NO. COA08-1224

NORTH CAROLINA COURT OF APPEALS

Filed: 16 June 2009

STATE OF NORTH CAROLINA

v. Rockingham County
Nos. 07 CRS 1984
07 CRS 50962

JONATHAN ELWOOD WALKER, SR.

Appeal by Defendant from judgment and commitment entered 11 April 2008 by Judge Catherine C. Eagles in Rockingham County Superior Court. Heard in the Court of Appeals 26 March 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General John J. Aldridge, III, for the State.

D. Tucker Charns for Defendant.

STEPHENS, Judge.

I. Procedural History

On 7 May 2007, Defendant Jonathan Elwood Walker, Sr. was indicted on two counts of attempted first-degree murder, one count of discharging a firearm into an occupied dwelling, and one count of discharging a firearm into an occupied vehicle.

Defendant was tried at the 8 April 2008 criminal session of Rockingham County Superior Court. On 11 April 2008, Defendant was found guilty of one count of attempted first-degree murder and one

count of discharging a firearm into an occupied vehicle. Defendant was found not guilty of the remaining charges.

Defendant was sentenced to 151 to 191 months in prison. From this judgment and commitment, Defendant appeals.

II. Facts

Gary Tilley and his uncle, Cliff Tilley, lived in a mobile home located at 371 Settlement Loop Road in Stoneville, North Carolina. Defendant and his wife, Patsy Walker, lived in a nearby home also on the property. On 31 March 2007, Gary and his friends, Frankie and Steve, gathered at Gary's home to do some work. Gary, Frankie, Steve, and Cliff intended to have a cookout after the work was finished. At some point before the cookout began, Defendant and Patsy walked over to Gary's house. While Cliff stayed home to prepare for the cookout, Gary, Frankie, Patsy, and Defendant left in Gary's truck to go buy drinks, bread, and cigarettes at Citgo.

When they arrived at Citgo, Defendant got out of the truck and started fighting with some people. Gary got Defendant back into the truck and told Frankie to take Defendant home. Gary told Frankie to tell Cliff to come pick Gary up. Cliff picked Gary up from the Citgo about eight minutes later. When Cliff and Gary arrived home, Defendant, Patsy, and Frankie were pulling out of the driveway in the white truck to go buy cigarettes at the store. Gary got into the truck to drive it, and Frankie moved over to the passenger's seat. On the way to the store, Defendant and Patsy

started fighting in the back seat. Gary pulled the truck over and told Defendant that "he ought to hit on somebody his own size; he shouldn't be beating on his wife." Defendant replied, "Well, I'll beat on you." Gary and Defendant got out of the truck. Gary grabbed Defendant and pushed him to the ground. Gary got back in the truck and took Frankie to Frankie's house. Gary then drove back home.

Cliff encountered Defendant walking up the road and asked Defendant what was going on. Defendant replied, "You see Gary, you tell him I got something waiting on him." Cliff continued to his home and parked his vehicle.

As Cliff parked, Gary was in his truck in the driveway about ten or twelve feet behind Cliff. Just as Cliff was getting out of his vehicle, Defendant "step[ped] out from behind the tree with a rifle and just start[ed] shooting at [Gary's] truck." Cliff saw Defendant cock the rifle at least three times when Defendant was walking up the driveway. Cliff asked Defendant, "[W]hat in the hell are you doing?" Defendant did not respond and continued to shoot at the truck. Cliff testified that "[a]ll of [a] sudden, the truck just lunged forward. It started towards him and I both." Cliff ran behind a nearby tree. The truck made a u-turn beside the tree and headed away across the field. Defendant continued to shoot at the truck. The truck then stopped and Gary jumped out, put his hands up, and begged Defendant not to shoot him. Defendant

shot at Gary again, and Cliff ran into his house. When Cliff got inside, he heard a shotgun go off and "it sounded like it was raining rocks and things hitting the trailer." Cliff called 911.

Bill Wade, a deputy sheriff with the Rockingham County Sheriff's Office, responded to the dispatch concerning gun shots being fired at 371 Settlement Loop Road. While waiting for backup, Wade heard a gun shot. When Deputy Jason Joyce arrived, Wade and Joyce entered the scene together. Wade observed Cliff taking cover next to a mobile home and flagging down Wade. Wade then observed Defendant running away from the scene towards some bushes. Defendant was apprehended and two unspent rifle cartridges were retrieved from Defendant's pants' pocket.

After securing Defendant, Wade entered Defendant's home and found a 16-gauge single-barrel shotgun lying opened on the bed. Defendant had some minor injuries to his face but declined medical attention. Defendant smelled strongly of alcohol.

Cliff told Wade that Defendant had fired at Gary while Gary was driving his truck to his home. Cliff stated that after initially being fired upon, Gary drove the vehicle into a field to avoid the gunfire. The truck stopped in the field approximately half-way between Defendant's home and Cliff's home. When Gary got out of the truck, Defendant chased Gary around the truck and fired an additional three to four shots at Gary.

Joyce located rifle shell casings in front of and to the side of Gary's truck and Deputy Jason Hutchins of the Rockingham County Sheriff's Office observed a bullet hole on the driver's side of the truck.

III. Discussion

By Defendant's two assignments of error, Defendant contends the trial court erred in not granting Defendant's motion to dismiss at the conclusion of all the evidence as the State did not offer sufficient evidence that Defendant did not act in self-defense. We are not persuaded.

When a defendant moves to dismiss a charge based on insufficiency of the evidence, the trial court must determine whether there is substantial evidence (1) of each element of the crime charged, and (2) that the defendant is the perpetrator. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998) (quotation marks and citation omitted). "The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant

dismissal." *Id.* However, if the evidence, when considered in light of the foregoing principles, is sufficient only to raise a suspicion as to either the commission of the crime or that the defendant on trial committed it, the motion to dismiss must be allowed. *Scott*, 356 N.C. at 595, 573 S.E.2d at 868. A trial court's denial of a motion to dismiss for insufficient evidence is a question of law, reviewed *de novo* upon appeal. *State v. Bagley*, __ N.C. App. __, __, 644 S.E.2d 615, 621 (2007).

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. N.C. Gen. Stat. § 14-17 (2007); *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000). Additionally, where there is evidence that a defendant charged with attempted murder acted in self-defense, the State has the burden of proving beyond a reasonable doubt that defendant did not act in self-defense. *State v. Potter*, 295 N.C. 126, 143, 244 S.E.2d 397, 408 (1978).

The elements which constitute perfect self-defense are:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a

> belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. McAvoy, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)). Perfect self-defense excuses a defendant altogether for a killing or an attempted killing.

The record in this case contains sufficient evidence to allow a jury to conclude that it did not appear that Defendant's use of force was necessary to save him from death or great bodily harm, nor did Defendant believe that it was. Viewing the evidence in the light most favorable to the State: Defendant and his wife got into an argument while riding with Gary to the convenience store. Gary pulled the truck over to the side of the road to intervene. Gary and Defendant got out of the truck and had an altercation. Gary then drove off without Defendant. Cliff saw Defendant walking up the road and asked Defendant, "[W]hat is going on?" Defendant responded, "You see Gary, you tell him I got something waiting on him." When Gary arrived in his driveway, Defendant "step[ped] out from behind the tree with a rifle and just start[ed] shooting at

the truck." Defendant cocked his rifle at least three times as he walked up the driveway. Gary's truck started driving towards Defendant and then made a u-turn and headed away. Defendant continued to shoot at the truck. The truck stopped and Gary jumped out, put his hands up, and begged Defendant not to shoot him. Defendant shot at Gary again. This evidence would allow a reasonable juror to find that Defendant could not have reasonably believed he was in danger of death or great bodily harm when Defendant was shooting at Gary.

Furthermore, the record contains substantial evidence that Defendant was the aggressor. The evidence favorable to the State indicates that after Gary and Defendant had an altercation, Gary left Defendant and drove away. Defendant obtained a gun, waited behind a tree for Gary to return, and then started firing at Gary when Gary drove the truck into the driveway. Even when Gary got out of the truck and asked Defendant not to shoot him, Defendant continued to shoot at Gary. Defendant thus initiated and escalated the confrontation. *See State v. Blackwell*, 163 N.C. App. 12, 17, 592 S.E.2d 701, 705 (finding that evidence that defendant left the scene and returned with a shotgun was sufficient to establish that he entered into confrontation willingly), *cert. denied*, 358 N.C. 378, 597 S.E.2d 768 (2004).

Defendant argues that "[t]he overwhelming evidence in this case was that a man, larger, taller and with a reputation for

violence, threatened [Defendant]." However, evidence supporting Defendant's theory does not negate the State's evidence, but is instead evidence to be considered by the jury in reaching its verdict. *In re Wilson*, 153 N.C. App. 196, 198, 568 S.E.2d 862, 863 (2002). Accordingly, we conclude that the trial court properly denied Defendant's motion to dismiss.

NO ERROR.

Judges JACKSON and STROUD concur.

Report per Rule 30(e).