Is Involuntary Manslaughter a Lesser of Second-Degree Murder by Drug Overdose?

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I'll save you the suspense: Yes. Read on for an explanation.

In North Carolina, second-degree murder occurs when a person kills another living human being with malice. *See* Jessica Smith, North Carolina Crimes, A Guidebook on the Elements of Crime 90 (7th ed. 2012) [hereinafter NC Crimes]. North Carolina law recognizes three forms of malice:

(1) the express emotions of hatred, ill will, and spite;

(2) the commission of an inherently dangerous act 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 (which I refer to below as "inherently dangerous act" malice); and

(3) a condition of the mind which prompts a person to take the life of another intentionally, or to intentionally inflict serious bodily injury which proximately results in death, without just cause, excuse, or justification.

NC Crimes at 84 & 91.

Suppose the defendant is charged with second-degree murder. Suppose further that the victim died of a drug overdose after having purchased drugs from the defendant. If the evidence supports it, can the judge instruct on involuntary manslaughter? Put another way, is involuntary manslaughter a lesser-included offense of second-degree murder based on a drug overdose? For the reasons below, I think that the answer is yes.

In *State v. Barnes,* 226 N.C. App. 318 (2013), the defendant was indicted for second-degree murder of victim Cardwell. At the time, G.S. 14-17 defined first-degree murder and provided:

All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon.

The evidence showed that Cardwell died of a methadone overdose, that the defendant had sold methadone to Cardwell the night before, and that defendant himself recently had nearly died from a methadone overdose. The trial court charged the jury on second-degree murder and involuntary manslaughter. After being convicted of involuntary manslaughter, the defendant appealed arguing that the trial court erred by instructing the jury on involuntary manslaughter. The Court of Appeals disagreed. It began by noting that the recklessness supporting second-degree murder and the recklessness supporting involuntary manslaughter differ only in degree, not kind. As has long been established in North Carolina, involuntary manslaughter requires only criminal negligence, defined as a carelessness or

recklessness that shows a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. NC Crimes at 100. By contrast, the malice required for second-degree murder includes commission of an inherently dangerous act 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 (a/k/a "inherently dangerous act" malice). *Id.* It's also well established that involuntary manslaughter is a lesser of second-degree murder. State v. Greene, 314 N.C. 649, 652 (1985). Noting the case law on the required showing of recklessness for murder and manslaughter, the *Barnes* court held that the evidence "would support a finding by the jury of reckless conduct under either [crime]." The court rejected the defendant's argument that the language in G.S. 14-17, quoted above regarding drug-related second-degree murders meant that the defendant only could have been convicted of second-degree murder. Citing *State v. Liner*, 98 N.C. App. 600, 605 (1990) ("inherently dangerous act" malice existed when the defendant, knowing that two people became violently ill after using certain drugs, supplied the same drugs to the victim, who later died), the court held that the statutory language does not change the elements of the crime; the State still must prove malice to support a charge of second-degree murder. And, where, as here, the jury would have grounds to reject second-degree murder recklessness but accept involuntary manslaughter recklessness, the trial court properly instructed on the latter crime.

Read together, *Liner* and *Barnes* hold that a drug overdose death can constitute an "inherently dangerous act" malice second-degree murder and that when the evidence could support the lower showing of recklessness for involuntary manslaughter, that offense should be submitted to the jury as a lesser of second-degree murder. I'll that note in 2012 the General Assembly amended G.S. 14-17, deleting the language quoted above and replacing it with a new subsection (b), setting the default punishment for second-degree murder at Class B1 and carving out two exceptions when punishment remains at Class B2. The two exceptions are for "inherently dangerous act" malice second-degree murder cases and those where death is proximately caused by the unlawful distribution of specified drugs and the ingestion of the drug caused the user's death. S.L. 2012-165 sec. 1. As I recall, the primary purpose of this change was to afford the prosecution greater flexibility in plea bargaining in homicide cases. I'm not aware of anything in the legislative history that would suggest that the General Assembly intended this change to abrogate existing case law regarding the lesser-included offenses of second-degree murder. Certainly nothing in the statute suggests that to be so.

As always, if you have a different take on any of these issues, please chime in.