NO. COA01-953

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Halifax County
No. 00 CRS 2809

JESSE TYANN BRACEY

Appeal by defendant from judgment entered 2 March 2001 by Judge Quentin T. Sumner in Halifax County Superior Court. Heard in the Court of Appeals 10 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General H. Dean Bowman, for the State.

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III and Robert J. McAfee, for defendant-appellant.

WALKER, Judge.

On 2 March 2001, defendant was convicted of first-degree murder under the theory of premeditation and deliberation and was sentenced to life imprisonment without parole. The State's evidence tended to show the following: During the early morning hours of 19 March 2000, Antonio Gunter (the deceased), Lamont Hannon (Mr. Hannon), and defendant attended a party at the residence of Vera Hannon, Mr. Hannon's mother, in Scotland Neck. Mr. Hannon testified that while they were inside the house, there was no trouble between defendant and him. However, Mr. Hannon witnessed the defendant and Steve Harris arguing in the yard. When

Mr. Hannon told both men to take their arguing across the street, defendant put his finger in Mr. Hannon's face and swore at him. Mr. Hannon then struck defendant once in the face with his fist. Mr. Hannon testified that he followed the defendant across the street and asked him if he wanted to fight, to which defendant responded, "Naw, I'm through with it." Mr. Hannon then turned and walked away. While he was walking away, the deceased approached Mr. Hannon and told him to "leave it alone." Immediately thereafter, Mr. Hannon testified he heard a pop and "Antonio fell into me and we both hit the ground." The bullet struck the deceased in the back of the head killing him.

Andre Shields testified that, as the deceased and Mr. Hannon were walking away from defendant, he heard a gunshot and spotted the defendant with "one foot in and one out" of the driver's side door. Mr. Shields further testified that, after defendant fired his pistol, the defendant "just got in his car and left."

Detective Ralph Macon of the Halifax County Sheriff's Department testified that he and Detective Stanfield interviewed defendant on 19 March 2000 after defendant had been arrested. Defendant waived his *Miranda* rights and gave a statement. He told Detective Macon that, after he was struck by Mr. Hannon, he "walked" back to his car and "reached into my coat pocket and pulled the pistol out." Defendant stated that he held the pistol at an angle and fired one shot into the crowd. Defendant further stated that it had been "a minute or two" between the time he was struck in the face and the time he fired his pistol. Defendant

told Detective Macon that he saw someone fall to the ground, and he "got into [his] car and drove away." Defendant did not make any statements to the detective as to whether he was intoxicated at the time of the shooting.

Gerard Fenner testified that defendant came to his house during the early morning hours of 19 March 2000. Defendant gave him a pistol and told Mr. Fenner that he thought he had just shot someone. Mr. Fenner and Dwayne Battle hid the pistol under a house on 12th Street. Mr. Battle subsequently sold the pistol to Tony Baker, who turned the pistol over to the Scotland Neck Police Department.

Further, Chief Doug Pilgreen of the Scotland Neck Police Department testified that later that day he observed defendant's vehicle parked in the yard behind a mobile home where it was difficult to be seen from the street. Chief Pilgreen stated that he knew defendant stayed in the mobile home quite frequently; however, he had never seen defendant's vehicle parked behind the mobile home prior to this occasion.

Defendant did not testify but he called Latisha Bellamy who testified that she witnessed the confrontation between the defendant and Mr. Hannon. She testified that Mr. Hannon and Dameon Arrington chased defendant to his vehicle and they "beat him till he got all the way to his car like he was a punching bag." Darrell Lassiter testified that he and defendant consumed beer at a friend's house, Clark's Café, and Vera Hannon's house and became "drunk" on the night in question.

On appeal, defendant first contends the trial court erred in denying his motion to dismiss the charge of first-degree murder for insufficient evidence of premeditation and deliberation. To survive a motion to dismiss, the State must present substantial evidence to support a finding of each essential element of the offense charged and that the defendant committed the crime. *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971). 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 considering a motion to dismiss, the court must examine the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 745, 761 (1992).

First-degree murder is the unlawful killing of another human being with malice, premeditation, and deliberation. *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Malice may be presumed when a deadly weapon is used to commit an unlawful killing. *State v. Porter*, 326 N.C. 489, 505, 391 S.E.2d 144, 155 (1990). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Conner*, 335 N.C. 618, 635, 440 S.E.2d 826, 835-36 (1994), *cert. denied*, 522 U.S. 876, 1189 S.Ct. 196, 139 L. Ed. 2d 134 (1997). "Deliberation means an intent to kill,

carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* at 635, 440 S.E.2d at 836. Both premeditation and deliberation may be proved by circumstantial evidence. *State v. Bruton*, 344 N.C. 381, 388, 474 S.E.2d 336, 341 (1996). Further, premeditation and deliberation can be inferred from statements and conduct of the defendant before and after the killing. *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992).

Here, the evidence viewed in the light most favorable to the State shows that after defendant was struck by Mr. Hannon's fist and was asked if he wanted to fight, defendant stated he was "through with it" and walked away. He "walked" back to his vehicle and after "a minute or two" opened the door and placed one foot inside and turned and fired his pistol in the direction of the deceased. He then quickly got into his vehicle and left. Defendant disposed of the pistol by leaving it with Mr. Fenner. Further, defendant parked his vehicle behind a mobile home where it was not visible from the street. Thus, we find there was sufficient evidence to submit first-degree murder based on the theory of premeditation and deliberation to the jury. The trial court did not err in denying defendant's motion to dismiss.

Defendant next argues that the trial court erred in denying his request for instruction on the defense of accident. A defendant is entitled to instructions to the jury regarding any

defenses which arise upon the evidence. *State v. Melton*, 187 N.C. 480, 481, 122 S.E. 17, 18 (1924).

A homicide will be excused as a result of an accident where it appears that a killing was unintentional, that the perpetrator acted with no wrongful purpose in doing the homicidal act, and that it was not the result of negligence. *State v. Turner*, 330 N.C. 249, 262, 410 S.E.2d 847, 854 (1991); *State v. Faust*, 254 N.C. 101, 112, 118 S.E.2d 769, 776 (1961). Evidence does not raise the defense of accident where the defendant was not engaged in lawful conduct when the killing occurred. *Faust*, 254 N.C. at 113, 118 S.E.2d at 776.

Here, defendant contends that because he did not intend to shoot the deceased but that he was "about to go and just shot," he is entitled to an instruction on accident. Defendant does not claim that his action was unintentional or that his pistol accidentally discharged. Instead, defendant admits pulling the pistol from inside his coat pocket and then he "turned around towards the crowd" and "fired one shot off." Accordingly, the trial court properly denied defendant's request for an instruction on the defense of accident.

Defendant further contends the trial court erred in refusing to give his requested instruction on transferred intent. A trial court must give an instruction that is a correct statement of the law and is supported by evidence. *State v. Moore*, 335 N.C. 567, 606, 440 S.E.2d 797, 819 (1994). However, the trial court need not give the requested instruction verbatim. *State v. Green*, 336 N.C.

142, 174, 443 S.E.2d 14, 33-34 (1994). An instruction that gives the substance of the requested instruction and is a correct statement of the law is sufficient. *Id.*

The defendant argues that his requested instruction would "set in the jury's mind not only the proper legal standard to apply to the facts found by the jury, but also to provide a more logical explanation to the jury of the defense theories of accident, intoxication or self-defense." Further, defendant argues that the instruction on transferred intent given by the trial court "bypasses consideration of second-degree murder in this instance by substituting blanket general intent to all of the people in the vicinity of Lamont Hannon" on this occasion.

Here, the trial court gave the following instruction on transferred intent: "If the defendant intended to harm one person but actually harmed a different person, the legal effect would be the same as if he had harmed the intended victim." The trial court's instruction is an accurate statement of the doctrine of transferred intent which was drawn from N.C.P.I.--Crim. 104.13 (2001). Further, defendant fails to point to any prejudice as to the instruction on voluntary intoxication and he did not request an instruction on self-defense. Therefore, the trial court did not err in refusing to give the defendant's requested instruction on transferred intent.

Defendant finally contends the trial court erred by denying his request for an instruction on voluntary manslaughter. Our Supreme Court has held that when a jury is properly instructed on

first-degree murder and second-degree murder and returns a verdict of guilty of first-degree murder on the theory of premeditation and deliberation, the failure to instruct on voluntary manslaughter is harmless error. *State v. Holt*, 342 N.C. 395, 398, 464 S.E.2d 672, 674 (1995); *State v. Bunnell*, 340 N.C. 74, 82, 455 S.E.2d 426, 430 (1995); *State v. Shoemaker*, 334 N.C. 252, 271, 432 S.E.2d 314, 324 (1993).

In the instant case, the jury was properly instructed on first-degree murder and second-degree murder. The jury returned a verdict of guilty of first-degree murder under the theory of premeditation and deliberation. Thus, assuming *arguendo* the trial court erred in failing to give an instruction on voluntary manslaughter, any error was harmless.

In conclusion, we find there was no error in the trial and conviction of defendant for first-degree murder.

No error.

Chief Judge EAGLES and Judge BIGGS concur.

Report per Rule 30(e).