NO. COA13-470
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Pasquotank County
Nos. 10CRS051362, 51372
10CRS002126

RONDELL SUPREME CHILDRESS,
Defendant.

Appeal by defendant from Judgments entered on or about 17 July 2012 by Judge Jerry R. Tillett in Superior Court, Pasquotank County. Heard in the Court of Appeals 23 September 2013.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Melody R. Hairston, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

STROUD, Judge.

Rondell S. Childress ("defendant") appeals from judgments entered after a jury in Pasquotank County found him guilty on five counts of discharging a firearm into an occupied dwelling and one count of attempted murder. For the following reasons, we

find no error in part, reverse in part, and find no prejudicial error at sentencing.

I. Background

On 13 September 2010, defendant was indicted on six counts of discharging a firearm into an occupied dwelling and one count of attempted murder. Defendant pled not guilty and was tried by jury in Pasquotank County. At trial, the State's evidence tended to show the following:

In the early morning hours of 12 August 2010, Patrice Harney was sitting on her porch with her brother and a couple of her cousins. Ms. Harney's two children were asleep inside the house. As they were sitting on the porch, Ms. Harney saw two cars drive by slowly, one green and one silver. One of the occupants of the silver car yelled out, "What's popping?" No one responded, but Ms. Harney and her cousins laughed about it. Ms. Harney testified that the phrase "What's popping" was associated with local gangs, but that she was unconcerned about it because she was not in a gang herself. The two cars then drove off and a police cruiser drove by.

After the police cruiser passed Ms. Harney's house, the silver car that had driven by earlier pulled back around. The silver car stopped when it got to her house. Defendant rolled

down the window and pointed a silver gun at Ms. Harney before firing several shots. Ms. Harney knew defendant from around the neighborhood and identified him as the shooter, but testified that there had previously been no problems between the two of them.

Crime Scene Investigator (CSI) Owen examined the damage to the house. He recovered three bullet casings from the area in front of the house—one 9mm casing and two .380 caliber casings. CSI Owen found three bullet holes in the siding of Ms. Harney's house, one bullet lodged in the kitchen door jamb, and one in the cinder block foundation. Ms. Harney also testified that one of the bullets destroyed a gumball machine that was in her children's room. Officer Cogar with the Elizabeth City Police Department found two bullet holes in the wall of the children's bedroom.

At the close of the State's evidence, defendant moved to dismiss all charges against him. The trial court denied the motion as to all charges but one of the counts of discharging a weapon into occupied property. Defendant elected not to present any evidence and then renewed his motion to dismiss. The trial court again denied the motion and instructed the jury on five counts of discharging a weapon into occupied property and one

count of attempted murder. The jury returned verdicts of guilty on all counts. The trial court sentenced defendant to consecutive sentences of 36 to 53 months imprisonment for each count of discharging a firearm into occupied property and a consecutive term of aggravated sentences of 185 to 231 months imprisonment for the attempted murder.

II. Sufficiency of the Evidence

Defendant first argues that the trial court erred in denying his motion to dismiss the five charges of discharging a firearm into an occupied dwelling and the attempted murder charge for insufficient evidence.

A. Standard of Review

> In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom. The State must present substantial evidence of each element of the offense charged. The trial court should consider all evidence actually admitted, whether competent or not, that is favorable to the State. If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied; however, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant

> as the perpetrator, the motion to dismiss must be allowed.

State v. Nobles, 350 N.C. 483, 504, 515 S.E.2d 885, 898 (1999) (citations, quotation marks, and brackets omitted).

B. Discharging a Firearm into an Occupied Dwelling

Defendant argues that the trial court erred in entering judgment on five counts of discharging a firearm into an occupied dwelling when the evidence failed to show five separate acts.[1] We disagree.

This Court very recently addressed a nearly identical argument in *State v. Kirkwood*, ___ N.C. App. ___, 747 S.E.2d 730 (2013). In *Kirkwood*, we reviewed the applicable case law:

> In [*State v. Rambert*, 341 N.C. 173, 459 S.E.2d 510 (1995)], [our Supreme] Court rejected the defendant's argument that his conviction and sentencing on three counts of discharging a firearm into occupied property violated double jeopardy principles. *Id.* at 177, 459 S.E.2d at 513. There, the State's evidence tended to show that the victim was sitting in a parked car in a parking lot when the defendant, riding in a car, pulled alongside the victim's car. *Id.* at 176, 459 S.E.2d at 512. The defendant produced a gun, the victim ducked, and the defendant fired a shot into the front windshield of the victim's car. *Id.* The victim drove forward and, when the cars were approximately 10 yards apart, the defendant fired a second

[1] Defendant does not challenge the sufficiency of the evidence as to any element of the crime charged or the sufficiency of the evidence identifying him as the perpetrator.

shot that struck the passenger's side door of the victim's car. *Id.* The defendant then "pursued" the victim and fired a third shot, which lodged in the rear bumper of the victim's car. *Id.*, 459 S.E.2d at 512–13.

The Court in *Rambert* held that this evidence "clearly show[ed] that defendant was not charged three times with the same offense for the same act but was charged for three separate and distinct acts." *Id.*, 459 S.E.2d at 512. The Court reasoned: "Each shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that defendant employ his thought processes each time he fired the weapon." *Id.* at 176–77, 459 S.E.2d at 513. Moreover, "[e]ach act was distinct in time, and each bullet hit the vehicle in a different place." *Id.* at 177, 459 S.E.2d at 513.

Similarly, in [*State v. Nobles*, 350 N.C. 483, 515 S.E.2d 885 (1999)], [our Supreme] Court relied upon *Rambert* to conclude that the trial court properly denied the defendant's motion to consolidate three of his seven charges of discharging a firearm into an occupied vehicle. The Court in *Nobles* relied upon evidence that tended to show the "defendant's actions were seven distinct and separate events," including evidence that prior to the time of the murder, the truck did not have any bullet holes or broken glass, but after the murder there were seven bullet holes in victim's truck: "[t]here were two bullet holes in the windshield, one near the middle of the windshield and one near the edge of the windshield on the passenger's side; there was a bullet hole below the windshield on the driver's side and one near the headlight on the driver's side; there was a bullet hole on the top of the truck's bed on the driver's side and one in the bed of the

> truck; and the driver's side door window was burst, which, based on the evidence, was caused by the fatal gunshot to the victim." *Id.*, 515 S.E.2d at 898–99. The Court further relied on evidence that the defendant's gun had the capacity to hold nine bullets, it was empty at the murder scene, and the gun was not a machine gun or other automatic weapon. *Id.*, 515 S.E.2d at 899.

Kirkwood, ___ N.C. App. at ___, 747 S.E.2d at 737-38.

Like the defendant in *Kirkwood*, defendant here relies on *State v. Maddox*, 159 N.C. App. 127, 583 S.E.2d 601 (2003), for the proposition that "where a semi-automatic weapon is used, evidence showing only that several shots were fired will not support multiple convictions for discharging a weapon into occupied property." In *Kirkwood*, we concluded that *Maddox* was not controlling because it was an assault case where we specifically distinguished *Rambert* and *Nobles*, while *Rambert* and *Nobles* specifically concerned the discharge of a firearm into occupied property. *Kirkwood*, ___ N.C. App. at ___, 747 S.E.2d at 739; *see also Maddox*, 159 N.C. App. at 133, 583 S.E.2d at 605 (distinguishing *Rambert* and *Nobles* as inapplicable to the assault case at issue).

Here, Ms. Harney testified that when the silver car pulled by her house the second time, defendant rolled down the window, pointed a silver gun at her and started firing. She said that

he fired "a lot" of shots. Investigator Owen found three bullet holes in the house's siding, one hole in the kitchen door jamb, and one in the cinder block foundation. As in *Nobles*, taken in the light most favorable to the State, the evidence here showed that defendant fired five shots into different parts of the house. *Cf. Nobles*, 350 N.C. at 505, 515 S.E.2d at 898-99.

Defendant further argues that we must assume that the weapon used was an automatic because there was no evidence clearly establishing that it was a semi-automatic and that therefore he only had to pull the trigger once to shoot multiple bullets. Defendant cites no case establishing such an presumption. There was no evidence that it was a machine gun or automatic weapon which fires multiple shots with one trigger pull. The ammunition recovered was 9mm and .380 caliber.

Taken in the light most favorable to the State, there was evidence that defendant fired five distinct shots from a weapon that required him to "employ his thought process each time he fired the weapon." *Nobles*, 350 N.C. at 505, 515 S.E.2d at 899. Moreover, as in *Nobles*, "[e]ach act was distinct in time, and each bullet hit the [dwelling] in a different place." *Id.* Therefore, we hold that the trial court did not err in denying

defendant's motion to dismiss the charges of discharging a firearm into an occupied dwelling.

C. Attempted Murder

Defendant next argues that the trial court erred in denying his motion to dismiss the charge of attempted murder. He specifically contends that the State failed to provide sufficient evidence that defendant acted with premeditation and deliberation. We agree.

The elements of attempted first degree murder are: "(1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing." *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000).

> 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; it is sufficient if the process of premeditation occurred at any point prior to the killing. 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.

State v. McAdoo, 165 N.C. App. 222, 228, 598 S.E.2d 227, 231 (2004) (citations and quotation marks omitted), *app. dismissed*, 359 N.C. 285, 610 S.E.2d 385 (2005).

> In the context of attempted first degree murder, an intent to kill and the existence of malice, premeditation and deliberation may be inferred from the conduct and statements of the defendant before and after the incident, ill-will or previous difficulty between the parties, and evidence regarding the manner of the attempted killing.

Peoples, 141 N.C. App. at 118, 539 S.E.2d at 28 (citation omitted).

Here, the State introduced no evidence about conduct or statements of defendant before or after the shooting which might demonstrate premeditation and deliberation. Indeed, the only evidence regarding conduct prior to the shooting was Ms. Harney's testimony that someone yelled "what's popping" when the two cars drove by initially. Ms. Harney recognized that phrase as a gang greeting, but testified that she was not in a gang and did not consider it alarming. There was no evidence of previous animosity—or even interaction—between defendant and Ms. Harney. Bullet holes were found in various parts of the house and were not particularly concentrated near Ms. Harney.

To show an attempted murder, the State must prove that the defendant specifically intended to kill the victim after premeditation and deliberation. *See McAdoo*, 165 N.C. App. at 228, 598 S.E.2d at 231. Unlike malice, specific intent to kill, premeditation, and deliberation will not be presumed from the fact that the defendant intentionally discharged a deadly weapon. *See State v. Propst*, 274 N.C. 62, 71, 161 S.E.2d 560, 567 (1968). The State here failed to present any evidence from which a reasonable juror might infer that defendant premeditated, deliberated, and specifically intended to kill Ms. Harney. On appeal, the State points to nothing showing such intent other than the facts that someone used a gang greeting and that defendant shot at Ms. Harney's front porch when she was on it.

We conclude that there was insufficient evidence of premeditation and deliberation to deny defendant's motion to dismiss the charge of attempted first degree murder. Therefore, we hold that the trial court erred in denying defendant's motion to dismiss the charge of attempted murder and reverse the judgment entered upon that conviction.

III. Sentencing

Defendant argues that the trial court erred when it accepted his admission of aggravating factors at sentencing by failing to address him personally and advise him as required by N.C. Gen. Stat. § 15A-1022.1(b) (2011).

To accept a defendant's admission of aggravating factors for sentencing, the trial court must advise the defendant of the rights he waives in doing so and follow the procedures for accepting a guilty plea under N.C. Gen. Stat. § 15A-1022(a) (2011). N.C. Gen. Stat. § 15A-1022.1(b). "In order to vacate a defendant's plea, the trial court's error [in failing to follow § 15A-1022] must have prejudiced the defendant such that there exists a reasonable possibility that a different result could have or would have been reached had the error not occurred." *State v. Salvetti*, 202 N.C. App. 18, 27, 687 S.E.2d 698, 704 (citation and quotation marks omitted), *app. dismissed and disc. rev. denied*, 364 N.C. 246, 699 S.E.2d 919 (2010). The burden of showing prejudice is on the defendant. N.C. Gen. Stat. § 15A-1443(a) (2011).

While we agree that the trial court erred by failing to address defendant as required, defendant has not argued or shown that he was prejudiced in any way by that failure. Thus, any argument to that effect has been abandoned. N.C.R. App. P.

28(a). Accordingly, we hold that defendant has failed to show prejudicial error and is not entitled to a new sentencing hearing.

IV. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying defendant's motion to dismiss the charges of discharging a firearm into occupied property, but did err in denying defendant's motion to dismiss the attempted murder charge for insufficient evidence. Therefore, we reverse the judgment entered upon the conviction for attempted murder. Finally, we hold that the trial court did not commit prejudicial error by failing to adhere to the requirements of N.C. Gen. Stat. § 15A-1022.1 at the sentencing hearing.

10CRS051372 and 10CRS002126 – NO ERROR.
10CRS051362 – REVERSED.

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).