2d 325, 331-32 (1982).

57. N.C. GEN. STAT. § 14-17 (1981).

to have the third option rather than limiting its choices to guilty or not guilty of first degree murder. With such high stakes involved, it is essential to protect defendants' rights by allowing the jury a full range of options if there is even a remote possibility that the defendant did not act with premeditation and deliberation.

Additionally, as Justice Carlton points out in his dissent, under the Court's decision in *Strickland*, trial judges are left with no real guidance from the Court in determining when a second degree murder charge is to be submitted to the jury.⁵⁸ If the rule suggested by Justice Carlton were adopted, judges would have a definite standard to guide them—they would submit the issue of second degree murder to the jury unless the defendant's own evidence affirmatively established the elements of premeditation and deliberation.

Had the Court wanted to revise its holding in *Harris* to make it consistent with the United States Supreme Court's holding in *Hopper*, it would have been more appropriate to create the new rule in a case with a different fact situation. The North Carolina Supreme court stretched the limited *Hopper* rule too far and succeeded in creating a new rule which leaves judges without any real help in determining when a second degree murder instruction is to be submitted to the jury.

CONCLUSION

The North Carolina Supreme Court significantly altered the law in North Carolina regarding second degree murder instructions with its decision in *State v. Strickland*. The rule now is this—a trial judge is responsible for determining whether there is any evidence tending to show that defendant did not act with premeditation and deliberation when committing a murder. If the judge finds that there is no such evidence, he is to exclude from the jury's consideration the option of a second degree murder verdict.

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58. 307 N.C. at 320, 298 S.E.2d at 673.