IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-983

Filed: 17 November 2020

Davidson County, Nos. 17CRS1409, 17CRS52490, 18CRS2469

STATE OF NORTH CAROLINA

v.

THOMAS SONNY BROWN, Defendant.

Appeal by Defendant from judgments entered 31 January 2019 by Judge Joseph N. Crosswhite in Superior Court, Davidson County. Heard in the Court of Appeals 12 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General A. Mercedes Restucha-Klem, for the State.

William D. Spence for Defendant-Appellant.

McGEE, Chief Judge.

Thomas Sonny Brown ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") and possession of a firearm by a felon. On appeal, Defendant argues the trial court erred by denying his motion to dismiss the charge of AWDWIKISI, by striking the entire testimony of Defendant's alibi witness,

and by admitting inadmissible hearsay testimony. We hold the trial court did not err.

I. Factual and Procedural Background

The State presented evidence tending to show that Defendant shot Jimmy Dupree, Jr. ("Mr. Dupree") on 1 May 2017 following a verbal altercation. Officer Andrew Seth Williams of the Lexington Police Department ("Officer Williams") testified that on 1 May 2017, he responded to a "shooting call" at 41 Mill Street, Lexington. Upon arriving at the scene, Officer Williams observed Mr. Dupree lying on the pavement in "a pool of blood" with "intestines coming from his abdomen area." Officer Williams observed a woman, Chiquanna Rankin ("Ms. Rankin"), comforting Mr. Dupree and holding his hand. Minutes later, paramedics arrived and determined that Mr. Dupree was Level 1 trauma, "the most serious level," and required immediate transport to Wake Forest Baptist Hospital.

Lieutenant Ben Clayton of the Lexington Police Department ("Lieutenant Clayton") testified that when he arrived at 41 Mill Street and asked "who did this[,]" Mr. Dupree answered, "T.J. did this." Lieutenant Clayton testified that Ms. Rankin pointed to a parked black Cadillac Escalade and declared, "that's the shooter's car over there and that's all I'm going to say." The officers searched the Escalade and discovered, in the center console between the two front seats, a wallet containing

Defendant's North Carolina identification card. A subsequent search of the North Carolina DMV records showed that the Escalade was registered in Defendant's name.

Charlie Chandler ("Ms. Chandler") testified that in May of 2017, she was in a romantic relationship with Defendant, who also went by "T.J." On 1 May 2017, Ms. Chandler drove to Defendant's friend's house at 41 Mill Street, as she did every day after work, to meet Defendant and "drink and smoke weed and just hang out and enjoy music until late night." Around 7:00 p.m., Ms. Chandler rode with Defendant in his black Escalade to pick up "his friend Jimmy," whom Ms. Chandler had not met before. After meeting up with Mr. Dupree at an apartment complex, Defendant instructed Mr. Dupree to follow Defendant, in his own car, back to 41 Mill Street.

Ms. Chandler testified that around 11:00 p.m., Defendant and Mr. Dupree got into a verbal altercation in the front yard of 41 Mill Street. After hearing a loud commotion, Ms. Chandler and Ms. Rankin came outside the house. Ms. Chandler testified that Mr. Dupree stated, "I'm going to shoot that b**** right there" and accused Defendant of hitting him. Defendant instructed Ms. Chandler to "[g]o get [his] piece." Ms. Chandler retrieved Defendant's twelve-gauge shotgun from the trunk of her car, where she stored the firearm because Defendant "didn't want to have it in his possession[.]"

Ms. Chandler testified that after she walked into the street and handed Defendant his loaded shotgun, Defendant "cocked it once and then shot" Mr. Dupree "[i]n the stomach." Ms. Chandler explained that when Defendant shot Mr. Dupree, the two men were facing each other, and Mr. Dupree was standing right in front of Defendant. Defendant put the shotgun back in Ms. Chandler's trunk and instructed her to get in the car; Ms. Chandler drove them to Winston-Salem, where the couple checked into a hotel for the night. A few days later, Defendant and Ms. Chandler were apprehended by U.S. Marshalls as they attempted to return to Lexington.

Mr. Dupree testified that he drove from Durham to Lexington with his wife and nephew to celebrate Defendant's birthday on 1 May 2017. Mr. Dupree "had a good relationship" with Defendant, whom he referred to as "T.J." Mr. Dupree and his family followed Defendant's Escalade to 41 Mill Street. Mr. Dupree testified that when his wife borrowed his car to run an errand, Mr. Dupree remained at 41 Mill Street, drank a couple of beers, and caught up with Defendant. However, when Mr. Dupree took a phone call from his cousin, Defendant "just started acting crazy and erratic about the situation" and told Mr. Dupree that he "should not be talking to [his] cousin on the phone because [Defendant] has problems with [Mr. Dupree's] cousin over the female." Defendant ordered Mr. Dupree to get off his porch.

Mr. Dupree testified that Defendant and Ms. Chandler followed him onto the street and Defendant "trie[d] to approach [him] and . . . put his finger in [Mr.

Dupree's] face." Mr. Dupree saw Defendant speak to Ms. Chandler and watched her walk away. Mr. Dupree briefly looked behind his back; when he turned back around and faced Defendant, he noticed that Defendant was standing closer to him and holding a "big gun." Mr. Dupree testified that Defendant stated, "f*** that" and then he "heard a big bang." According to Mr. Dupree, Defendant shot him in his lower left side close to his abdominal area. Mr. Dupree "thought [he] was dead[,]" so he "fell to the ground" and "prayed to God." Mr. Dupree testified that Ms. Rankin ran into the street and yelled that Defendant had shot Mr. Dupree; Defendant responded, "f*** that N****."

Sergeant Charlie Hall of the Lexington Police Department ("Sergeant Hall") testified that he interviewed Mr. Dupree at Wake Forest Baptist Hospital on 2 May 2017. Although both Mr. Dupree and Ms. Chandler believed that Mr. Dupree was shot in the stomach, Sergeant Hall explained that the slug actually punctured Mr. Dupree's back and the projectile came out through his stomach. Sergeant Hall testified, "I believe [Mr. Dupree's] head could have been facing [Defendant]" and explained:

> It's common for people to twist and fall when they are shot. They can twist away either while they're shot, just before they're shot. It's very common in any kind of traumatic situation for someone to naturally not want to see it, to just prior to something happening to look away to turn away, to not want to see it. To not want to have that image ingrained in their head.

At this point at trial, the State rested, and Defendant moved to dismiss the AWDWIKISI charge for insufficient evidence. The trial court denied Defendant's motion.

Defendant testified that he spent most of the day on 1 May 2017 at 320 Spring Drive, the house where he lived with his cousin, William Brown ("Mr. Brown"), and Mr. Brown's wife and daughter. In the late afternoon, Defendant and Mr. Brown drank alcohol and smoked marijuana. Defendant testified that around 11:45 p.m., he received a text message from Ms. Chandler; around 12:30 a.m., Ms. Chandler picked Defendant up from 320 Springs Drive and drove him to a hotel in Winston-Salem. Defendant explained that he could not drive because he had "caught a DUI in Guilford county" and "also caught one in Lexington."

Carlie Bennett ("Mr. Bennett") testified that he was "[g]ang related" to Mr. Dupree and explained that Mr. Dupree had put a "hit" out on him because Mr. Dupree "wanted [Mr. Bennett] dead." According to Mr. Bennett, on 1 May 2017, he was across the street from Parkdale Mills when he observed Ms. Chandler and Mr. Dupree. Later, Mr. Bennett and Mr. Dupree had an altercation and Mr. Bennett shot Mr. Dupree in the abdomen. Ms. Chandler then drove Mr. Bennett to Salisbury. On cross-examination, Mr. Bennett testified that he was currently housed in the same cell block as Defendant at the Davidson County Jail.

Mr. Brown testified that on 1 May 2017, he spent the day and night with Defendant at 230 Spring Drive. He testified that after a day spent "drinking and chilling," he last saw Defendant at 11:30 p.m., when Defendant went into his room to go to sleep. The State objected, and the trial court excused the jury. The State argued that it had not been notified during discovery that Mr. Brown would testify as an alibi witness; Defense counsel explained he had not notified the State because he was unaware that Mr. Brown was going to testify that he saw Defendant at 11:30 p.m. As a result, the trial court ordered that the testimony of Mr. Brown be stricken and instructed the jury to disregard Mr. Brown's testimony.

At the close of the evidence, Defendant renewed his motion to dismiss and the trial court denied Defendant's motion. Defendant was charged with AWDWIKISI, possession of a firearm by a felon, and habitual felon. Defendant was tried in Superior Court, Davidson County on 28 January 2019. The jury returned verdicts finding Defendant guilty of AWDWIKISI and possession of a firearm by a felon. Defendant also pled guilty to the habitual felon charge. The trial court sentenced Defendant to a term of 110-144 months imprisonment for AWDWISKI and a consecutive term of 96-128 months imprisonment for possession of a firearm by a felon. Defendant appeals.

II. Motion to Dismiss

Defendant argues the trial court erred by denying his motion to dismiss the charge of AWDWIKISI because there was insufficient evidence that Defendant possessed a specific intent to kill Mr. Dupree. We disagree.

We review the trial court's denial of a motion to dismiss for insufficient evidence *de novo*. *State v. English*, 241 N.C. App. 98, 104, 772 S.E.2d 740, 744 (2015). "[T]he question for the trial court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense, and of the defendant's being the perpetrator of such offense." *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983) (citation omitted). Substantial evidence is "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Bunn*, 173 N.C. App. 729, 733, 619 S.E.2d 918, 921 (2005). "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, 451 S.E.2d 211, 223 (1994) (citation omitted). Furthermore, a "defendant's simple act of moving to dismiss at the proper time preserve[s] all issues related to the sufficiency of the evidence for appellate review." *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020).

The elements of AWDWIKISI 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." *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) (citations omitted). The only element of AWDWIKISI that Defendant challenges as being unsupported by sufficient evidence is the intent to kill. "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). "An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972) (citations omitted). Moreover, an assailant "must be held to intend the normal and natural results of his deliberate act." *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270 (1973).

Defendant cites decisions where this Court found the evidence of a defendant's intent to kill was sufficient to withstand a motion to dismiss an AWDWIKISI charge and argues that those cases "differ from, and are distinguishable from, the little, if any, evidence of [D]efendant's intent offered by the State in [D]efendant's trial below." Defendant asserts that in contrast to those cases, his case is devoid of any evidence that he had a volatile relationship with Mr. Dupree, made murderous threats or gestures to Mr. Dupree, expressed hope for the death of Mr. Dupree, or had a motive

to kill Mr. Dupree. Defendant is correct that evidence of that specific nature is not present in this case; however, the State presented sufficient evidence that Defendant intended to kill Mr. Dupree.

In the present case, the State offered evidence that Defendant shot Mr. Dupree with a 12-guage shotgun at close range. Ms. Chandler's testimony that Defendant instructed her to get his "piece" demonstrates that Defendant *chose* to introduce a shotgun into what was otherwise a strictly verbal altercation with an unarmed friend. The State also presented evidence that Defendant, after taking possession of the loaded gun from Ms. Chandler, cocked it once and shot Mr. Dupree at point blank range. Indeed, Mr. Dupree testified that after coming into possession of the gun, Defendant moved closer to where Mr. Dupree was standing. Mr. Dupree further testified that after he was shot by Defendant, he heard Defendant say to Ms. Rankin, "f*** that N****."

Defendant's actions in asking for a loaded shotgun during a purely verbal dispute and stepping closer to Mr. Dupree before cocking the gun support a reasonable inference that Defendant intended to kill Mr. Dupree when he shot him at point blank range. Moreover, Defendant's statement disregarding Mr. Dupree's life provides additional evidence that Defendant intended to kill Mr. Dupree. Considering the evidence in the light most favorable to the State, as we must do, we hold that sufficient evidence was presented that Defendant intended to kill Mr.

Dupree. As a result, we hold that the evidence supports the AWDWIKISI charge and the trial court did not err in denying Defendant's motion to dismiss.

III. Alibi Witness

Defendant argues that the trial court abused its discretion and erred by striking the entire testimony of his alibi witness, Mr. Brown, because there was no court order directing Defendant to notify the State of alibi witnesses. Defendant also contends that the exclusion of Mr. Brown's testimony is disproportionate under the 6th Amendment to the United States Constitution. We hold that Defendant has waived any right to appellate review of this issue.

At trial, when Mr. Brown testified that he saw Defendant at 11:30 p.m. on 1 May 2017, the State objected, and the trial court excused the jury. The State explained that during discovery, defense counsel provided notice that Mr. Brown would testify that he last saw Defendant at 5:00 p.m. on 1 May 2017; however, at trial, Mr. Brown testified that he last saw Defendant at 11:30 p.m. The State asked the trial court to strike Mr. Brown's testimony because Mr. Brown was actually an alibi witness and Defendant had not notified the State of the alibi defense. Defense counsel responded, "[e]verything [the State] said is correct. When I first spoke with Mr. William Brown, it's my understanding that – he informed me that the last time he saw [Defendant] was at 5:00 p.m." Defense counsel explained that he was also

learning for the first time that Mr. Brown had seen Defendant at 11:30 p.m. and stated, "[i]f I had heard otherwise I would have filed notice of alibi." The trial court proclaimed:

> All right. In this matter in the [c]ourt's discretion it seems like everybody is in agreement. . . . [Defense counsel] has indicated he did not provide notice of an alibi witness. Therefore, the [c]ourt's [sic] in it's [sic] discretion will strike the testimony of this witness. And we will give the jury the appropriate instructions.

The trial court advised the State and Defendant that it intended to instruct the jury as follows: "The Jury is to disregard the entire testimony of William Brown. I would ask the jury not to speculate as to what he would have said and give no consideration, whatsoever, to his testimony." At that point, the trial court asked, "[a]nything else from either side?" Defense counsel responded, "[n]ot from the defense, Your Honor."

Defendant argues for the first time on appeal that the trial court erred by striking Mr. Brown's testimony because, in the absence of a court order, Defendant was not required to provide the State with notice of his alibi witnesses. "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002). Rule 10 of the North Carolina Rules of Appellate Procedure states the general rule governing how parties preserve issues for appellate review:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). It has been "stressed that Rule 10 . . . 'is not simply a technical rule of procedure' but shelters the trial judge from 'an undue if not impossible burden.'" *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008) (quoting *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983)). In other words, "Rule 10 functions as an important vehicle to insure that errors are not 'built into' the record, thereby causing unnecessary appellate review." *State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983).

Defendant did not argue before the trial court that he was not required to provide notice of his alibi witnesses to the State. Moreover, Defense counsel did not object when the trial court stated, "it seems like everybody is in agreement" or when the trial court announced its decision to strike Mr. Brown's testimony. Indeed, the record reveals that Defendant lodged no objection, constitutional or otherwise, during the trial court's consideration or ruling on the State's objection. As a result, the trial court was not provided an opportunity to consider and rule upon Defendant's contention that, in the absence of a court order, there was no requirement that he

notify the State of his alibi witnesses. Defendant has therefore waived any right to appellate review of this issue. *Khaja v. Husna*, 243 N.C. App. 330, 349, 777 S.E.2d 781, 792 (2015) ("As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal.").

IV. Hearsay

Defendant argues the trial court erred by admitting testimony of Sergeant Clayton amounting to inadmissible hearsay. Specifically, Defendant contends that Sergeant Clayton's testimony that Ms. Rankin said, "[t]hat's the guy's car that shot him and that's all I'm saying" was inadmissible hearsay that should have been excluded. We disagree.

Rule 801 of the North Carolina Rules of Evidence defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C–1, Rule 801(c) (2019). However, "[o]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (citation omitted). "Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *Id.* (citation omitted).

In the present case, Sergeant's Clayton's testimony regarding Ms. Rankin's statement was not offered to prove the truth of the matter asserted – that Defendant shot Mr. Dupree. Instead, the testimony was offered to explain the basis for the officers' subsequent search of the Escalade parked at the scene. *See State v. Rollins*, 226 N.C. App. 129, 140, 738 S.E.2d 440, 44–49 (2013) (holding that testimony regarding an officer's conversation with a suspect was admitted for the proper purpose of explaining the officer's decision to conduct a subsequent search); *State v. Alexander*, 177 N.C. App. 281, 284, 628 S.E.2d 434, 436 (2006) (holding that testimony was admissible to explain how an officer received information leading him to form a reasonable suspicion of defendant's involvement in a crime). Therefore, we hold that Sergeant Clayton's testimony regarding Ms. Rankin's statement was not hearsay because it provided context for the officers' subsequent course of conduct and explained why the officers searched the parked Escalade. As a result, the trial court did not err in admitting the statement.

V. Conclusion

For the reasons discussed above, we hold the trial court committed no error.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).