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NO. COA12-572
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v.

Wake County
Nos. 10 CRS 207962
11 CRS 011870

SERGIO MONTEZ SORRELL

Appeal by Defendant from judgment entered 18 November 2011 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 23 October 2012.

Roy Cooper, Attorney General, by Robert M. Curran, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by David W. Andrews, Assistant Appellate Defender, for defendant.

THIGPEN, Judge.

Sergio Montez Sorrell ("Defendant") appeals from a judgment entered 18 November 2011 convicting him of attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. On appeal, Defendant challenges the trial court's denial of his motion to dismiss the attempted murder and the assault

with a deadly weapon with intent to kill inflicting serious injury charges, specifically arguing there was insufficient evidence that Defendant was the perpetrator of the offenses. We find Defendant's argument without merit.

The evidence of record tends to show the following: Around noon on 15 March 2010, several members of the Bloods gang gathered outside the apartment on Oakwood Avenue in Raleigh, North Carolina, in which Defendant lived. Three of the Bloods gang members - Melkym Darby ("Darby"), Damon Gresham ("Gresham"), and Donnell Cannady ("Cannady") - were in a silver Lexus. Two other Bloods gang members - Bryan Robinson ("Robinson") and Dramon Watson ("Watson") (together, hereinafter, "the Bloods") - were standing outside the apartment near Watson's black Jaguar. Robinson was armed with a gun. The Bloods were talking to a female and a male about Defendant. According to Darby, the Bloods were not gathered for any particular reason; rather, they "were just going to drop a friend . . . off, and we s[aw] them there so we hung out and started talking to them." Gresham also stated that the Bloods stopped on Oakwood "[j]ust to talk" to friends who they "[j]ust happened to see[.]"

There had been recent disagreements between Defendant and Gresham and between Defendant and Cannady, including, but not limited to, an incident in December 2009 or January 2010, at which time Defendant had been hit with a bottle while at a club, and a second incident in February 2010, at which time Defendant had stabbed two people, one of whom was Gresham.

On 15 March 2010, seven or eight minutes after the Bloods gathered outside Defendant's apartment on Oakwood, Defendant walked out from behind the apartment building towards the Bloods with a gun visibly hanging out of his coat and said, "Are you all ready?" Then, Defendant started shooting.

After Defendant started shooting, all of the Bloods began running west toward Carver Street. However, two to three minutes after Defendant started shooting, Robinson, who also had a gun, started shooting back toward Defendant. Watson was hit on the left side of his face by a single gunshot during the shootout between Robinson and Defendant.

Soon thereafter, Cannady took Watson to the emergency room, where Dr. Ndidi Aziwke treated Watson. Dr. Aziwke determined that the bullet should not be removed, as removal would create a risk of spinal cord injury. Watson later had a stroke due to the bullet's prevention of adequate blood flow to Watson's

brain, and Watson was paralyzed on his right side and had trouble talking. Watson was eventually released from the hospital, underwent therapy, and regained the ability to talk.

On 3 May 2010, Defendant was indicted on charges of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, and on 10 October 2011, Defendant was indicted on a charge of possession of a firearm by a felon. Defendant's case came on for trial during the 14 November 2011 session of Wake County Superior Court, and the jury found Defendant guilty of all charges. Defendant admitted two aggravating factors. The trial court entered a consolidated judgment, consistent with the jury's verdicts, convicting Defendant and sentencing him to 240 to 297 months incarceration. From this judgment, Defendant appeals.

I. Motion to Dismiss

In Defendant's sole argument on appeal, he contends the trial court erred in denying his motion to dismiss the charges of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant specifically contends the State did not submit substantial evidence that Defendant was the perpetrator of the offenses. We disagree.

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998) (citation omitted). "The trial court must examine the evidence in the light most favorable to the State, granting the State every reasonable inference to be drawn from the evidence." *Id.*

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (citation and quotation marks omitted). "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) (citation omitted). "In making its determination [of whether there is

substantial evidence], the trial court must consider all evidence admitted . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "[C]ontradictions and inconsistencies do not warrant dismissal; the trial court is not to be concerned with the weight of the evidence." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). Moreover, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation and quotation marks 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), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005) (citing N.C. Gen. Stat. § 14-17).

"The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death." *Id.* (citing N.C. Gen. Stat. § 14-32(a)).

Under the doctrine of transferred intent, "[i]t is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary." *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) (citations omitted). "Criminal liability, if any, and the degree of homicide must be thereby determined." *Id.* "Such a person is guilty or innocent exactly as [if] the fatal act had caused the death of his adversary[:]. It has been aptly stated that 'the malice or intent follows the bullet.'" *Id.* (quoting 40 Am. Jur., 2d Homicide, § 11, p. 302 (1968) (citations omitted)). Under this doctrine "it is immaterial whether [the defendant] intended injury to the person actually harmed; if [the defendant] in fact acted with the required or elemental intent toward someone, that intent suffices as the intent element of the crime charged as a matter of substantive law." *State v. Locklear*, 331 N.C. 239,

245, 415 S.E.2d 726, 730 (1992) (citations omitted). The doctrine of transferred intent applies in cases in which the defendant is charged with the attempted commission of a crime requiring intent. See *State v. Goode*, 197 N.C. App. 543, 551, 677 S.E.2d 507, 513 (2009).

In this case, Defendant challenges the sufficiency of the evidence that he was the perpetrator of the offenses charged. Defendant's theory of the case was that Robinson fired the bullet that injured Watson. This argument is based on the following evidence or lack thereof: (1) the types of guns used by Defendant and Robinson, although identified, were never linked to either the Defendant or Robinson - in other words, the evidence shows that two guns were fired, but not who fired which gun; (2) consequently, the two types of spent bullet cartridges were never directly linked to either Robinson's gun or Defendant's gun; and (3) Robinson and Defendant were both shooting - Defendant contends, in close proximity to Watson - when he was injured. Defendant ultimately argues the evidence that he was the perpetrator - that Defendant, not Robinson, shot and injured Watson - was not substantial. We find Defendant's argument without merit.

We believe there was substantial testimonial evidence of record to identify Defendant as the perpetrator, such that Defendant's motion to dismiss was properly denied. Both Darby and Gresham gave testimony tending to show that Defendant fired the bullet that injured Watson. No one testified Robinson fired the bullet that injured Watson.

During Darby's testimony, Darby stated that "[Defendant] shot [Watson] in the face." Darby also gave the following testimony:

Q. All right. So you're standing out there talking, . . . seven or eight minutes go by. What happens next?

A. [Defendant] come up and walk around the car.

Q. Did you see where [Defendant] came from?

A. I didn't see exactly where he came from, but I think it was from behind the apartment.

. . .

Q. Where were you all standing in relation to those two buildings?

A. We were standing in the street in front of the car. The car was parked in front of the first apartment building.

. . .

Q. . . . Where did [Defendant] go when he came from around the apartment?

A. Around the car.

. . .

Q. When you first looked up and saw him, did he have anything in his hands?

A. Not when I first saw him.

Q. Did you see a gun at all when you first saw him?

A. No.

Q. What happened next?

A. He came around in front of the car, started shooting.

Q. How close to the group of you that were standing there talking was he when he started shooting?

A. For some of us, probably about three or four feet; others, probably about ten.

Q. Because the group was - is that because the group was spread out?

A. Spread out.

Q. Where did the gun come from?

A. I don't know.

Q. Do you recall what kind of gun it was?

A. No.

Q. What happened between the time that you saw [Defendant] just walking around the car and the shooting started?

A. [Defendant] just came around and started shooting. I took off running.

Q. How many times did [Defendant] shoot?

A. About eight or nine.

Q. Did [Defendant] say anything to any of you?

A. Just said, "You ready?"

Q. [Defendant] said, "You ready?" Could you tell who he was talking to when he said that?

A. Huh-uh. [Indicating, no.]

. . .

Q. . . . What direction did you run?

A. Right, to my right.

Q. Would you have been running - so on that section of Oakwood, what are the two nearest cross-streets on either side?

A. Fisher Street and Carver Street.

Q. Did you run towards Fisher or towards Carver?

A. Towards Carver.

Q. Did anyone else run in that direction?

A. If I'm not mistaken, everybody did.

Q. What about [Defendant]?

A. I didn't stay or stand around and see where he ran.

Q. Did he run the same direction as you?

A. I don't know.

Q. When you got down to Carver Street, did you see him at all?

A. No.

Q. Okay. What happened once you hit Carver Street?

A. We got halfway down the street, and [Robinson] comes back and told me his homeboy's shot.

Q. What did you do when you heard that?

A. I was going to keep going, but [Cannady] told me to turn around and go back, go get him.

Q. So did you and [Cannady] turn around and go back?

A. Yeah.

Q. When you got back to Oakwood Avenue, what was going on?

A. He was just in the street.

Q. Who was in the street?

A. [Watson].

Q. What was he - or what was his condition? What did he look like at that time?

A. He was bleeding, couldn't walk.

Q. So when you say [Watson] was in the street, was he standing? Sitting?

A. [Robinson] was holding him up.

Q. Could you tell where he had been hit?

A. Huh-uh. There was too much blood.

Q. What did you do next?

A. Helped him get in the car.

Q. What car did you help him into?

A. Lexus.

Q. What happened once you guys got [Watson] into the back of the car?

A. [Cannady] took him to the hospital.

With regard to Robinson's role in the shootout, Darby gave the following testimony:

Q. So suddenly [Defendant] - you're saying [Defendant] appeared and he started shooting. What did [Robinson] do?

A. I don't know. I didn't stick around to see. But at the time, I didn't know. I do know now that [Robinson] shot back.

. . . .

Q. When was the first time that you realized that [Robinson] had a gun?

A. When we came back and he got [Watson] and put him in the car.

Q. And so when you were standing there, you didn't know, but you came to know later?

A. Yeah.

Gresham gave testimony tending to show that Defendant was the first shooter. Gresham said that Robinson was "at the front of their [Jaguar]" by the hood, and Watson was also "in front of the Jaguar." Gresham, however, was standing on the sidewalk "near the trunk of the [Jaguar][.]" Gresham saw Defendant come outside "with a gun hanging out of his coat." Defendant walked straight up to the Jaguar, neither "towards the front or the back of the car[,] " but "[a] couple feet away" from Gresham. Gresham said Defendant then asked, "Are you all ready?" after which he "[p]ulled out the gun and started shooting." Gresham "took off running." Gresham testified that when Defendant started shooting, "[Watson] ran[.]" When asked, "what happened to [Watson]?" Gresham replied, "I never seen him because I was running down the hill."

Gresham further stated that he "[saw Defendant] shooting towards [Watson][,]" and Gresham identified Defendant in court as the person who shot Watson. Gresham testified that Robinson was firing his gun towards Defendant and "shooting back at [Defendant][,]" not at Watson. Moreover, Robinson did not start firing back at Defendant until "[t]wo to three minutes" after Defendant started shooting. When asked to confirm, "[Robinson] waited two or three minutes before he pulled a gun out?" Gresham

responded, "Yes." This testimony combined with evidence tending to show that the Bloods ran from Defendant immediately after Defendant started shooting creates the inference that Watson would not have been in the vicinity to have been hit by Robinson's bullet. When asked again "[whether] the only person who [was] firing in the direction that [Watson was] facing [was Robinson]?" Gresham specifically reaffirmed, "No[,] [Robinson] was firing at . . . [Defendant]."

Based on the foregoing testimonial evidence, which we recognize does not include any statements pertaining to the types of guns fired by Defendant or Robinson or concerning the types of ammunition collected from rounds fired, we nonetheless conclude that the foregoing testimonial evidence is sufficient substantial evidence such that the question of whether Defendant was the perpetrator - the shooter of the gun that injured Watson - was properly a question for the jury in this case. Therefore, the trial court did not err in denying Defendant's motion to dismiss the charges of attempted first degree murder and assault with a deadly weapon with the intent to kill inflicting serious injury.

NO ERROR.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).