IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ANTONIO MORALES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D13-1113

Opinion filed December 23, 2014.

An appeal from the Circuit Court for Clay County.
Don H. Lester, Judge.

Nancy A. Daniels, Public Defender, and Nada M. Carey, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Michael McDermott, Assistant Attorney General, Tallahassee, for Appellee.

VAN NORTWICK, J.

Antonio M. Morales appeals his judgment and sentence for attempted first degree murder, contending that the trial court erred in denying Morales' motion for judgment of acquittal since the State failed to present adequate circumstantial evidence from which a jury could have found his actions were premeditated.

Viewing, as we must, the evidence and inferences that can be drawn from the evidence in the light most favorable to the State, as explained in detail below, we find merit in Morales' argument and reverse and remand.

Morales was charged by information with attempted murder in the first degree for his involvement in events on the night of August 6, 2011. The case proceeded to a jury trial. The State's first witness was Leon Oliver, who testified that, on the night in question, he was promoting an event at Club Christopher, a nightclub in Orange Park. Oliver stated that he had intervened in some minor disputes that transpired during the evening and that, when closing time arrived, he was outside in the parking lot and then saw an exiting patron arguing with people inside a vehicle that was leaving the parking lot.

Oliver testified that the patron arguing with the people in the vehicle was not involved in the disputes that had cropped up earlier in the evening. Oliver stated that he saw the vehicle stop and a person emerge from the rear passenger seat and fire four rounds from a gun, hitting the patron once in the stomach. Oliver stated that the shooting occurred extremely quickly and that the only person he saw with a firearm was the shooter. Oliver stated that he believed the shooter was one of the individuals he had tried to calm down earlier in the night, but he was not certain. Through Oliver, the State introduced surveillance video from the club that depicted the victim and the vehicle involved in the shooting, as well as what appears to be

the shooting itself. The video has no sound and does not show the participants' faces.

Several law enforcement witnesses testified about collecting evidence from the scene, which included spent shell casings and projectiles, as well as locating and detaining the vehicle described in the shooting, along with its passengers. Gunshot residue tests were performed on the occupants of the vehicle; trace amounts of gunshot residue were found on the samples taken from Morales, but no residue was detected in the samples taken from the other people who were found in the vehicle. The State also introduced recordings of several telephone calls Morales made from jail, wherein Morales made several potentially inculpatory statements.

Kevelin Holmes testified that he was at Club Christopher on the night in question; that he had no problems with anyone inside the club; and that he exited the club at closing time. Holmes stated that on his way out, he attempted to speak with a female; that she did not acknowledge two of his salutations; that he then proceeded on his way; and that he saw her get into a grey vehicle with several other people. Holmes testified that he did not know and had not had any interaction with the people in the vehicle up to that point in the evening.

Holmes stated that the vehicle pulled past him quickly, "kind of like it fixing to hit me," which prompted Holmes to say something towards the vehicle; the

vehicle occupants said something back; and Holmes responded. Holmes testified that the vehicle drove on "a bit;" that he heard arguing; and that he looked back and "threw my hands up to try and figure out what was going on as I looked at them . . . and next thing I know I hear shots." Holmes stated that he was shot once in the stomach by a black male who exited the rear passenger door of the vehicle, and gave an in-court identification of Morales as the shooter.

Following the State's presentation of evidence, defense counsel moved for judgment of acquittal, arguing that the State failed to make a *prima facie* case against Morales because there was a lack of physical evidence, the surveillance video did not show the crime take place, and Morales made no confession to the crime. The trial court denied the motion, concluding that Holmes' identification of Morales "removes this from a purely circumstantial case."

At the close of all the evidence, defense counsel renewed the motion for judgment of acquittal, which the trial court again denied. The jury ultimately found Morales guilty of attempted first-degree murder. The trial court adjudicated Morales guilty and sentenced him to forty-five years' imprisonment pursuant to the 10/20/Life statute. This appeal ensued.

A trial court's denial of a motion for judgment of acquittal is reviewed *de novo*. Jones v. State, 4 So. 3d 687, 688 (Fla. 1st DCA 2009). "Direct evidence is evidence which requires only the inference that what the witness said is true to

prove a material fact. . . . Circumstantial evidence is evidence which involves an additional inference to prove the material fact." Kocaker v. State, 119 So. 3d 1214, 1224 (Fla. 2013) (quoting Charles W. Ehrhardt, Florida Evidence § 401.1 (2012 ed.)). Viewing the evidence and reasonable inferences that can be drawn therefrom in the light most favorable to the State, "[a] motion for judgment of acquittal should be granted in a circumstantial evidence case if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Carpenter v. State, 785 So. 2d 1182, 1194 (Fla. 2001) (quoting State v. Law, 559 So. 2d 187, 188–89 (Fla. 1989)).

Section 782.04, Fla. Stat. (2011), provides:

> (1)(a) The unlawful killing of a human being:
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
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> * * *
>
> is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.
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> * * *
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> (2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

As the Florida Supreme Court has explained:

> Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Calhoun v. State, 138 So. 3d 350, 366 (Fla. 2013) (citations and internal quotations omitted).

> An act evinces a "depraved mind" when the act is of the kind that:
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> (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and (2) is done from ill will, hatred, spite or an evil intent, and (3) is of such a nature that the act itself indicates an indifference to human life.

Bellamy v. State, 977 So. 2d 682, 683 (Fla. 2d DCA 2008) (citation omitted). "A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt . . ." § 777.04(1), Fla. Stat. (2011).

"Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Carpenter, 785 So. 2d at 1196 (quoting Holton v. State, 573 So. 2d 284, 289 (Fla. 1990)). "Where the State's proof fails to exclude a reasonable hypothesis that the homicide

occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Randall v. State, 760 So. 2d 892, 901 (Fla. 2000).

We agree with Morales that the record does not include sufficient evidence from which a jury could exclude every reasonable hypothesis except that of guilty of a premeditated design. There is no evidence in the record that Morales made any statement indicating he had a conscious purpose to kill Holmes when he fired the gun. Contrary to the trial court's ruling below and the State's assertion in the Answer Brief, Holmes' testimony is direct evidence only of the fact that Morales was the shooter. Holmes could not, nor could any witness other than Morales, directly testify as to Morales' state of mind. As the prosecutor stated in his closing argument, "[i]t's circumstantial proof, the circumstances you have to look to determine someone's intent in their mind." Therefore, the State's evidence of premeditation is circumstantial. See Kocaker, 119 So. 3d at 1224.

The State did not produce any evidence that Morales had procured the two guns recovered by law enforcement from the vehicle with the purpose of using them against anyone at the club that evening. In fact, there was no testimony as to how the guns came to be in the vehicle or to whom they belonged. Cf. Floyd v. State, 850 So. 2d 383, 397 (Fla. 2002) (defendant's act of bringing gun with him to victim's home was inconsistent with his theory that he quarreled with and shot victim "in a moment of uncontrolled rage without having fully formed a conscious

purpose to kill."). While there was evidence that Holmes and the occupants of the vehicle were arguing immediately prior to the shooting, including Holmes' testimony that he was cursing at the vehicle occupants, the record demonstrates that Morales and Holmes did not know one another and had not had any difficulties with each other prior to the incident.

Holmes was shot once in the abdomen. Cf. Kopsho v. State, 84 So. 3d 204, 221 (Fla. 2012) (evidence that defendant shot victim three times and kept bystanders away while victim perished was sufficient to support inference of premeditation); Davis v. State, 26 So. 3d 519, 530 (Fla. 2009) (finding ample support for premeditation when defendant stabbed victim with knife until it broke, got another knife and returned to complete killing, and evidence demonstrated that wounds were inflicted to vital areas of back, chest, and neck). Further, although there is competent substantial evidence that multiple shots were discharged, the fact that multiple shots were fired does not establish premeditation to the exclusion of other reasonable inferences that could be drawn from the evidence. It is plausible that Morales fired multiple rounds in a matter of seconds as a result of a sudden outburst of anger, ill will, and indifference to human life.

Because the State's evidence as to the essential element of premeditation does not exclude the reasonable hypothesis that the offense was committed with depraved mind, we reverse Morales' judgment and sentence for attempted first-

degree murder. Because there is ample evidence from which the jury could have found each of the elements for attempted second-degree murder, however, which is a lesser included offense about which the jury was instructed, we instruct the trial court to adjudicate Morales guilty of attempted second-degree murder and resentence him. See § 924.34 Fla. Stat. (2013); see also State v. Sigler, 967 So. 2d 835, 844 (Fla. 2007) ("[W]hen all of the elements of a lesser offense have been determined by the jury, section 924.34 is a valid exercise of the legislative prerogative allowing appellate courts to direct a judgment for such an offense.").

Therefore, we REVERSE Morales' judgment for attempted first-degree murder and REMAND with instructions for the trial court to enter judgment for attempted second-degree murder and resentence accordingly.

CLARK J., CONCURS, and ROBERTS, J., DISSENTS WITH OPINION.

ROBERTS, J., dissenting,

I respectfully dissent from the majority's decision to reverse Morales' conviction for attempted first-degree murder and remand to the trial court for entry of a conviction for attempted second-degree murder. The majority opinion concluded that there was insufficient evidence of premeditation to support the conviction for attempted first-degree murder. Although I disagree with the majority's decision on the merits, I believe we cannot reach the merits because Morales' argument on appeal was never presented to the trial court below and is, thus, not preserved.

At the close of the State's evidence, Morales' defense attorney moved for a judgment of acquittal, arguing that the State failed to meet its burden of proving attempted first-degree murder in a purely circumstantial case. The defense attorney first relied Lindsey v. State, 14 So. 3d 211 (Fla. 2009), to argue that the circumstantial evidence was insufficient to establish guilt beyond a reasonable doubt. Notably, in Lindsey, the issue involved circumstantial evidence relating to the defendant's involvement in the crime, not to the premeditation element. The defense attorney also relied on Ballard v. State, 923 So. 2d 475 (Fla. 2006), to argue that there was no physical evidence of value in the case linking Morales to the shooting. As in Lindsey, Ballard involved an examination of the sufficiency of

the circumstantial evidence to support Ballard's involvement in the crime, not the premeditation element. Morales' defense attorney continued the argument, stating:

> There – if you look at the video you cannot see the actual crime take place. There are no admissions by Mr. Morales in his jail calls. There's no confession and I would argue that the eyewitness identification by Mr. Holmes was only made here in court when he knew where the defendant would be seated whereas previously he had indicated to me to me that the individual that he recalled firing at him had little twists in his hair and, of course, I question his credibility given that he's a six-time convicted felon.

The trial court denied the motion, finding that Holmes' in-court identification of the appellant meant that the case was no longer a purely circumstantial one. The motion for judgment of acquittal was perfunctorily renewed at the close of the evidence and was again denied.

The record is clear that the argument for a judgment of acquittal was solely directed to the sufficiency of the evidence regarding the identity of the shooter. All of the cases relied upon by Morales' defense attorney deal with identity. At no time did the defense attorney argue the sufficiency of the evidence regarding the element of premeditation. None of the cases cited supporting the argument have anything to do with premeditation. Neither the word "premeditation" nor any synonyms thereof appear in the transcript of the argument in support of a judgment of acquittal or in any of the cases cited.

It is axiomatic that an issue cannot be maintained on appeal unless the supposed error is adequately presented to the trial court so that it may be corrected

below. See State v. Currilly, 126 So. 3d 1244, 1245 (Fla. 1st DCA 2013). In order to adequately preserve an issue for appeal, an argument must be sufficiently precise so as to fairly apprise the trial court of the relief sought and the grounds therefor. Id. See also Fla. R. Crim. P. 3.380(b) (a motion for judgment of acquittal must "fully set forth the grounds on which it is based"). On appeal, Morales argues that the State's evidence failed to prove a premeditated intent to kill. However, below, Morales' defense attorney only advanced an argument attacking identity. As such, we cannot reach the merits of the issue on appeal as the issue was not preserved. See Vargas v. State, 845 So. 2d 220, 221 (Fla. 2d DCA 2003) (finding that while a motion for judgment of acquittal arguably preserved the issue of the defendant's identity as the murderer, it was insufficient to preserve the issue of premeditation).

Even assuming we could reach the merits, the trial court properly let the case go to the jury. The victim testified that the vehicle the defendant was riding in passed him quickly in the parking lot. He exchanged words with the occupants and the occupants said something back. The vehicle drove on "a bit" and stopped. Holmes heard the occupants arguing. The rear passenger of the vehicle exited the vehicle and began shooting. Holmes identified the appellant as the shooter. Another eye witness told the jury that the shooter "fired, fired, fired[,] and then one more shot was fired and then they sped off[.]" The witness further testified that

before the car sped off, the shooter "[g]ot back in the car and one more shot, one more shot came out and hit the carpet."

Premeditation "can be formed in a moment and need only exist 'for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable result of that act.'" DeAngelo v. State, 616 So. 2d 440, 441 (Fla. 1993) (quoting Asay v. State, 580 So. 2d 610, 612 (Fla. 1991), *cert. denied*, 502 U.S. 895 (1991)). The evidence presented in this case was not wholly circumstantial and was sufficient for the jury to find the defendant guilty of attempted first-degree murder. I would affirm.