NO. COA08-445

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v. Columbus County
No. 04 CRS 53256

WENDELL FREEMAN

Appeal by defendant from judgment entered 20 September 2007 by Judge Gregory A. Weeks in Superior Court, Columbus County. Heard in the Court of Appeals 1 December 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III, for the State.

Mark Montgomery, for defendant-appellant.

WYNN, Judge.

Defendant Wendell Freeman appeals from a conviction of first-degree murder, arguing that the trial court erred when it denied his motion to dismiss because the State presented insufficient evidence that he acted with premeditation and deliberation. After careful review, we uphold Defendant's conviction.

At trial, the State presented evidence tending to show the following: After talking to Dorian Carmichael while parked on a street corner, Defendant decided to leave but noticed that Andrew Brown was standing behind his van. Defendant asked Mr. Brown to

move, finally telling him, "You better move, or you're getting it." According to Mr. Carmichael, Defendant "put the van in reverse and I said, 'Yo, man, watch out. He's going to back up.' . . . And Mr. Brown just stood there for a moment. And then Mr. Freeman put the van in reverse and started backing up." Then, Defendant got out of his van, exchanged words with Mr. Brown, got back in the van and drove away.

However, Defendant only got about a block away when he turned the van around and drove back to the scene. Defense witnesses Tony Wilson and Gerald Troy testified that Defendant and Mr. Brown argued and exchanged blows briefly; Defendant pushed Mr. Brown first, then shot him after Mr. Brown tried to hit Defendant. Mr. Carmichael testified that he saw Defendant draw a gun, stick it to Mr. Brown's head, and pull the trigger. After the shooting, Defendant got back in the van and left the scene.

From his conviction of first-degree murder Defendant appeals, arguing that the trial court erred by denying his motion to dismiss because the State presented insufficient evidence of premeditation and deliberation. Finding sufficient evidence to support each element of first-degree murder, we affirm Defendant's conviction.

To survive a motion to dismiss, a court need only determine that there is substantial evidence tending to prove each element of the crime and that Defendant was the perpetrator. *State v. Carter*, 335 N.C. 422, 429, 440 S.E.2d 268, 271 (1994). Further, although the evidence "may contain contradictions or discrepancies . . . these are for the jury to resolve and do not require dismissal."

Id. at 429, 440 S.E.2d at 271-72. On review, we must determine whether the evidence, taken in the light most favorable to the State, "would permit a reasonable juror to find defendant guilty of each essential element of the offense beyond a reasonable doubt." *State v. Mueller*, 184 N.C. App. 553, 560, 647 S.E.2d 440, 446, *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007).

First-degree murder "is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). Further, a killing is "premeditated" where the defendant "formed the specific intent to kill" during some period of time prior to the actual killing, "however short." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). A killing is "deliberate" where the defendant acted "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.* "The fact that a defendant was angry or emotional, however, does not negate a finding of deliberation unless his anger or emotion was strong enough to have disturbed his ability to reason." *State v. Owen*, 130 N.C. App. 505, 512, 503 S.E.2d 426, 431 (citation omitted), *disc. review denied,* 349 N.C. 372, 525 S.E.2d 188 (1998).

In evaluating the State's evidence of premeditation and deliberation, a court may consider the following factors:

> (1) lack of provocation on the part of the deceased, (2) the conduct and statements of

> the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Vause, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991) (citation omitted).

Here, the State presented substantial evidence tending to show that the Defendant: threatened the deceased if he failed to move from behind the Defendant's van; returned to the scene of the initial confrontation after he had driven away; got out of the van and went over to the deceased; began arguing with the deceased; escalated the encounter to physical violence; and shot the deceased in the head at close range. Taken in the light most favorable to the State, we hold that this evidence was sufficient to permit a reasonable juror to find defendant guilty of first-degree murder beyond a reasonable doubt. *Mueller*, 184 N.C. App. at 560, 647 S.E.2d at 446.

Nonetheless, Defendant argues that the cases of *State v. Williams*, 144 N.C. App. 526, 548 S.E.2d 802 (2001), *aff'd per curiam*, 355 N.C. 272, 559 S.E.2d 787 (2002), and *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981), support his contention that he did not act with premeditation or deliberation because the killing occurred during a confrontation with Mr. Brown. Both cases are distinguishable.

In *Williams*, this Court held that there was insufficient evidence to show that the defendant acted with premeditation and deliberation where the defendant shot and killed a man during a fight outside a night club. *Williams*, 144 N.C. App. at 526, 548 S.E.2d at 802. This Court stated there was no evidence that the defendant knew the deceased prior to the altercation, that there was any animosity between the two, and importantly, that the "defendant's actions before and after the shooting did not show planning or forethought on his part." *Id.* at 530-31, 548 S.E.2d at 805. Unlike the Defendant here, who verbally threatened Mr. Brown, left the scene, and then came back to confront him, the defendant in *Williams* was engaged in a series of confrontations through the evening and was punched in the jaw by the deceased prior to the shooting. *Id.* at 527, 548 at 803-04.

Similarly in *Corn*, our Supreme Court found insufficient evidence to support the conclusion that the "defendant acted in accordance with a fixed design or that he had sufficient time to weigh the consequences of his actions" where the shooting was a sudden event lasting only a few moments. *Corn*, 303 N.C. at 298, 278 S.E.2d at 224. In *Corn*, the deceased entered the defendant's home while intoxicated, approached the defendant who was lying on his couch, and insulted the defendant who then shot the deceased several times in the chest. *Id.* at 297-98, 278 S.E.2d at 223-24. Unlike the defendants in the aforementioned cases, the defendant here left the scene of the initial confrontation; chose to return

to confront the deceased some ten to fifteen minutes later; and escalated the confrontation to physical violence.

In sum, we hold that the evidence presented by the State was sufficient to support Defendant's conviction for first-degree murder.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

Reported per Rule 30(e).