IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-683

Filed: 6 August 2019

Harnett County, No. 17 CRS 050372-73, 050415

STATE OF NORTH CAROLINA

v.

TYREE NEWSUAN, Defendant.

Appeal by Defendant from judgments entered 21 February 2018 by Judge Imelda J. Pate in Harnett County Superior Court. Heard in the Court of Appeals 12 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Torrey D. Dixon, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.

MURPHY, Judge.

Defendant, Tyree Newsuan, appeals his convictions for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI). Defendant argues the evidence neither supported a finding (A) that he specifically intended to kill his victim, nor (B) that the shooting was premeditated and deliberated. Here, there was ample evidence at trial of Defendant's intent to kill,

including his statements, actions, positioning, and pursuit of the victim. Further, there was sufficient evidence for a jury to find that, because he had time to form the intent to kill prior to acting and lacked appreciable provocation, Defendant premeditated and deliberated upon the shooting in question. The trial court did not err.

BACKGROUND

On the evening of 28 January 2017, Defendant, driving a white Dodge Charger, passed a vehicle going in the opposite direction near the intersection of North Carolina Highway 210 and Shady Grove Road in Harnett County. While approaching Defendant, the other vehicle's driver, Youseff Al-Biek, flashed his high beams to signal to Defendant that his high beams were on as well. After passing Mr. Al-Biek, Defendant turned around and drove back toward Mr. Al-Biek's vehicle, stopping next to him at the aforementioned intersection. The cars were positioned such that Defendant's passenger-side mirror was nearly touching Mr. Al-Biek's driver-side mirror.

Defendant lowered his vehicle's passenger-side window and asked Mr. Al-Biek, "[w]hy the fuck did you flash your headlights at me?" Mr. Al-Biek did not respond. Defendant then told Mr. Al-Biek to "hold on a second." Defendant produced a handgun and, leaning toward the passenger door of his vehicle, fired multiple shots at Mr. Al-Biek. Mr. Al-Biek was shot in the shoulder and his vehicle sustained

damage from multiple gunshots. Defendant then drove away in the opposite direction. Approximately thirty seconds passed between the time Defendant stopped at the intersection and his departure.

After the shooting, Mr. Al-Biek was transported to Cape Fear Valley Hospital by EMS, where he was treated for his wound. His treating physician testified at trial that Mr. Al-Biek "was a very lucky man" to have survived the shooting given the "closeness of the bullet to [his] lung." Despite undergoing multiple days of treatment at Cape Fear Valley Hospital, Mr. Al-Biek later required surgery at a second hospital in New York in order to remove the bullet.

On 20 February 2017, Defendant was indicted for attempted first-degree murder, AWDWIKISI, assault by pointing a gun, possession of firearm by felon, and five counts of discharging a weapon into an occupied vehicle. The case went to trial on 12 February 2018. At trial, Mr. Al-Biek and an eyewitness both testified to the events of the shooting. During the trial, the State dismissed two counts of discharging a weapon into an occupied vehicle and the charge of assault by pointing a gun. Defendant moved to dismiss all remaining charges at the close of the State's evidence and again at the close of all the evidence. The trial court denied both motions. On 21 February 2018, Defendant was convicted on all remaining charges and received active sentences of 248 to 310 months for attempted first-degree murder and AWDWIKISI, 19 to 32 months for possession of firearm by felon, and 97 to 129

months for three counts of discharging a weapon into an occupied vehicle in operation. Defendant timely appealed.

ANALYSIS

Defendant contends the trial court erred in denying two motions to dismiss for lack of evidence: one with respect to AWDWIKISI and the other with respect to first-degree murder. Sufficiency of the evidence is a question of law, and "[we] review[] 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 [a] 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, . . . and (2) of [the] defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "Substantial evidence," as it pertains to the elements of the offenses charged, "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). Here, whether Defendant was the perpetrator is not at issue; thus, we examine the record for evidence reasonably supporting each essential element of the offenses in question.

The elements of AWDWIKISI are "(1) an assault, (2) with a deadly weapon, (3) an intent to kill, and (4) infliction of a serious injury not resulting in death." *State v. Grigsby*, 351 N.C. 454, 456, 526 S.E.2d 460, 462 (2000). As it pertains to AWDWIKISI, "intent to kill" means a "specific intent to kill" and not inflict some

other harm. *See, e.g.*, *State v. Pugh*, 48 N.C. App. 175, 176, 268 S.E.2d 242, 243 (1980). Defendant does not contend that shooting at the victim's car did not constitute an assault with a deadly weapon, nor that the bullet wound inflicted to the victim's shoulder did not constitute a serious injury not resulting in death. As such, the sole question regarding the AWDWIKISI charge is whether the evidence reasonably supported a jury finding that Defendant specifically intended to kill the victim when he shot a handgun from his passenger-side window into the victim's adjacent driver-side window.

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). Defendant alleges there was insufficient evidence presented of the first and third elements for a jury to find him guilty of attempted first-degree murder; however, Defendant raises no issue with respect to the second and fourth elements except as they are predicated on the specific intent to kill. Nor does he contest the sufficiency of the evidence to demonstrate he acted with malice. Accordingly, we examine whether there was sufficient evidence at trial of (A) the specific intent to kill requisite to both AWDWIKISI and attempted first-degree murder and (B) whether the evidence at trial reasonably supported a

finding of premeditation and deliberation requisite to the attempted first-degree murder charge.

A. Intent to Kill

Defendant contends that the record contains insufficient evidence of specific intent to kill to convict him on either charge at issue. "To show the 'specific intent to kill' required to prove first-degree murder, the State must show more than an intentional act by the defendant resulting in the death of the victim; the State also must show that the defendant intended for his action to result in the victim's death." *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992). Because the intent to kill concerns a subjective mental state, "ordinarily it must be proved, if proven at all, by circumstantial evidence . . . ." *Grigsby*, 351 N.C. at 457, 526 S.E.2d at 462. Such evidence may include "[t]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances . . . ." *Id.* Furthermore, when taking fatal action, "an assailant 'must be held to intend the natural consequences of his deliberate act.'" *Id.* (quoting *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270 (1973)).

Here, there is ample evidence in the record to support a finding that Defendant intended to kill the victim. After the victim flashed his lights at Defendant, Defendant pulled so closely adjacent to the victim's car that the mirrors nearly touched. Cursing at the victim and telling him to "hold on a second," Defendant

leaned from his driver's seat toward the passenger-side door. After drawing his gun, Defendant fired multiple shots at Mr. Al-Biek. Our caselaw has held that gunfire at close proximity is sufficient to support a jury finding of specific intent. *See Peoples*, 141 N.C. App. at 118, 539 S.E.2d at 28 (holding that two shots fired from several feet away following an altercation sufficiently evidenced intent to kill). A reasonable juror could well conclude that, by drawing as close to Mr. Al-Biek as possible within the confines of their respective cars and firing a handgun at point-blank range, Defendant intended to kill his victim.

Defendant contends that there is no evidence that the shots were fired with the intent to kill, as opposed to threaten or intimidate. However, the law does not require that the evidence specifically rule out alternative explanations in order to constitute substantial evidence supporting the specific intent to kill. While "[t]he mere proof of an assault with a deadly weapon inflicting serious injury does not by itself establish an intent to kill," *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982), Defendant's behaviors surrounding the shooting constituted evidence beyond the mere fact of the assault. This evidence, together with the fact that Defendant shot directly at Mr. Al-Biek—as opposed to, for example, flashing his gun or firing in a different direction—constitutes substantial evidence to support the jury's finding of intent to kill. The trial court did not err in denying Defendant's motions to dismiss on this ground.

B. Premeditation and Deliberation

Defendant further argues the record contains insufficient evidence of premeditation and deliberation to support a conviction of attempted first-degree murder. As with the intent to kill, "[p]remeditation and deliberation relate to mental processes and . . . usually must be proved by circumstantial evidence." *State v. Elliott*, 344 N.C. 242, 267, 475 S.E.2d 202, 212 (1996).

"'Premeditation' means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Put differently, for a defendant to have premeditated an attempted murder, he must have (1) specifically intended to kill the victim, and (2) formed that intent prior to the action constituting the attempted murder. Because the jury was presented sufficient evidence of Defendant's intent to kill, we must resolve whether the evidence could also reasonably support a finding that Defendant formed that intent prior to shooting the victim.

Here, the evidence supports a finding of premeditation. The record indicates that, prior to stopping beside the victim's car, Defendant was driving in the opposite direction from the victim and had to pull over, turn around, and drive back towards the victim's vehicle. Furthermore, approximately thirty seconds elapsed between the time Defendant approached the victim's vehicle and the shooting itself. The victim did not speak to Defendant during the stop, nor is there any other evidence that the

situation was aggravated after the victim initially flashed his high beams. Taken as a whole, this evidence could reasonably convince a juror that Defendant formed the specific intent to kill the victim during the time lapse prior to the shooting. While the entire exchange was brief by ordinary standards, even "a moment of thought may be sufficient to form a fixed design to kill." *State v. Steele*, 190 N.C. 506, 511-12, 130 S.E. 308, 312 (1925). The design to kill may arise in the time required to "hold on a second," let alone the time required to pursue a moving vehicle. The element of premeditation is supported by substantial evidence.

We next examine whether the jury was provided substantial evidence of deliberation. "'Deliberation' means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation." *State v. Carter*, 335 N.C. 422, 429, 440 S.E.2d 268, 272 (1994). "The phrase 'cool state of blood' means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason." *Elliott*, 344 N.C. at 267, 475 S.E.2d at 212. However, "[o]ne may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and, to a large extent, controlled by passion at the time." *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154. Thus, the "cool state of blood" phrasing does not restrict first-degree murder or attempts to only the most coldly calculated actions; rather, it excludes from the category of first-degree murder a narrow range of instances where "the purpose to kill was formed

and *immediately* executed in a passion . . . ." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981) (emphasis added).

When violence escalates in "a chain reaction" without other evidence of deliberation preceding the killing, a defendant has not, as a matter of law, premeditated the alleged murder. *See State v. Williams*, 144 N.C. App. 526, 527-31, 548 S.E.2d 802, 804-05, *aff'd per curiam*, 355 N.C. 272, 559 S.E.2d 787 (2001) (finding insufficient evidence of deliberation to support a finding of first-degree murder when the defendant shot the victim during mutual combat). This is not such a case. Defendant and his victim were not fighting, and the record does not suggest that Mr. Al-Biek meaningfully engaged with Defendant in any manner after flashing his high beams. A reasonable juror, viewing the evidence and testimony through the lens of daily experience, could conclude that the solitary, mundane gesture toward Defendant from the victim would not inspire the level of "violent passion" required to incite deadly force without deliberation. While Defendant's statements prior to the shooting suggest a passionate indignation toward the victim, the jury need not have found Defendant dispassionate to convict him of attempted first-degree murder. There was no error at trial.

CONCLUSION

The record contains sufficient evidence to support a jury finding that Defendant (A) possessed the intent to kill requisite to both AWDWIKISI and

attempted first-degree murder and (B) the attempted killing was premeditated and deliberate. Accordingly, the trial court did not err in denying Defendant's motions to dismiss.

NO ERROR.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).