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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-223

Filed: 19 December 2017

Nash County, No. 14CRS053698-99, 15CRS007936

STATE OF NORTH CAROLINA

v.

MICHAEL BERNARD PERRY, Defendant.

Appeal by Defendant from judgments entered 29 September 2016 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General I. Faison Hicks, for the State.

Marilyn G. Ozer, for Defendant-Appellant.

MURPHY, Judge.

Michael Bernard Perry ("Defendant") appeals from his judgments for first-degree murder under the felony murder rule and possession of a firearm by a felon.[1] On appeal, he contends the trial court erred by: (1) determining a witness was

[1] The jury also convicted Defendant of discharging a weapon into an occupied vehicle while in operation; however, the trial court arrested judgment on that conviction.

unavailable to testify, and reading the witness's prior testimony into the record in violation of Defendant's constitutional right to confrontation; (2) denying Defendant's motion to continue to locate and subpoena a witness; and (3) denying Defendant's motion to dismiss. We disagree, and conclude Defendant received a trial free from error.

Background

On 27 August 2014, Defendant and Billy Coppage ("Coppage") entered the Gentlemen's Playground, a nightclub and bar in Rocky Mount that features female dancers. The security guard, Robert Richardson ("Richardson"), also an off-duty Highway Patrol Officer, knew Defendant as a club "regular." Shortly after Defendant arrived, Richardson heard a "commotion" and "saw everybody running to one particular spot in the club[.]" It appeared there was "one guy everybody was going after." Richardson broke up the fight and attempted to get everyone that was arguing—Defendant, Coppage, Jamey Lee Silver ("Silver"), De'Angelo Swift ("Swift"), and some club dancers—to go outside. Defendant and the dancers were arguing with Swift, who was being held back by his companion, Silver. Richardson heard Defendant threaten Silver, "You don't know me. You know, I'll make you disappear." Silver replied, "What? [Y]ou don't know me, I'll make you disappear." At this point, Richardson told everyone to leave and called 911.

Silver and Swift got into a vehicle and began to back out of the parking lot, while continuing to argue with Defendant and the others from inside the car. Still on the phone with the 911 dispatcher, Richardson turned his back from Silver and Swift to look at the dancers, and to point for them to go back inside. When he turned back around, Silver had left the car and was approaching Richardson with a golf club in his hand.

Richardson told Silver to leave; the police were on their way. Silver agreed to leave, and walked back to the car, putting the golf club in the back seat, and then getting in the driver's side of the car. Silver told Swift to get in the car, and he put the car in gear. Richardson heard someone say, "He got a gun." Looking around, Richardson saw Coppage coming up from the trunk of a car with "something in his hand." Richardson saw Defendant take the object from Coppage and "pull it back[,]" as if chambering a round into a handgun, and heard shots fire. Richardson saw Defendant shoot "at least five or six" times in the direction of Silver and Swift's vehicle, hitting Silver. Richardson testified that he saw no other weapons.

Silver died as a result of the gunfire. Swift ran around the front of the car to the driver's side, opened the door, and Silver fell out onto the street, with the vehicle still in gear. Defendant and Coppage got in a car and left. The police arrived. Various surveillance cameras at the Gentlemen's Playground recorded these events.

As a result of the 27 August 2014 shooting, Defendant was charged with first-degree murder of Silver, possession of a firearm by a felon, and discharging a firearm into an occupied vehicle in operation. Defendant's first trial ended in a mistrial. The second trial, now appealed, began on 26 September 2016.

I. The Denial of Defendant's Motion to Continue

The State secured the attendance of Swift at Defendant's first trial pursuant to the Interstate Compact Act because Defendant lived out of state. During the first trial, Swift, a veteran of the United States Navy, reported that he had post-traumatic stress disorder, and was under federal supervision, partly to ensure he takes his medicine and meets with a physician. Swift's supervising federal judge refused to provide the State with information concerning Swift. When the State informed Defendant of these circumstances, Defendant moved for a mistrial because he did not have access to Swift's medical records, or to any records indicating that post-traumatic stress disorder was the reason for the federal judge to be supervising Swift. The trial court denied the motion, but ruled Swift could not testify.

"A little more than" two weeks prior to the second trial, the State indicated to Defendant that the State would not call Swift to testify, nor secure Swift's attendance, because the State remained unable to turn over records related to Swift's supervision to Defendant. Defendant also did not secure Swift's attendance prior to trial. On the first day of trial, Defendant moved for a continuance so he could make a motion for

the federal judge to provide the trial court with access to the records, arguing the records were necessary impeachment material. The trial court denied the motion.

II. Edwards's Testimony

During trial, Richardson testified, and the State used surveillance video from the Gentlemen's Playground to illustrate his testimony. Another eyewitness, Heather Allen, testified. Other witnesses, various police officers, and a medical examiner testified as to Defendant's guilt.

However, retired Police Officer Matt Edwards ("Edwards") was absent from trial, although he testified at the first trial. Edwards performed the crime scene investigation, secured certain evidence, and took pictures. The State informed the trial court it had been unable to serve Edwards with a subpoena, and moved to use his testimony from the previous trial under Rule 804 of the North Carolina Rules of Evidence's exception for an unavailable declarant. Defendant objected, arguing that using Edwards's prior testimony would violate Defendant's constitutional right to confrontation, and renewed a motion for continuance in light of the State's failure to serve Edwards. The trial court requested the State make a showing for the trial court to verify it made efforts to secure Edwards's presence. In response, the State explained it had sent police officers to the local address the State provided for Edwards, and had the officers wait at the home for Edwards, who never appeared. These officers also knocked on the door. The State then dispatched an investigator

from the District Attorney's Office to serve Edwards at his home; he was unsuccessful. The State also attempted to reach Edwards by telephone and text messages.

After this showing, the trial court directed the bailiff to dispatch a sheriff's deputy to Edwards's house to secure Edwards's immediate attendance. When the dispatched deputy returned, he informed the trial court that he was unable to serve Edwards. The deputy further added that he had been to the address before to serve Edwards in other matters, but that he "always had trouble getting" Edwards. Deputy Joyner has "had to return several times the past two or three times" he has been there. Before returning to the trial court, the deputy ran the tags on the vehicle at the residence, and it was registered to Edwards. He also spoke with a neighbor, with whom he had spoken before, about Edwards. The neighbor claimed Edwards was home, and noted several police officers had looked for Edwards at the property in the past. Based on this information, the deputy "knocked and knocked, hollered: 'Sheriff's office,' went around the perimeter of the house, looked in the back door, and looked in the back of the rear door[,]" but he did not see anyone or hear any noise coming from the house.

After this investigation, the deputy saw the postal carrier putting mail in the mailbox. The postal carrier confirmed Edwards was living at the address. Deputy Joyner waited for approximately 15 or 20 minutes, and then returned to the trial court. After the deputy gave this report, the trial court found that Edwards had

willfully avoided service in this case despite the numerous attempts to serve him, and was therefore unavailable as a witness. The trial court granted the State's motion to read Edwards's prior sworn trial testimony to the jury. Defendant moved for a mistrial based on the admission of the testimony, which was denied.

III. Motion to Dismiss

Defendant moved to dismiss all charges based on insufficiency of evidence at the end of the State's evidence, and again at the end of all evidence. The trial court denied both motions.

IV. Verdict and Sentencing

The jury convicted Defendant of discharging a firearm into an occupied vehicle in operation; first-degree felony murder, based on the felony of discharging a firearm into an occupied vehicle in operation; and possession of a firearm by a felon. The trial court arrested judgment on the conviction for discharging a firearm into an occupied vehicle in operation, and sentenced Defendant to life imprisonment without parole for first-degree felony murder, and to 17 to 30 months imprisonment for possession of a firearm by a felon.

Analysis

Defendant argues the trial court erred by: (1) determining Edwards was unavailable, and reading the witness's prior testimony into the record in violation of Defendant's constitutional right to confrontation; (2) denying Defendant's motion to

continue to locate and subpoena a witness; and (3) denying Defendant's motion to dismiss. We disagree. The trial court did not err.

I. Unavailability

Defendant argues the trial court erred in finding Edwards was unavailable as a witness for the purposes of N.C.G.S. § 8C-1, Rule 804(a)(5) (2017), and that, because of this error, the trial court erred in failing to grant his motion for a mistrial. Defendant further argues that depriving him of the opportunity to confront Edwards at trial violated the Confrontation Clause of the Sixth Amendment of the United States Constitution. We disagree.

"We review a trial court's decisions regarding a defendant's allegations of constitutional violations de novo." *State v. McKiver*, ___ N.C. ___, ___, 799 S.E.2d 851, 854 (2017) (citation omitted).

"Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Simmons,* 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008) (citation omitted). N.C.G.S. § 15A-1061 (2015) provides that a "judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case."

A. Hearsay Exception

In Defendant's first argument, he contends the trial court erred in finding Edwards was unavailable as a witness for the purposes of Rule 804 of the North Carolina Rules of Evidence, permitting his former testimony to be read at trial instead of requiring his live testimony. Rule 804 permits former testimony to be introduced at trial in certain circumstances, including if the declarant is "unavailable" as a witness. N.C.G.S. § 8C-1, Rule 804(b)(1). Former testimony is:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

N.C.G.S. § 8C-1, Rule 804(b)(1). Since the testimony at issue was given by Edwards as a witness at a former proceeding of the same cause, and Defendant had an opportunity and similar motive to develop the testimony by cross-examination, our analysis hinges on whether Edwards was "unavailable" for the purposes of Rule 804.

Before former testimony may be admitted under Rule 804(b), the trial court "must find that at least one of the conditions" in which a declarant may be found unavailable as a witness has been satisfied. *State v. Nobles*, 357 N.C. 433, 440, 584 S.E.2d 765, 771 (2003). These conditions are listed in subsection (a) of Rule 804. In the present case, the trial court concluded Edwards was unavailable pursuant to Rule 804(a)(5), which includes when a declarant "[i]s absent from the hearing and the

proponent of his statement has been unable to procure his attendance . . . by process or *other reasonable means*." N.C.G.S. § 8C-1, Rule 804(a)(5) (emphasis added).

The trial court must "enter sufficient findings of fact to support its conclusion of unavailability[.]" *State v. Clonts*, ___ N.C. App. ___, ___, 802 S.E.2d 531, 545 (2017). The statement's proponent bears the burden of satisfying the requirements of unavailability under Rule 804(a). *Nobles*, 357 N.C. at 440, 584 S.E.2d at 771 (citations omitted).

Here, the trial court made the following findings to support its conclusion of unavailability:

> That the District Attorney's Office has previously issued a valid subpoena for the presence and testimony of Matthew Edwards, former retired Rocky Mount police officer, who was a crime scene investigator who testified in this matter previously.
>
> That although numerous attempts have been made to serve the subpoena on Mr. Edwards, he has avoided the service.
>
> That the Court, on its own motion, sent the Nash County deputy to Mr. Edwards'[s] house, purpose [sic] of serving the subpoena on him and they have been able unable to do so.

Based on these findings, the trial court concluded Edwards was "willfully avoiding service of process in this matter[,]" and, therefore, was "unavailable as a witness."

A review of the transcript reveals the trial court based these findings on the State's evidence of Edwards's unavailability. These efforts included: (1) a detective

attempting to serve Edwards with a subpoena, having multiple officers attempt to call him, text him, and sit outside his house; and (2) an investigator attempting to serve Edwards with a subpoena, sitting outside Edwards's house for more than one hour on multiple occasions without success. In addition to these efforts, the trial court, on its own motion, sent a deputy to serve Edwards. That deputy reported to the trial court that he could not locate Edwards to serve the subpoena. Corroborating the prosecutor's statements regarding the State's inability to locate Edwards, the deputy also reported as follows:

> I went to [the address] to attempt to locate [Edwards]. I have been there. I'm familiar with the residence. I've been there before to serve in reference to other matters and always had trouble getting Mr. Edwards. In fact, I've had to return several times the past two or three times I've been there. I went today, I saw a 2011 Kia Sorrento in the yard. The tag on that . . . came back registered to Mr. Edwards. I saw a neighbor in the yard who I had spoken with before in reference to Mr. Edwards and he said, "Well, he's home. I can guarantee you he's home." He said he's home. He said, "Several Rocky Mount police officers have been here looking him." He said "In fact, the DA"-- he didn't tell me who it was. He said, "In fact, the DA has come over here to his door looking him and nobody's been able to get him." He said, "He's in the house but just ain't coming out." So I knocked and knocked, hollered, "Sheriff's office," went around the perimeter of the house, looked in the back door, looked in the back of the rear door. There's a patio there, had a lot of cans and stuff inside, but I couldn't visually make contact with anyone. I didn't hear anything coming from the house. And about that time postal carrier come up and I verified with the postal carrier that he's still there at the present address. She's putting mail in the mailbox and she said he is and the neighbor says he'd bet anything-

> - he said, "I can bet you everything that he's in the house, he's just not coming out," and he's the one that provided me with the information. He remembers officers that came, and he never came. I sat in the yard for like, 15, 20 minutes . . . .

After the deputy gave this report, the trial court concluded Edwards was "unavailable."

Defendant argues this determination of unavailability was improper because the trial court failed to avail itself of "any of the statutory methods to bring a witness to the courthouse." Specifically, Defendant complains the trial court did not: issue an order of arrest of a material witness pursuant to N.C.G.S. § 15A-305(6) (2015); or serve a subpoena by telephone, so that Edwards could be served and, subsequently, held in contempt if he failed to appear. As the State did recite that it attempted to serve the subpoena by telephone, we will only address Defendant's argument that the trial court should have ordered Edwards's arrest as a material witness. Defendant has not provided any case law requiring the trial court to issue such an order before making an unavailability ruling, and our case law is clear that to justify an unavailability ruling by the trial court, the State must only establish it made a good-faith effort to obtain the absent witness's presence. *See State v. Clark*, 165 N.C. App. 279, 286-87, 598 S.E.2d 213, 219 (2004). Police officers' repeated good-faith attempts to locate a witness satisfy that requirement. *Id.* at 286-87, 598 S.E.2d at 219.

Defendant also argues that North Carolina law requires a trial court to order a witness to testify and to inform him he will be held in contempt if he refuses to testify. In making this argument, Defendant relies on *State v. Linton*, 145 N.C. App. 639, 551 S.E.2d 572 (2001) (citation omitted). In *Linton* we held that where a witness is present at trial and expresses that she does not want to testify, the judge must order the witness testify before finding the witness unavailable under North Carolina Rule of Evidence 804(a)(2). *Id.* at 646-47, 551 S.E.2d at 577. *Linton* is inapplicable to the case before us, as the witness in question, Edwards, was not present at trial. Moreover, *Linton* analyzes Rule 804(a)(2), not (a)(5). Defendant's reliance on *Linton* is misplaced.

We hold that through its repeated attempts to locate Edwards, the State sufficiently demonstrated its good-faith efforts to procure Edwards to testify at Defendant's trial. The trial court did not err in declaring Edwards unavailable to testify at Defendant's trial for purposes of the hearsay exception.

B. Confrontation Clause

Next, we turn to whether the trial court violated the Confrontation Clause when it permitted Edwards's former testimony to be read at trial.

The Sixth Amendment right to confrontation applies to the states through the Fourteenth Amendment of the United States Constitution. *Barber v. Page*, 390 U.S. 719, 721, 20 L. Ed. 2d 255, 259 (1968) (citations omitted). This right provides that

"[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. There is "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant." *Barber*, 390 U.S. at 722, 20 L. Ed. 2d at 258 (citation omitted); *see also Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004) ("Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

Our appellate review of whether a defendant's right to confrontation has been violated is a three-fold analysis: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *Clark*, 165 N.C. App. at 283, 598 S.E.2d at 217 (quoting *Crawford*, 541 U.S. at 69, 20 L. Ed. 2d at 203).

Here, as Edwards's prior testimony clearly qualifies as testimonial, and Defendant had a prior opportunity to cross-examine him, our analysis focuses solely on "whether the State carried its burden of demonstrating the unavailability of [the witness] for trial to a degree that survives constitutional scrutiny, and whether the

trial court's ruling comports with the constitutions of North Carolina and the United States, and other relevant law." *See Clonts*, ___ N.C. App. at ___, ___ S.E.2d at ___.

> A finding of unavailability may be proper when . . . the State demonstrates that, after making sufficient reasonable efforts, it has been unable to locate the witness. The common thread justifying entry of prior recorded testimony is that the witness is either demonstrably unavailable for trial, or there is no evidence to support a finding that, with a good-faith effort by the State, the witness may be made available at some reasonable time in the future.

Id. at ___, ___ S.E.2d at ___ (emphasis omitted).

In *State v. Clark*, 165 N.C. App. 279, 598 S.E.2d 213 (2004), we held police officers' repeated good-faith attempts to locate a witness demonstrate the State carried its burden of proving the unavailability of a witness for trial to a degree that survives constitutional scrutiny. *Id.* at 286, 598 S.E.2d at 219. Similarly, here, the State demonstrated to the trial court that officers made repeated attempts to locate Edwards by: issuing more than one subpoena for Edwards, that it attempted to serve on multiple occasions; sending multiple officers to Edwards's house to attempt to serve him there, waiting longer than an hour on more than one occasion, although the officers were unable to see Edwards in the house or to hear him; and attempting to serve Edwards by telephone.

We are bound by prior holdings of this Court and our Supreme Court to hold the State made a good-faith effort to locate Edwards, and there was no evidence to

support a finding that, with a good-faith effort by the State, the witness would be made available at some reasonable time in the future. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Therefore, the trial court did not violate the Confrontation Clause by permitting the trial court to read Edwards's former testimony at trial.

II. Defendant's Motion to Continue

Defendant argues his constitutional right to a fair trial and due process were violated when the trial court denied his motion to continue in order to locate and subpoena a critical witness. We disagree. The trial court correctly denied this motion because: (1) Defendant failed to request the correct procedure for compelling a non-resident witness to attend and testify at criminal proceedings in this State; and (2) Defendant was dilatory in requesting that a non-resident witness's presence be required at trial.

"[W]hen a motion to continue raises a constitutional issue, . . . the trial court's ruling is fully reviewable by an examination of the particular circumstances of each case[,]" *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000) (quotation omitted), and we review it de novo. *State v. Gardner*, 322 N.C. 591, 594, 369 S.E.2d 593, 596 (1988) (citation omitted). However, the denial of a motion to continue is only sufficient grounds to grant a new trial "when the defendant is able to show that the

denial was erroneous and that he suffered prejudice as a result of the error." *Rogers*, 352 N.C. at 124, 529 S.E.2d at 675 (citation omitted).

Although N.C.G.S. § 15A-803(a) (2015) authorizes the issuance of a material witness order, it does not give "the trial court the means to compel a non-resident witness to attend and testify at criminal proceedings in this State[,]" which is the function of N.C.G.S. § 15A-811 *et seq.* (2015). *See State v. Cyrus*, 60 N.C. App. 774, 775, 300 S.E.2d 58, 59 (1983). A trial court is not under a "duty to search our statutes" to explain to parties that, where N.C.G.S. § 15A-803 is insufficient to compel a witness to attend a hearing in this State to testify, another statute would provide procedure for obtaining the result sought. *State v. Tindall*, 294 N.C. 689, 700, 242 S.E.2d 806, 812-13 (1978). Although a trial judge cannot exercise his discretion inconsistent with the Sixth Amendment of the United States Constitution and the right to compulsory process is a fundamental right without proscribed time limits, the right to compulsory process can be waived when an accused is less than diligent in preparing for trial. *Cyrus*, 60 N.C. App. at 776, 300 S.E.2d at 59.

Here, Defendant filed his motion to continue the trial because a material witness "needs to be subpoenaed" on 15 September 2016, and trial began only 11 days later, on 26 September 2016. The motion did not state Swift was the witness Defendant sought to subpoena. Further, he did not follow the correct procedure; Defendant never took steps to secure the appearance of Swift pursuant to the

procedure for out of state witnesses, and did not raise the fact that Swift resided out of state as an issue until the first day of trial. Even then, Defendant did not request the trial court assist him as required by the procedures North Carolina maintains to compel a non-resident witness to attend and testify at criminal proceedings in this State. It is not the duty of the trial court to instruct a defendant how to accomplish this task. *Cyrus*, 60 N.C. App. at 776, 300 S.E.2d at 59; *Tindall*, 294 N.C. at 700, 242 S.E.2d at 813.

Moreover, Defendant was dilatory in raising the issue before the trial court, and the right to compulsory process can be waived by a defendant. *See Cyrus*, 60 N.C. App. at 776, 300 S.E.2d at 59 (explaining the right to compulsory process can be waived when an accused is less than diligent in preparing for trial). The trial court did not err by denying Defendant's motion for a continuance.

III. Defendant's Motion to Dismiss

Defendant argues the trial court erred when it denied Defendant's motion to dismiss the murder charge because the State failed to present sufficient evidence that Defendant intended to shoot into an occupied vehicle. We disagree.

We review the denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). When a defendant makes a motion to dismiss, the court considers "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein,

and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quotation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). When determining whether substantial evidence exists, we "consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

In *State v. Williams,* 284 N.C. 67, 72-73, 199 S.E.2d 409, 412 (1973), *abrogated on other grounds by State v. Weaver,* 306 N.C. 629, 635, 295 S.E.2d 375 (1982), our Supreme Court explained that the requisite mental intent for discharging a firearm into a moving vehicle is established when a defendant "intentionally, without legal justification or excuse, discharg[es] a firearm into an occupied [property] with knowledge that the [property] is then occupied by one or more persons or when he has reasonable grounds to believe that the [property] might be occupied by one or more persons." *See id.* at 73, 199 S.E.2d at 412; *see also State v. James*, 342 N.C. 589, 595-96, 466 S.E.2d 710, 714-15 (1996).

Defendant argues there is no reasonable inference that the victim was inside the vehicle at the time Defendant formed the intent to pull the trigger, based on

Defendant's interpretation of the Gentlemen's Playground security video and purported studies on "lag time between the decision to take an action and performing the action[.]" We disagree.

At the outset, we note the record on appeal contains no studies on "lag time[,]" therefore, we do not consider these studies, despite Defendant's arguments as to their value. *See* N.C.R. App. P. 9(a) (2017) (explaining appellate review is based "solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to" Rule 9 of the North Carolina Rules of Appellate Procedure). Thus, Defendant's argument that the trial court erred by denying his motion to dismiss the murder charge relies only on his interpretation of the security video. Upon careful review of the video, and in view of the other abundant competent evidence presented to the jury in this case, including eyewitness testimony that the victim was inside the vehicle at the time he was hit by Defendant's gunfire, we hold there was substantial evidence that Defendant intended to shoot into an occupied vehicle. Thus, the trial court did not err by denying the motion to dismiss.

Conclusion

For the reasons stated above, the trial court did not err. The trial court properly: determined Edwards was unavailable, and did not violate the Confrontation Clause by making this determination; denied Defendant's motion to continue to locate Swift; and denied Defendant's motion to dismiss.

NO ERROR.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).