IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-425

Filed: 4 December 2018

Bertie County, No. 13 CRS 50001-2, 17 CRS 50

STATE OF NORTH CAROLINA

v.

SALIM ABDU GOULD, Defendant.

Appeal by Defendant from judgments entered 11 October 2017 by Judge Cy A. Grant in Bertie County Superior Court. Heard in the Court of Appeals 1 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kenneth A. Sack, for the State.

William D. Spence, for defendant-appellant

HUNTER, JR., Robert N., Judge.

Salim Abdu Gould ("Defendant") appeals following jury verdicts convicting him of attempted first degree murder, possession of a firearm by a felon, and assault with a deadly weapon inflicting serious injury with intent to kill. On appeal, Defendant contends the trial court erred in denying his motions to dismiss the charges of

attempted first degree murder and assault with a deadly weapon inflicting serious injury with intent to kill. We find no error.

I. Factual and Procedural Background

On 2 January 2013, the Bertie County Sheriff's Department arrested Defendant pursuant to warrants. On 29 July 2013, a Bertie County Grand Jury indicted Defendant for attempted first degree murder and possession of a firearm by a convicted felon. On 17 April 2017, another Bertie County Grand Jury indicted Defendant for assault with a deadly weapon inflicting serious injury with intent to kill.

On 9 October 2017, the court called Defendant's case for trial. The State first called Jeffery Perry. On 29 December 2012, Perry drove with his brother, Shaequan Winston, toward his home in Lewiston, North Carolina. During the drive, Perry saw Niysha Brown and Defendant on the side of the road, walking toward a store. Perry stopped and let Niysha and Defendant into his car. Perry drove to Niysha's home to play cards. Several people were already at Niysha's home, including Eric Gorham.

Winston and Niysha left the home briefly.[1] When they returned, Perry, Winston, Niysha, and Defendant played a game of spades. During the game, Niysha and Defendant accused Perry and Winston of "reneging." After this, the game ended. Perry asked Niysha for a beer. Niysha refused to give him a beer. This upset

[1] Perry did not testify about where the two went.

Winston, but Perry convinced Winston to leave the party with Perry. As Perry and Winston left the party, Winston and Niysha "were still having words." Niysha, carrying a board with nails in it, followed Perry and Winston outside. Niysha tried to hit Winston with the board. Before she hit him, Winston grabbed the board from her, and the two began fighting.

Defendant joined the fight. Winston held Niysha back as Winston punched Defendant. Gorham asked Perry about breaking up the fight. Perry went to break up the fight, but Defendant punched Perry in the face and said, "I['ve] been wanting you."

After Defendant punched Perry, Perry took off a ring and fought Defendant. Defendant wanted Perry "on the ground[,]" so he could "try to punch [Perry] out on the ground." Defendant tried to "headbutt" Perry. Finally, someone pulled Defendant off of Perry.[2] Perry left with Winston and Gorham.

When Perry got home, he realized he did not have his ring with him. Later that night, Perry's mother took Perry and Winston back to Niysha's home to get his ring. While at Niysha's home, Larkel Brown walked up behind Perry. Larkel told Perry and Winston to "go ahead before it be some problems or something." Larkel also said he had a gun. Perry told Larkel he also had a gun, although he did not. Perry did not see Defendant again until 31 December 2012.

[2] Perry did not testify as to whom pulled Defendant off of Perry.

On 31 December 2012, Perry, Winston, and some other men moved "back and forth in between Johnny Mack [Trailer Park] and town[ ]" trying to find their friend, Maurice. Defendant lived in Johnny Mack Trailer Park. During the group's search for Maurice, they went to Niysha's home. Maurice was not at Niysha's home, but Defendant was there. Defendant said to the group, "you thought nobody wasn't here. You thought I wasn't here." Perry, Winston, and the group of men returned to Johnny Mack Trailer Park. As they came out of the trailer park and headed to a party up the street, the group ran into Maurice on the shortcut between the trailer park and Governors Road. While on the shortcut, Perry needed to use the restroom. Perry stopped behind a trailer but told the others to go ahead. The others did not walk too far ahead of Perry. Perry heard a gun cock back and someone say, "You thought it was over." Perry also remembered seeing Defendant and Larkel Brown.

Winston inserted himself between Perry and Defendant. Perry turned around, so he and Defendant faced each other at "[a]rm's length[.]" Perry saw Defendant's gun, which Defendant held at Perry's "waist area[.]" Perry told Defendant:

> we even don't even have to go this way . . . .
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> ….
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> I'm trying to live for my son. That's when [Defendant] was like, F you and your son. So that's when [Perry] s[aw] that [Defendant] was serious and [his] next instinct was [Defendant]'s not playing, get the heck out of here[.]

Perry tried to turn and run from Defendant, but Defendant shot Perry before he could get away. Perry laid on the ground with his intestines hanging out of him. Perry saw Defendant standing directly over him, holding a gun. Defendant only left when Larkel picked Defendant up and took him away.

An ambulance arrived[3] and took Perry to Bertie Hospital. Medical personnel later airlifted Perry to a hospital in Greenville, North Carolina. While in the hospital in Greenville, Perry underwent twenty-four or twenty-five surgeries.

The State next called Shaequan Winston, Jeffery Perry's brother. Winston's testimony regarding the events on 29 December 2012 and 31 December 2012 substantially matched Perry's testimony. Winston provided the following additional information. When Perry tried to break up the fight between Winston and Defendant, Defendant stopped fighting Winston and said to Perry, "I wanted your a** anyway."

On 31 December 2012, when Perry stopped in "the cut" to use the restroom, Defendant appeared and put a gun to Perry's neck. Defendant said, "You thought this s*** was over." Perry "beg[ed] and plead[ed] . . . [d]on't shoot me, don't shoot me." Winston saw Perry lying on the ground. Winston grabbed Defendant to stop Defendant from leaving the scene. Larkel pushed and shoved Winston so Winston would let Defendant go. Larkel then grabbed Defendant, and the two ran away.

[3] The transcript does not say what time the ambulance arrived.

Winston ran and told someone to call the police. Neither Winston nor anyone with him that night had a gun.

The State next called Charles Harmon, a former patrol sergeant with the Bertie County Sheriff's Office.[4] On 31 December 2012 around 11:30 p.m., Harmon responded to a call about a shooting on Governors Road outside of Lewiston. When Harmon arrived, he noticed a large crowd. He then saw "a black male laying on the ground[,]" with his intestines "partially on his stomach." This male was Jeffery Perry. Harmon did not see a weapon near Perry. After EMS took Perry to the hospital, Harmon spoke with Winston. Winston told Harmon that Defendant shot Perry.

The State next called Greg Atkins. On 31 December 2012, Atkins worked for the Bertie County Sheriff's Office. Atkins went to the hospital "[t]o check on Mr. Perry and to try to get some information from him it if was possible." When Atkins spoke with Perry, Atkins asked Perry if Defendant shot Perry. Perry nodded "yes." Atkins told Perry that Atkins needed an audible answer and asked again if Defendant shot Perry. Perry responded "yes."

The State next called Naomi Mizelle, a detective with the Bertie County Sheriff's Office.[5] On 2 January 2013, Winston gave Mizelle a statement, which

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[4] The State also called Joseph Cary. This opinion provides only factual background pertinent to those charges for which the jury convicted Defendant. The testimony of the omitted witness is not pertinent to the issues on appeal and is, therefore, excluded in the interest of brevity.

[5] On 31 December 2012, Mizelle responded to a call about a shooting on Governors Road. While at the scene, she found a shotgun shell, alcohol, and blood spatter. Another officer later got one of the bullets which had been removed from Perry and turned it over to Mizelle.

substantially matched Winston's testimony in court. On 20 January 2013, Mizelle spoke with Perry. Perry told Mizelle that Defendant shot him.

On 28 January 2013, Mizelle contacted Joseph Cary, one of the men with Perry and Winston on 31 December 2012. Cary told Mizelle the following. On 31 December 2012, after it was dark outside, the group went to Johnny Mack Trailer Park. While Perry used the restroom, four people jumped out. Cary heard a "boom" and saw Perry on the ground. Defendant pointed a gun at Perry, so Cary "got in the way[.]" Cary also told Mizelle he saw Defendant shoot Perry with a shotgun. The day before trial, Mizelle unsuccessfully tried to contact Cary again.[6]

The State rested. Defendant moved to dismiss all charges. The trial court denied the motion.

Defendant testified on his own behalf. On 30 December 2012,[7] when Perry and Winston got upset over the card game, Defendant "[got] up from the table" because "[t]ypically [he's] not an argumentative person." Defendant went in the kitchen and drank a beer. Perry and Niysha argued about Niysha refusing to give Perry a beer.

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[6] The only time Mizelle successfully contacted Cary, Cary told Mizelle he was busy but would call Mizelle if he was available for trial. A deputy eventually served Cary with a subpoena. Mizelle also tried to contact other witnesses from 31 December 2012 — Larry Williams, Eric Gorham, and Maurice — but never got in touch with any of them.

[7] Although the record indicates the card game and first fight occurred on 29 December 2012, Defendant testified it happened on 30 December 2012.

Everyone ran outside, and Defendant followed and watched Niysha and Winston fight. Perry leaned on Defendant because Perry was so intoxicated. When Winston tried to "jump on N[iys]ha[,]"[8] Defendant grabbed Perry, slammed him to the ground, and headbutted him. Defendant continued to headbutt Perry until someone told Defendant, "if you hit [t]hat boy in the temple you will kill him." Defendant got up and left Perry on the ground. After the fight ended and everybody left, Perry, Winston, and their mother came back to Niysha's home. Perry made "a move like he[was] going to pull out a weapon[.]" Defendant told Niysha to call somebody, and Niysha called the landlord, Larkel Brown. Defendant did not leave the home, but heard Perry say, "don't touch me[,] my junk may go off." Larkel Brown finally convinced Perry, Winston, and their mother to leave.

On 31 December 2012, Defendant went to his mother's home in Johnny Mack Trailer Park using "the cut." Defendant saw Perry in some bushes. When Defendant saw him, Perry "[was] coming towards [Defendant] with movement in his hands in his pocket or part in his pants." Defendant "thought [Perry] was going to harm [him] . . . [so Defendant] jumped on [Perry.]" Defendant said he did not have a gun with him. When Defendant jumped Perry, "seven or eight" people "jumped on" Defendant. During this scuffle, Defendant heard a gunshot. Perry said, "mmmm,

[8] The spelling of Ms. Brown's first name changes in the transcript; however, we use "Niysha" for consistency. Additionally, it is unclear from the transcript who "jump[ed]" on Niysha.

I'm hit." After the shot, Defendant jumped up and ran because he was "in fear of [his] life." On 2 January 2013, officers arrested Defendant.

Defendant rested and renewed his motion to dismiss. The court denied the motion. The jury found Defendant guilty of all charges. The trial court sentenced Defendant to consecutive sentences of: (1) 238 to 298 months for attempted first degree murder; (2) 19 to 32 months for possession of a firearm by a felon; and (3) 88 to 118 months for assault with a deadly weapon inflicting serious injury with intent to kill. Defendant gave oral notice of appeal.

II. Jurisdiction

Defendant has an appeal of right to this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Standard of Review

"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) (citation omitted). "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 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "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) (citations omitted).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (internal citations, quotation marks, and italics omitted) (alteration in original). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, 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, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted). Upon a motion to dismiss, "the trial court does not resolve issues of witness credibility, but is only concerned with the sufficiency of the evidence." *State v. Burton*, 224 N.C. App. 120, 125, 735 S.E.2d 400, 405 (2012) (citation omitted).

IV. Analysis

A. Attempted First Degree Murder

Defendant contends the trial court erred in denying his motions to dismiss the charge of attempted first degree murder. Specifically, Defendant argues the State

failed to present sufficient evidence he shot Perry or formed a premeditated and deliberate, specific intent to kill Perry.[9] We disagree.

1. Identity of the shooter

Defendant contends only Winston testified that Defendant was the person who shot Perry. Defendant discredits Winston's testimony because Winston is Perry's brother and "had been smoking weed, drinking heavily, and was intoxicated at the time of the shooting."[10] Defendant's arguments go to the credibility of evidence, not its sufficiency. *State v. Ingram*, 227 N.C. App. 383, 385, 741 S.E.2d 906, 909 (2013) (citation omitted) ("Defendant's contention that this identification was questionable goes to the credibility of the evidence, not its sufficiency for purposes of withstanding a motion to dismiss. The credibility of witnesses is not for this Court to determine."). Perry told Atkins and Mizelle that Defendant shot him. Perry also testified Defendant shot him. Accordingly, the State presented substantial evidence of Defendant's identity as the shooter.

2. Premeditated and Deliberate, Specific Intent

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[9] In his brief, Defendant argues the State failed to show a connection between him and the gun. Defendant contends because only Winston, who was intoxicated on the night of the shooting, testified, and because the State produced no physical evidence of Defendant's connection to the gun, the State did not produce sufficient evidence of Defendant's identity as the shooter. Although Defendant testified he did not shoot Perry, we resolve all contradictions in favor of the State. *Rose*, 339 N.C. at 192-93, 451 S.E.2d at 223 (citation omitted).

[10] Defendant also points to inconsistencies in Winston's testimony and the statement he gave to police and inconsistences between Winston's and Perry's versions of events. However, the inconsistencies went to facts other than identity of the shooter, *and* we resolve all contradictions in favor of the State. *Rose*, 339 N.C. at 192-93, 451 S.E.2d at 223 (citation 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) (citations omitted).

"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) (citation omitted). "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 (citation omitted).

> In the context of attempted first-degree murder, circumstances that may tend to prove premeditation and deliberation [and specific intent to kill] include: (1) lack of provocation by the intended victim or victims; (2) conduct and statements of the defendant both before and after the attempted killing; (3) threats made against the intended victim or victims by the defendant; and (4) ill will or previous difficulty between the defendant and the intended victim or victims.

State v. Cozart, 131 N.C. App. 199, 202, 505 S.E.2d 906, 909 (1998) (citations omitted). *See also State v. Peoples*, 141 N.C. App. 115, 118, 539 S.E.2d 25, 28 (2000) (citing

State v. Coplen, 138 N.C. App. 48, 59-60, 530 S.E.2d 313, 321 (2000)); *State v. Revels*, 227 N.C. 34, 36, 40 S.E.2d 474, 475 (1946) (citations omitted). Courts also consider the manner of the attempted killing. *Peoples*, 141 N.C. App. at 118, 539 S.E.2d at 28 (citation omitted).

In order to have specific intent to kill, Defendant must have intended for his actions to result in the victim's death. *State v. Coble*, 351 N.C. 448, 449-451, 527 S.E.2d 45, 47 (2000) (citation omitted). "An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred." *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956).

Here, prior to the shooting, Defendant and Perry fought and Defendant told Perry, "I['ve] been wanting you." Winston also heard Defendant tell Perry he "wanted" Perry. These encounters between Defendant and Perry are evidence of lack of provocation and threats made against the intended victim "that may tend to prove premeditation and deliberation[.]" *Cozart*, 131 N.C. App. at 202, 505 S.E.2d at 909. Additionally, when Perry stopped to use the restroom while walking through "the cut," both Perry and Winston heard someone say, "You thought this was over" when Defendant cocked the gun and placed it on Perry. Before Defendant shot Perry, Peggy begged for his life. In response, Defendant said, "F you and your son." When Perry tried to run away, Defendant shot Perry in his torso at close range.

We conclude the State presented substantial evidence of premeditation, deliberation, and specific intent to kill. Accordingly, the court did not err in denying Defendant's motions to dismiss the attempted first degree murder charge.

B. Assault with a Deadly Weapon Inflicting Serious Injury with Intent to Kill

Defendant next contends the State failed to present sufficient evidence he had the requisite intent to kill Perry. We disagree.

"The essential elements of the crime [of assault with a deadly weapon inflicting serious injury with intent to kill] are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death." *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994) (citations omitted).

We conclude the State presented substantial evidence of Defendant's intent to kill, based on the facts and applicable law recounted above. Accordingly, the court did not err in denying Defendant's motions to dismiss the assault with a deadly weapon inflicting serious injury with intent to kill.

V. Conclusion

For the foregoing reasons, we find no error in the judgments.

NO ERROR.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).