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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-246

Filed: 3 October 2017

Mecklenburg County, Nos. 13 CRS 243916-19

STATE OF NORTH CAROLINA

v.

DEON QUINTIN MCDONALD

Appeal by defendant from judgments entered 16 September 2016 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

ARROWOOD, Judge.

Deon Quintin McDonald ("defendant") appeals from judgments entered upon his convictions for first degree murder, assault with a deadly weapon with the intent to kill inflicting serious injury, robbery with a firearm, and conspiracy to commit robbery with a firearm. Defendant argues that the trial court erred by instructing the jury on the issue of flight. Based on the reasons stated herein, we find no error.

I. Background

On 12 November 2013, defendant was indicted for assault with a deadly weapon with the intent to kill inflicting serious injury in violation of N.C. Gen. Stat. § 14-32(a), robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87, conspiracy to commit robbery with a dangerous weapon, and murder in violation of N.C. Gen. Stat. § 14-17.

Defendant was tried at the 12 September 2016 criminal session of Mecklenburg County Superior Court, the Honorable Yvonne Mims-Evans presiding. The State's evidence tended to show that during the late afternoon hours of 31 October 2013, Terrell Freeman ("Freeman") and Azjee Pierce ("AJ") were at the Econo Lodge on Independence Boulevard in Charlotte, North Carolina. Freeman had marijuana and AJ had advertised on Instagram that it was for sale. Two potential buyers had contacted AJ and were interested in purchasing an ounce of marijuana for approximately $260.00. Freeman's personal cell phone, a Samsung flip-phone, was used to communicate with the potential buyers. Freeman and AJ agreed to meet the buyers at the Rosecroft Apartments, a location the buyers selected. Freeman testified that he had about $1,800.00 to $3,000.00 in cash on his person. That evening, AJ and Freeman arrived at Rosecroft Apartments in Freeman's car, a blue Pontiac Grand Am. AJ was the driver.

Upon arrival, AJ parked the Pontiac by backing into a parking space. The two potential buyers were sitting on the stairs of the apartment complex and they approached Freeman's vehicle. Freeman was sitting in the front passenger seat. Freeman described one of the men as "kind of tall, light skin with dre[a]ds. The other one was a little shorter, a little darker, had dre[a]ds." Freeman believed the men were both young, African-American males, "at the max 22 [years old]." The two men entered the backseat of Freeman's vehicle and closed the door. The parties started discussing the price and weight of the marijuana and realized that the marijuana did not amount to an ounce. Freeman asked the two men if they wanted him to retrieve more marijuana and they answered, "yeah" and exited the vehicle.

AJ and Freeman drove away from the Rosecroft Apartments and went to the Econo Lodge to obtain more marijuana. After getting more marijuana, AJ and Freeman returned to the Rosecroft Apartments. AJ again backed into a parking spot. The tall, light skinned man with dreads approached their vehicle and opened the rear, driver's side door. He said, "hold on, wait for my brother[]" and Freeman told him to shut the door. Freeman then saw the shorter man run towards the car. The two potential buyers started shooting at Freeman and AJ. Freeman testified that he felt the shots hitting the left side of his ribs and his left arm. The shorter man came around to the passenger side and shot Freeman again in his groin area with a revolver. Freeman grabbed the shorter man's arm and tried to "smack the gun, and

he shot me again in my arm." The shorter man then "took off running." Freeman testified that the taller man "had already took off running."

Freeman tried to exit the car when he fell to the ground. He had been shot seven times. AJ had exited the vehicle and ran, but fell to the ground as well. AJ kept saying "no, she couldn't breathe." Less than a minute after the taller shooter had left the scene, he returned to the Pontiac and began rummaging for something on the driver's side of the vehicle. The man then left through the woods.

Dr. James M. Sullivan, an expert in forensic pathology, testified that he performed an autopsy on AJ. Dr. Sullivan testified that AJ suffered a gunshot wound to her neck, two skin lacerations, and injuries to her elbow and left knee. The cause of AJ's death was the gunshot wound to the neck.

Freeman made an in-court identification of defendant as the taller shooter. When Freeman was in the hospital being treated for his injuries, he identified defendant as one of the shooters in a photographic lineup administered by a detective with the Charlotte-Mecklenburg Police Department ("CMPD"). In a second photographic lineup administered by the CMPD, Freeman identified Harold Lindsey as the other shooter, "[h]e was in the car, he shot me."

Bryan Buchalski, a CMPD crime scene investigator, testified that he collected the following items from the crime scene: a black, Huawei cell phone in the grass; a spent .22 shell casing in the front driver seat of the Pontiac; a cell phone on the front

passenger seat; jeans that contained $1,670.00 and marijuana in the pockets; and two USB cables on the ground near the passenger door.

Todd Roberts, a fingerprint examiner with the CMPD, testified that fingerprints taken from the trunk of Freeman's Pontiac matched defendant's fingerprints.

Christopher DeCarlo, a detective with the Digital Forensics and Cyber Crimes Unit of the CMPD, testified that he examined a Samsung flip-phone and black Huawei phone that were collected from the crime scene. The number of the Samsung cell phone was 704-xxx-x274 and was assigned to Freeman. The Samsung had outgoing calls to and incoming calls from 704-xxx-x473, a number assigned to Harold Lindsey. An incoming phone call from Harold Lindsey's number was received on the Samsung cell phone at 9:05 p.m. on 31 October 2013. The number of the Huawei cell phone was 803-xxx-x482 and was assigned to defendant. The Huawei cell phone had several incoming and outgoing calls from Harold Lindsey's number on the evening of 31 October 2013. It also had a saved contact listed as "Mom Dukes." The number associated with "Mom Dukes," 704-xxx-x341, was assigned to defendant's mother.

Aby Moeykens, a CMPD DNA analyst and expert in DNA forensic analysis, testified that she analyzed swabs taken from the black cell phone and from defendant. There was "a partial major DNA profile obtained from the cell phone, which matched the DNA profile obtained from [defendant]."

Defendant did not present any evidence.

On 16 September 2016, a jury found defendant guilty of all charges. The trial court consolidated the assault with a deadly weapon with the intent to kill inflicting serious injury, robbery with a dangerous weapon, and conspiracy to commit robbery with a firearm convictions for judgment and sentenced defendant to a term of 73 to 100 months. Defendant was sentenced to life imprisonment without parole for the first degree murder conviction, to begin at the expiration of the first sentence.

Defendant appeals.

II. Discussion

The sole issue on appeal is whether the trial court erred by instructing the jury on the issue of flight. Defendant contends that there was insufficient evidence to show that he avoided apprehension and that there is a reasonable possibility a different result would have been reached had the trial court not issued the flight instruction. We disagree.

During the charge conference, defendant objected to the instruction on flight. The trial court overruled defendant's objection and instructed the jury in accordance with the North Carolina pattern jury instructions as follows:

> The State contends and the defendant denies that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient[,] in

> itself[,] to establish the defendant's guilt. Further, this [circumstance] has no bearing on the question of whether the defendant acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation or deliberation.

See N.C.P.I. – Crim. 104.36 (2013).

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo*, by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

It is well established that

> an instruction on flight is justified if there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.

State v. Harvell, 236 N.C. App. 404, 411, 762 S.E.2d 659, 664 (2014), *disc. review denied*, 368 N.C. 296, 776 S.E.2d 191 (2015) (citing *State v. Blakeney*, 352 N.C. 287, 314, 531 S.E.2d 799, 819 (2000)). "[T]he evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence." *State v. Grullon*, 240 N.C. App. 55, 58, 770 S.E.2d 379, 381 (citation omitted), *disc. review denied*, 368 N.C. 269, 772 S.E.2d 732 (2015).

On appeal, defendant relies on *State v. Thompson*, 328 N.C. 477, 402 S.E.2d 386 (1991), and *State v. Holland*, 161 N.C. App. 326, 588 S.E.2d 32 (2003), in support of his argument. However, we find neither case determinative.

In *Thompson*, the defendant challenged the trial court's decision to not provide his requested jury instruction on flight. The evidence demonstrated that defendant was in the army and stationed at Fort Bragg. After he committed a crime in rural Cumberland County, he returned to the military reservation and mistakenly drove into an off-limits area behind the officer's club. The defendant stopped his truck next to a dumpster behind the officer's club. After seeing the military police car approach his truck, the defendant drove away. *Thompson*, 328 N.C. at 490, 402 S.E.2d at 392-93. The North Carolina Supreme Court held that this "evidence alone [was] not enough to warrant an instruction on flight." *Id.* at 490, 402 S.E.2d at 393. "[T]he defendant returned to a place where, if necessary, law enforcement officers could find him. Essentially, the defendant returned home." *State v. Shelly*, 181 N.C. App. 196, 209, 638 S.E.2d 516, 525-26, *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007).

In *Holland*, the defendant argued that the evidence was insufficient to merit an instruction on flight. *Holland*, 161 N.C. App. at 330, 588 S.E.2d at 36. The evidence demonstrated that the defendant left the crime scene with his accomplices and drove to the home of one of the accomplices. *Id.* Thereafter, the defendant was driven to a girlfriend's residence. *Id.* Our Court stated that "[v]isiting a friend at

their residence is not an act that, by itself, raises a reasonable inference that defendant was attempting to avoid apprehension." *Id.* Accordingly, our Court found that it was error for the trial court to instruct the jury on flight. However, it held that the error was harmless in light of the remaining evidence against the defendant. *Id.*

Here, the circumstances are distinguishable from those found in *Thompson* and *Holland*. There was no evidence presented that defendant left the crime scene and returned home, and there was no evidence that he merely visited a friend at their residence after he left the scene of the crime.

Instead, we find *State v. Anthony*, 354 N.C. 372, 555 S.E.2d 557 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002), and *State v. Lloyd,* 354 N.C. 76, 552 S.E.2d 596 (2001), to be instructive. In *Anthony*, the North Carolina Supreme Court upheld a flight instruction where the evidence presented, when considered in the light most favorable to the State, demonstrated that after shooting the victims, the defendant immediately entered his vehicle and quickly drove away from the crime scene "without rendering any assistance to the victims or seeking to obtain medical aid for them." *Anthony*, 354 N.C. at 425, 555 S.E.2d at 591. The defendant passed a police officer who was en route to the scene of the shooting but failed to flag the officer down. *Id.* The Court held that "this evidence was sufficient to establish that defendant did more than merely leave the scene of the crime." *Id.*

Likewise, in *Lloyd*, the North Carolina Supreme Court upheld a flight instruction where the "defendant's behavior in the aftermath of the shooting establishe[d] that he did more than merely leave the scene of the crime[.]" *Lloyd*, 354 N.C. at 120, 552 S.E.2d at 626. There was testimony from numerous witnesses that the defendant "hurriedly left the scene of the murder without providing medical assistance to the victim." *Id.* at 119, 552 S.E.2d at 626. Soon thereafter, the defendant drove to a different location to confront the victim's boyfriend, went to a convenience store to purchase a soda, and then called the police department to arrange a surrender. *Id.* The Court noted that "at no time during his conversation with [an officer with the police department] did defendant request assistance for the victim, nor did he tell the officer where he could then be found." *Id.*

Here, similar to the circumstances found in *Anthony* and *Lloyd*, there was evidence presented that defendant did more than merely leave the scene of the crime. There was testimony from one of defendant's victims, Freeman, that after defendant shot Freeman and AJ, he immediately fled the scene. Although defendant returned less than a minute later, he again left the scene after rummaging through Freeman's vehicle. At no point did defendant render any assistance to the victims of his crime or seek to obtain medical assistance for them. This evidence, when considered in the light most favorable to the State, was sufficient to warrant the trial court's instruction on flight.

Even assuming *arguendo* that the instruction on flight was improper, it cannot reasonably be said to have been prejudicial to defendant. Evidence in the form of Freeman's testimony, Freeman's identification of defendant through a photographic lineup, fingerprints matching defendant found on the Pontiac, defendant's cell phone being found at the crime scene, and DNA found on a cell phone found at the scene matching defendant provided overwhelming evidence of defendant's guilt. Accordingly, we hold that defendant received a fair trial, free of error.

NO ERROR.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).