An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA07-1494

NORTH CAROLINA COURT OF APPEALS

Filed: 3 June 2008

STATE OF NORTH CAROLINA

v.

CEDRIC LAMONT HARRIS

Martin County
No. 05 CRS 50703

Appeal by defendant from judgments entered 6 June 2007 by Judge Thomas D. Haigwood in Martin County Superior Court. Heard in the Court of Appeals 14 May 2008.

Court of Appeals

Slip Opinion

Attorney General Roy A. Cooper III, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Rudolf, Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

STEELMAN, Judge.

Where the State presented evidence of defendant's intent to kill, the trial court did not err in denying defendant's motion to dismiss the charge of attempted first-degree murder. The trial court did not commit plain error in failing to instruct the jury on the lesser-included offense of assault with a deadly weapon inflicting serious injury. Where the testimony of a previous confrontation involving defendant did not prejudice defendant, a new trial is not warranted. It was not a violation of double jeopardy, the rule of lenity, the merger principle, or due process of law for the trial court to enter judgments against defendant for

both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury.

I. Factual and Procedural Background

On the evening of 16 May 2005, Cedric Harris ("defendant") went to the home of Rodney Ames. Henry Ward was at the home, and the three men smoked marijuana. They then left Ames's house and went to the home of Devon Reid's girlfriend. Reid and Desmond Staton were at the house. At approximately midnight on 17 May 2005, the five men walked to defendant's house to get more marijuana. Defendant suggested they take a shortcut through a cemetery. Defendant was walking behind Reid. Halfway through the cemetery, defendant shot Reid in the back of the head. Reid fell to the ground and the other four men fled. Reid survived the shooting.

On 1 August 2005, defendant was indicted for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The jury found defendant guilty of both charges. The trial court found defendant to be a prior record level IV for felony sentencing purposes. Defendant was sentenced to a term of 251 to 311 months imprisonment for the charge of attempted first-degree murder and a concurrent sentence of 133 to 169 months for assault with a deadly weapon with intent to kill inflicting serious injury. Defendant appeals.

II. Motions to Dismiss

In his first argument, defendant contends that the trial court erred in denying his motion to dismiss the charge of attempted

first-degree murder due to insufficiency of the evidence. We disagree.

"Upon defendant's motion for dismissal, the question for the Court is 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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *State v. Murray*, 154 N.C. App. 631, 634, 572 S.E.2d 845, 847 (2002) (quotation omitted). The court must view the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (citation omitted).

The elements of attempted first-degree murder are: "(1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing." *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) (citing N.C. Gen. Stat. § 14-17 (2003); *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000)).

> Premeditation means that the defendant thought about killing for some length of time, however short, before he killed. Deliberation means that the intent to kill was formulated in a

> cool state of blood, one not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation. The phrase 'cool state of blood' means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason.

State v. Williams, 144 N.C. App. 526, 529-30, 548 S.E.2d 802, 805 (2001) (internal citations and quotations omitted). "Ordinarily, premeditation and deliberation are not susceptible of proof by direct evidence, and therefore must usually be proved by circumstantial evidence." *State v. Love*, 296 N.C. 194, 203, 250 S.E.2d 220, 226-27 (1978). Some of the circumstances to be considered in determining the existence of premeditation and deliberation include lack of provocation on the part of the victim; the conduct and statements of the defendant before and after the killing; and ill will or previous difficulties between the parties. *State v. Parker*, 354 N.C. 268, 280, 553 S.E.2d 885, 894 (2001); *Williams* at 530, 548 S.E.2d at 805.

Defendant argues that the State did not present sufficient evidence of premeditation and deliberation. He asserts that as the men were walking through the cemetery, Reid yelled "Boo." Defendant argues that this statement provoked him to shoot Reid, and that the shooting occurred in the "midst of a sudden action that was a spontaneous response to [the victim] yelling 'Boo.'" Defendant further contends that there was no evidence of other indicators of premeditation or deliberation, and that his conviction for attempted first-degree murder must be reversed.

The evidence presented at trial, viewed in the light most favorable to the State, was that Reid "yelled out 'Boo'" in a joking manner while the men were walking through the cemetery. Everyone laughed and told Reid to "stop playing." A few seconds later, after the group had walked several steps, defendant shot Reid in the back of the head at an arm's length distance. It was defendant who suggested that the group walk through the cemetery. Reid testified that prior to the incident, he had given defendant $700.00 for marijuana, and defendant had neither given him the drugs nor refunded his money. Ward testified that, on the day after the shooting, defendant warned him not to tell anyone about the shooting incident.

"A person who deliberately fires a pistol [at] his victim at point-blank range must be held to intend the normal and natural results of his deliberate act." *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270 (1973). We hold that the State presented sufficient evidence for the jury to infer that defendant formed the specific intent to kill Reid. When viewed in the light most favorable to the State, the evidence showed that there was no provocation on the part of Reid, and that there was no excuse or justification for the shooting. *See State v. Watson*, 287 N.C. 147, 156, 214 S.E.2d 85, 91 (1975) ("Mere words, however abusive, are never sufficient legal provocation to mitigate a homicide to a lesser degree"); *see also State v. Montague*, 298 N.C. 752, 757, 259 S.E.2d 899, 903 (1979) ("Legal provocation must be under circumstances amounting to an assault or threatened assault."

(citation omitted)). Even assuming *arguendo* that Reid's statement "Boo" was some degree of provocation, there is nothing in the record to suggest that this statement was sufficient to "overcome the defendant's reason." *See Williams* at 530, 548 S.E.2d at 805. The trial court properly denied defendant's motion to dismiss. This argument is without merit.

III. Jury Instructions

In his second argument, defendant contends that the trial court erred in failing to instruct the jury on the lesser-included offense of assault with a deadly weapon inflicting serious injury. We disagree.

"Since defendant failed to object to the jury charge or any omission thereto before the jury retired to consider its verdict, our review is limited to plain error." *State v. Cromartie*, 177 N.C. App. 73, 75-76, 627 S.E.2d 677, 680 (2006) (citation omitted). "Defendant must show that the error was so fundamental that it had a probable impact on the result reached by the jury." *State v. Campbell*, 340 N.C. 612, 640, 460 S.E.2d 144, 159 (1995) (citation omitted).

If the State presents positive evidence as to each element of the offense charged, and there is no contradictory evidence relating to any element, a defendant is not entitled to an instruction on a lesser included offense. *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citations omitted).

Defendant contends that the trial court committed plain error by failing to instruct the jury to consider whether defendant was

guilty of assault with a deadly weapon inflicting serious injury, a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant asserts the evidence concerning his intent to kill was equivocal; therefore, the judge should have instructed the jury on the lesser assault crime. Specifically, defendant argues that he shot Reid "suddenly under the influence of [the victim] yelling 'Boo'", that there was no evidence of prior altercations or ill will between the parties, and that defendant did not inflict any lethal wounds after Reid fell to the ground. Defendant contends that this evidence, or lack thereof, raises an issue as to whether he intended to kill Reid.

The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: "(1) assault; (2) with a deadly weapon; (3) with intent to kill; and (4) serious injury not resulting in death." *State v. James*, 321 N.C. 676, 687, 365 S.E.2d 579, 586 (1988); N.C. Gen. Stat. § 14-32(a) (2007).

> The only difference in what the State must prove for the offense of misdemeanor assault with a deadly weapon and felony assault with a deadly weapon with intent to kill is the element of intent to kill. Where all the evidence tends to show a shooting with a deadly weapon with the intent to kill, the trial court does not err in refusing to submit the lesser included offense of assault with a deadly weapon.

State v. Riley, 159 N.C. App. 546, 553-54, 583 S.E.2d 379, 385 (2003) (internal citations omitted). "The defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant

circumstances." *James* at 688, 365 S.E.2d at 586 (citation omitted).

As discussed in our analysis of defendant's first argument, the evidence showed that defendant shot Reid in the back of the head at point-blank range without any provocation. Defendant must be held to intend the natural consequence of his deliberate act. *Jones* at 534, 197 S.E.2d at 270. There was no contradictory evidence presented as to the 'intent to kill' element of assault with a deadly weapon with intent to kill inflicting serious injury. *See Millsaps* at 562, 572 S.E.2d at 772; *Cromartie* at 77, 627 S.E.2d at 680 ("It is irrelevant that defendant only shot the victim one time. The lack of multiple shots fired does not negate intent to kill." (citation omitted)).

Defendant has failed to demonstrate to this Court that absent the alleged error, the jury would probably have reached a different result. This argument is without merit.

IV. Evidentiary Ruling

In his third argument, defendant contends that the trial court erred in admitting testimony about defendant's confrontation with Desmond Staton. We disagree.

At trial, over defendant's objections, Henry Ward was permitted to testify about a confrontation between defendant and Staton which occurred prior to the date of the shooting. Ward stated that Staton "got jumped" by defendant and as a result had to go to the hospital.

Defendant claims that this testimony was irrelevant, prejudicial, and that he is entitled to a new trial.

A general objection to evidence is ordinarily inadequate to preserve an alleged error for review unless it is clear from the entirety of the evidence that no purpose can be served from its admission. *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996).

Defendant objected during Ward's testimony regarding the confrontation between defendant and Staton, but he failed to specify the grounds for his objection. Since defendant made only a general objection to the evidence, we hold that this issue has not been preserved for our review. *See Jones* at 535, 467 S.E.2d at 20. This argument is without merit.

Even assuming *arguendo* that defendant's objection preserved the matter for our review, and that the trial court erred in admitting the evidence, defendant cannot demonstrate prejudice. A defendant is only prejudiced by the erroneous admission of evidence "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice . . . is [on] the defendant." N.C. Gen. Stat. § 15A-1443(a) (2007); *State v. Mebane*, 106 N.C. App. 516, 529, 418 S.E.2d 245, 253 (1992).

There was evidence presented at trial that defendant owed Reid a substantial sum of money, that he lured him into the cemetery, that he shot Reid in the back of the head at point-blank range,

that instead of procuring assistance, he fled the scene, and that he subsequently warned the other men to keep silent about the shooting.

We hold that defendant has not met his burden of showing a reasonable possibility that, had the alleged error not been committed, a different result would have been reached at trial. *See State v. Martin*, 322 N.C. 229, 238-39, 367 S.E.2d 618, 623-24 (1988). This argument is without merit.

V. Verdict

In his final argument, defendant contends that the trial court erred in imposing separate sentences for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury on the grounds that the sentences violate his constitutional protection against double jeopardy, the rule of lenity, the merger principle, and due process of law. We disagree.

Defendant acknowledges in his brief that we have previously rejected this argument. *See Tirado* at 559, 599 S.E.2d at 534. We are bound by prior decisions of this Court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). This argument is without merit.

Defendant has failed to argue his remaining assignments of error, and they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2007).

NO ERROR.

Judges HUNTER and STEPHENS concur.

Report per Rule 30(e).