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NO. COA08-338

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2008

STATE OF NORTH CAROLINA

v.

MICHAEL CONTREZ JONES

Wake County
No. 06 CRS 048148

Appeal by Defendant from judgment entered 11 July 2007 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 10 September 2008.

Court of Appeals

Attorney General Roy Cooper, by Assistant Solicitor General, John F. Maddrey, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for Defendant.

Slip Opinion

ARROWOOD, Judge.

Defendant appeals from judgment entered 11 July 2007 convicting him of first degree murder. We find no error.

The evidence tends to show that Michael Contrez Jones (Defendant), a member of the street gang known as the Bloods, shot and killed Jamel Jefferies (Jefferies), suspected by Blood members of being a member of a rival gang, the Crips. On 2 June 2006, Sean McCullers (McCullers), a member of the Bloods, started a fight with Jefferies because of his suspected Crip affiliation. On 3 June 2006, Jefferies and a group of men visited the home of sisters, Tiara Banks and Capri Banks, looking for McCullers and other Blood

members. Capri Banks reported the visit to Kerwin Pittman (Pittman), a ranking member of the Bloods, stating that ten or twelve Crips were outside her house. At the time of the call, Pittman was attending a meeting with members of the Bloods, and he told the group about the incident. The group then took three cars to Pittman's house to retrieve guns; Pittman, already armed with a .38 Special, picked up a nine millimeter High Point rifle from his house. Percy Smith (Smith), another Blood member, carried a small .22 caliber handgun. Another Blood member carried a .22 German luger. Pittman gave the nine millimeter High Point rifle to Defendant and asked whether he would shoot, and Defendant stated, "Yeah, I'm going to shoot. That's how I got my name." The gang called Defendant, "Hitman."

The group then went to Banks' apartment, but no suspected Crip members were there. With Smith driving, and Defendant in the passenger seat of Smith's white pick-up truck, the Bloods traveled to Beauty Avenue to find Jefferies. Patrick Ballard, Lamarion Powell, Demetrius Bullock and Eric Townes – fellow Blood members and affiliates – rode on the back of the truck. The Bloods found Jefferies with a group of ten people on Beauty Avenue. Defendant fired the first shot from the passenger seat of the truck. After Defendant's initial shot, a domino of gunshots ensued; Ballard believed seven to ten gunshots were fired. Jefferies died from injuries received. These involved two gunshot wounds to the head, one gunshot pierced the left ventricle of his heart, and one bullet to his abdomen.

Special Agent Christopher Adam Tanner (Agent Tanner) of the firearms section of the North Carolina State Bureau of Investigation crime lab indicated that four of the recovered bullets, including one fatal gunshot wound to Jefferies' head, were "nine millimeter projectile[s]" fired from a nine millimeter High Point rifle.

On 11 July 2007, a jury convicted Defendant of first-degree murder and the trial court entered judgment sentencing him to life imprisonment without parole. From this judgment, Defendant appeals.

Motion for Appropriate Relief

On 9 September 2008, the day before his appeal, Defendant filed a motion for appropriate relief asserting that a juror had not disclosed at trial that she was related to a testifying co-defendant or that she was familiar with the case. An affidavit from the father of the testifying co-defendant stated that the juror was related to him because the juror's "mother and my mother are cousins, though not first cousins." The affidavit further indicates that he had discussed the case with the juror prior to trial and after his son testified. Defendant asserts that this Court should either vacate his conviction and order a new trial or order that a hearing be conducted on the allegations contained in his motion for appropriate relief.

Pursuant to section 15A-1418(b) of our General Statutes, when a motion for appropriate relief is filed in this Court, we "must decide whether the motion may be determined on the basis of the

materials before [us], or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings." N.C. Gen. Stat. § 15A-1418(b) (2007).

In the instant case, the materials presented by Defendant are insufficient for our determination of his motion. Here, the materials in Defendant's motion for appropriate relief contain only the sworn affidavit of Eric Townes, Sr., and Bernice Townes' birth certificate. "Mindful that it is more within the province of a trial court rather than an appellate court to make factual determinations," *State v. Verrier*, 173 N.C. App. 123, 132, 617 S.E.2d 675, 680 (2005), we conclude that the materials in the instant case are insufficient to enable us to render a decision regarding defendant's motion. Accordingly, we dismiss Defendant's motion for appropriate relief without prejudice to Defendant to file a new motion for appropriate relief in the Superior Court. *See* N.C. Gen. Stat. § 15A-1418 (official commentary) ("It is possible that some factual matters could be decided . . . in the appellate division, but frequently they would require that the trial court hold an additional evidentiary hearing. Thus the appellate division is . . . given authority to remand the case to the trial division for a hearing. It is possible that the hearing could determine the disposition of the case and eliminate the necessity for going forward with the review"); *see also Verrier*, 173 N.C. App. at 132, 617 S.E.2d at 680.

Motion to Dismiss

The law governing a trial court's ruling on a motion to dismiss is well established. "[T]he trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995)(citing *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001)). The trial court must also resolve any contradictions in the evidence in the State's favor. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002). "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *Id.* "'[T]he question for [this] 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. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002)(quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

(a) Intent, Premeditation, and Deliberation

Defendant first argues that the State lacked evidence of Defendant's intent, premeditation and deliberation, asserting that his "decision to remain silent was used against him by the trial court" and that the trial court essentially required him "to testify he did not intend to shoot the weapon[.]" Defendant contends the trial court thereby unconstitutionally shifted the burden of proof to Defendant. We disagree with these contentions and conclude that there was sufficient evidence of each element of first degree murder to support the trial court's denial of Defendant's motion to dismiss.

The following principle of law is fundamental: a person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 363, 25 L. Ed. 2d 368, 374 (1970). "In order to convict a defendant of premeditated, first-degree murder, the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 222 (2007). "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). "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. "Specific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation." *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838-39 (1981).

In the instant case, the trial court concluded that there was sufficient evidence to deny Defendant's motion to dismiss, but insufficient evidence that the co-defendants acted with intent to kill Jefferies, such that an acting in concert instruction to the jury would have been improper. The State, not Defendant, requested a jury instruction on acting in concert, and the trial court denied the request, stating the following:

> [Y]ou (the State) [have] called all the people with weapons, none of whom testified that they acted with the intent to kill Jamel Jefferies or that they premeditated and deliberated. In fact, all their evidence would be to the contrary, that they actually went out there, from the way I understand their evidence, without the intent, necessarily, to use a firearm, and then, once the shooting started, they started shooting, too. And the State's evidence seems to suggest that the Defendant fired the first shot and that they, then reacted.

Defendant argues that the trial court, in stating the following, "based its decision [with regard to the motion to dismiss and the jury instruction on acting in concert] on the testimony of the co-defendants" and by doing so "implicitly required [Defendant's] testimony[,]" thus violating his Fifth Amendment privilege against

self incrimination. Defendant argues that the trial court thereby shifted the burden to Defendant to prove his innocence.

We find this argument unconvincing. The testimony of the co-defendants with regard to their criminal intent is certainly relevant to the issue of whether Defendant might be held criminally liable for their actions under an acting in concert theory. However, we are not convinced that the testimony of the co-defendants is relevant in this particular case to the question of whether Defendant's Fifth Amendment rights were infringed.

Defendant cites *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39 (1979), *overruled in part by Boyde v. California*, 494 U.S. 370, 108 L. Ed. 2d 316 (1990) (stating that the appropriate standard is "whether there is a reasonable likelihood that the jury applied the instructions" in a way that violated petitioner's constitutional rights), for the proposition that the trial court in the instant case shifted the burden of proof to Defendant. *Sandstrom* held that a jury instruction unconstitutionally shifted the State's burden:

> Sandstrom's jurors were told that "[the] law presumes that a person intends the ordinary consequences of his voluntary acts." They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory.

Sandstrom, 442 U.S. at 515, 61 L. Ed. 2d at 45. Such shifting or lowering of the burden of proof may also occur, for example, if the judge tells "the jury that it must infer [a] presumed fact if the State proves certain predicate facts." *Francis v. Franklin*, 471

U.S. 307, 314, 85 L. Ed. 2d 344, 353 (1985). *Sandstrom* is distinguishable from the instant case, in which, the court gave no instruction creating an impermissible presumption, and arguably the State had a more difficult burden of proving beyond a reasonable doubt that Defendant committed first degree murder without the instruction that Defendant acted in concert with the co-defendants. Had the trial court instructed the jury on acting in concert, he would have told the jury the following:

> If two or more persons act together with a common purpose to commit a crime, each of them is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the others in pursuance of the common purpose or as a natural or probable consequence of the common purpose.

State v. Barnes, 345 N.C. 184, 232, 481 S.E.2d 44, 71 (1997). Essentially, the trial court's ruling gave the State a more stringent burden, to prove that Defendant, individually, committed each element of first-degree murder, including premeditation and deliberation. Defendant does not provide precedent, nor adequate argument, for the proposition that by considering the testimony of the co-defendants, concluding that an acting in concert instruction was not applicable, and denying Defendant's motion to dismiss, the trial court thereby created a presumption of certain predicate facts or lowered the State's burden of proving every element of the crime of first degree murder. No case cited by Defendant stands for the proposition that, in considering the entirety of the evidence presented at trial to make a determination on Defendant's motion to dismiss, that the trial court thereby required Defendant

to present additional evidence – specifically, Defendant's own testimony – to prove insufficiency of the evidence and attain a favorable ruling on Defendant's motion.

We believe that *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982), is instructive here. In *Jordan*, the State, in its closing argument to the jury, "noted that defendant had not produced any alibi witnesses and stated, 'Where are the witnesses who can put him anywhere else?'" *Id.* at 279-80, 287 S.E.2d at 831. Defendant, on appeal, argued that the foregoing statement by the District Attorney was an "impermissible comment on defendant's failure to testify." *Id.* at 280, 287 S.E.2d at 831. However, our Supreme Court held that "[t]he prosecutor's remark here was directed solely toward the defendant's failure to offer evidence to rebut the State's case, not at defendant's failure to take the stand himself; as such, the statement did not constitute an impermissible comment on defendant's failure to testify." *Id.*

As in *Jordan*, we believe that the trial court's reliance on the testimony of the co-defendants and other evidence presented in this case was not an infringement of Defendant's Fifth Amendment right to remain silent. Rather, the court's decision was made in consideration of the evidence presented to the court, which did not, by Defendant's choice, include his own testimony. We conclude that Defendant's Fifth Amendment rights were not infringed, and the State's burden to prove every element of the offense of first degree murder was neither shifted nor lowered by the trial court.

Our review is therefore limited to whether there was sufficient evidence presented to support the trial court's denial of Defendant's motion to dismiss.

There is plenary evidence of record of each element of the offense of first degree murder. The testimony of Patrick Ballard, Eric Townes, Amara Powell, and Demetrious Bullock placed Defendant, with the High Point rifle, in the front passenger seat of the truck driven to Beauty Avenue. Defendant "ask[ed] Pittman [whether he could be] one of the shooters." Defendant, with two other ranking members of the Bloods, "made [the] decision" to "go over there and start shooting." Gang members asserted, "We're going to war[,]" and one member asked Defendant whether he would shoot, to which Defendant responded, "Yeah, I'm going to shoot. That's how I got my name." Defendant's name among gang members was "Hitman." Defendant also gave directions to the driver of the lead vehicle. As the truck arrived at its destination on Beauty Avenue, Defendant "pulled out the gun[,]" said, "'Let's pop him,' and started to empty [the gun's cartridge]." Patrick Ballard, Demetrious Bullock and Tiara Cunningham testified that Defendant fired the first shots toward Jefferies. The State's evidence, through the testimony of Agent Tanner, also established that one of the fatal shots was fired from the High Point rifle, Defendant's weapon. *See State v. Leary*, 344 N.C. 109, 121, 472 S.E.2d 753, 760 (1996) (stating that "[a] defendant's conduct before . . . the killing is a circumstance to be considered in determining whether he acted with premeditation and deliberation"); *State v. Robinson*, 355 N.C. at 337, 561 S.E.2d

at 256 (stating that "declarations of the defendant before and during the . . . occurrence giving rise to the death of the deceased" are also "[c]ircumstances from which premeditation and deliberation may be inferred" (quotations omitted)); *State v. Ruof*, 296 N.C. 623, 637, 252 S.E.2d 720, 729 (1979) (stating that premeditation and deliberation may be inferred from the multiple shots fired by defendant).

After a thorough review of the transcript and record, we determine that the State made a sufficient showing to support inferences of defendant's premeditation, deliberation, and specific intent to kill by presenting evidence of: defendant's preparation, conduct, statements during the events surrounding the shooting, and the multiple gunshots fired by defendant. Accordingly, we affirm the trial court's denial of defendant's motion to dismiss the charges of first degree murder.

<u>(b) Proximate Cause</u>

In Defendant's second argument, Defendant contends that the trial court erred by denying his motion to dismiss because there was insufficient evidence to support *actus reus.* We disagree.

Absent an acting in concert instruction, "it [is] necessary for the State to prove each element of first degree murder on the theory of premeditation and deliberation, including the *actus reus* of firing the fatal shots." *State v. Wilson*, 345 N.C. 119, 124, 478 S.E.2d 507, 510 (1996). Defendant contends that the State's sole evidence that Defendant fired a fatal shot is not substantial because "[t]he only evidence that one of the fatal bullets came

from a weapon that [Defendant] might have been carrying was faulty ballistics testimony[.]" Defendant argues on appeal that "[t]he testimony of the SBI agent . . . did not meet the standards of the scientific community." We find this argument unconvincing.

Primarily, we note that Defendant did not object at trial when Agent Tanner was tendered as an expert in the field of firearms identification. (T414) In fact, Defendant did not object during the entirety of Agent Tanner's testimony, and Defendant did not ask Agent Tanner any questions on cross-examination. Defendant has waived appellate review of these issues by his failure to object to them at trial. *See* N.C.R. App. P. 10(b)(1).

Assuming *arguendo* that Defendant properly preserved the issue for appellate review, we would nonetheless conclude that the State presented sufficient evidence to withstand Defendant's motion to dismiss with regard to *actus reus*. At trial, Dr. Deborah Radisch, an employee of the Office of the Chief Medical Examiner in Chapel Hill and the Associate Chief Medical Examiner of the State of North Carolina, testified that the bullet, which Agent Tanner stated was fired from Defendant's High Point rifle, "went into [Jefferies] skull and . . . through his brain from left to right[.]" The bullet was recovered in the "left temporal lobe on the right side of the brain[.]" Dr. Radisch testified that the foregoing gunshot wound "would've been fatal in a short period of time[,]" and it "would have been a fatal shot in and of itself."

SBI Special Agent Adam Tanner, an expert in the field of firearms identification, testified that at least four of the

bullets recovered from the crime scene were fired from the High Point rifle, which Defendant possessed and fired. Agent Tanner also testified that the bullet found in the left temporal lobe on the right side of Jefferies' brain was fired from the High Point rifle. Jeffries testified that he has "gone through the process of connecting a bullet or a shell casing to a particular weapon . . . hundreds [of times,] [and he does this] in [his] normal course of business with the [North Carolina] State Bureau of Investigation . . . [e]very day." Agent Tanner stated that he had previously "testified as an expert in the field of firearms identification . . . 18 to 19 times." Agent Tanner also testified that those "who produce[] High Point firearms do[] things to aid us in our ability [to identify the bullets.]" For example, Agent Tanner stated, "for the cartridge cases, to make them easier to identify, he takes a belt sander to breach face of the firearms that he produces to really scratch them up and give them a nice unique surface so that they leave readily identifiable . . . marks whenever a cartridge case is discharged." Agent Tanner continued, "a High Point firearm – a bullet and a cartridge case fired from a High Point is usually fairly easy to pick out that it was a High Point."

Defendant cites *State v. Wilson*, for the proposition that the evidence here was insufficient; in *Wilson*, the Court stated:

> Even taken in the light most favorable to the State, while there was evidence that defendant was present, armed, participated in the robbery, and may have been involved in the shooting, this evidence merely raises a suspicion that defendant fired the shots that killed the two victims. A suspicion, even a strong suspicion, is insufficient to support a

> guilty verdict. Considering the number of bullets recovered, the location of those bullets, the number of bullets found in the guns recovered from defendant's possession, and the short length of the encounter, a conclusion that defendant himself fired the fatal shots during this robbery could only be based on suspicion and conjecture.

Wilson, 345 N.C. at 125, 478 S.E.2d at 511 (citation omitted). In *Wilson*, "the evidence tend[ed] to show that two bullets were recovered from the scene and five bullets were recovered from the victims' bodies." *Id.* at 124, 478 S.E.2d at 511. The Court reasoned that "[e]ven taken in the light most favorable to the State, while there was evidence that defendant was present, armed, participated in the robbery, and may have been involved in the shooting, this evidence merely raises a suspicion that defendant fired the shots that killed the two victims." *Id.* The instant case, however, is distinguishable from *Wilson* and the evidence is more substantial. Here, the expert testimony of Dr. Radisch and Agent Tanner, along with the testimony of four eyewitnesses, provide sufficient evidence, not mere suspicion and conjecture, that a bullet which was found lodged in the left temporal lobe of the right side of Jeffries' brain was fatal to Jefferies and was fired by Defendant from the High Point rifle he carried.

We also find the reasoning of *State v. Anderson*, 175 N.C. App. 444, 450, 624 S.E.2d 393, 398, *disc. review denied*, 360 N.C. 484, 632 S.E.2d 492 (2006) instructive here. In *Anderson*, this Court stated:

> [O]nce the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion

> is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility. Questions of weight are for a jury to determine, and [v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence[.]

Id. (internal quotations omitted). Here, Defendant neither cross-examined Agent Tanner nor objected to his testimony. Moreover, the *Anderson* Court noted that "[o]ur Supreme Court has previously upheld the admission of similar firearms or ballistics testimony[,]" citing *State v. Gainey*, 355 N.C. 73, 88-89, 558 S.E.2d 463, 473-74 (2002) and *State v. Felton*, 330 N.C. 619, 638, 412 S.E.2d 344, 356 (1992), both of which uphold the "admissibility of SBI agent's testimony regarding rifling characteristics of particular bullets." *Anderson*, 175 N.C. App. at 449, 624 S.E.2d at 398.

We conclude that the evidence with regard to *actus reus* was sufficient in this case to withstand Defendant's motion to dismiss, assuming *arguendo* that Defendant properly preserved this issue on appeal. This assignment of error is overruled.

Jury Instruction

Defendant finally argues that the trial court erred by denying his request for a jury instruction on the lesser-included offense of involuntary manslaughter.

"The trial judge must charge on a lesser included offense if: (1) the evidence is equivocal on an element of the greater offense

so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified." *State v. Whitaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982) (citing *State v. Riera*, 276 N.C. 361, 368, 172 S.E.2d 535, 540 (1970)). "'Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required.'" *State v. James*, 342 N.C. 589, 594, 466 S.E.2d 710, 713 (1996) (quoting *State v. Yelverton*, 334 N.C. 532, 544-45, 434 S.E.2d 183, 190 (1993)). In *Yelverton*, our Supreme Court stated:

> Involuntary manslaughter and second-degree murder are lesser-included offenses supported by an indictment charging murder in the first degree. A defendant is entitled to a charge on a lesser-included offense when there is some evidence in the record supporting the lesser offense.

Yelverton, 334 N.C. at 544, 434 S.E.2d at 190 (citations and quotations omitted).

The question in this case is whether there was evidence adduced at trial to support a conviction of involuntary manslaughter. We conclude there was not. "Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury." *State v. Powell*, 336 N.C. 762, 767, 446 S.E.2d 26, 28 (1994). "Involuntary manslaughter [may] also be defined as the unintentional killing of

a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Greene*, 314 N.C. 649, 651, 336 S.E.2d 87, 88-89 (1985). Culpable negligence is defined as an act or omission evidencing a disregard for human rights and safety. *State v. Wilkerson*, 295 N.C. 559, 580, 247 S.E.2d 905, 918 (1978). "The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice." *State v. McAvoy*, 331 N.C. 583, 589-90, 417 S.E.2d 489, 493 (1992).

Specifically, Defendant contends that the jury could possibly have concluded that the group confronted Jefferies without the intention of actually shooting their guns. Defense counsel's argued at trial in support of his request for an instruction on involuntary manslaughter, stating the following: "[I]t's just people going around being stupid and carrying guns, and just that act alone is criminally – could be criminally negligent in the eyes of the jury[.]" We disagree with these contentions.

As in *James,* the evidence here "is clear that defendant acted with malice and therefore could not have been found guilty of manslaughter, which requires the absence of malice." *James*, 342 N.C. at 595, 466 S.E.2d at 714. The evidence tends to show that Defendant fired a High Point rifle at Jefferies and a bullet lodged in the left side of Jefferies' brain. Before the shooting, Defendant "ask[ed] Pittman [whether he could be] one of the shooters." Moreover, Defendant, with two other ranking members of

the Bloods, "made [the] decision" to "go over there and start shooting." When gang members asserted, "We're going to war[,]" Defendant stated, "I'm going to shoot. That's how I got my name." Defendant's name among gang members was "Hitman." Defendant acted as a navigator and leader to members and affiliates of the Bloods, giving them directions to Beauty Avenue. As the truck arrived at its destination on Beauty Avenue, Defendant "pulled out the gun[,]" and said, "'Let's pop him[.]'" Defendant "then started to empty [the gun's cartridge]." Patrick Ballard, Demetrious Bullock and Tiara Cunningham testified that Defendant fired the first shots toward Jefferies. From the foregoing evidence, no rational fact finder could find defendant was not aware that Jeffries would likely be shot from the bullets fired from his gun.

We therefore conclude that, because the evidence clearly shows malice, there was no evidence to support an instruction for involuntary manslaughter. Accordingly, we reject Defendant's argument that the trial court erred by failing to instruct the jury on involuntary manslaughter.

For the foregoing reasons, we find that the trial court did not err in denying Defendant's motion to dismiss or failing to instruct the jury on involuntary manslaughter.

No Error; Motion for Appropriate Relief Dismissed Without Prejudice.

Judges BRYANT and JACKSON concur.

Report per Rule 30(e).