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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-176

Filed 12 September 2023

Union County, Nos. 20CRS350 and 20CRS50732

STATE OF NORTH CAROLINA

v.

ASHIASH DEMOND RIVERS, Defendant.

Appeal by Defendant from judgments entered 7 April 2022 by Judge Kevin M. Bridges in Union County Superior Court. Heard in the Court of Appeals 5 September 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kunal J. Choksi, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for Defendant-Appellant.

RIGGS, Judge.

Defendant Ashiash Demond Rivers appeals from judgments entered after a jury found him guilty of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury (“ADWIKISI”). On appeal, Mr. Rivers contends that: (1) the trial court violated his constitutional right to be free

from double jeopardy by instructing the jury that it could convict Mr. Rivers of attempted first-degree murder and ADWIKISI based on the shared fact that a gun was used to complete both crimes; and (2) prejudicially erred in admitting a jailhouse call into evidence in which Mr. Rivers appeared to admit to shooting the victim. On careful review, we hold Mr. Rivers received a fair trial, free from constitutional or prejudicial error.

I. FACTUAL AND PROCEDURAL HISTORY

In the early morning hours of 13 February 2020, Kyron Mosely and Mr. Rivers had a 15-minute conversation on a residential street in which Mr. Rivers accused Mr. Mosley of shooting at Mr. Rivers' home. Following the end of the conversation, Mr. Mosely turned around and took three steps. Mr. Mosley was then shot in the back two times and fell to the ground. While on the ground, Mr. Mosley was shot two times in the arm. Mr. Mosely did not see who shot him, but, according to his later trial testimony, only he and Mr. Rivers were on the street at the time of their conversation and the subsequent shooting.

The State indicted Mr. Rivers on 1 June 2020 for attempted first-degree murder and ADWIKISI. After his arrest, Mr. Rivers called Mr. Mosley from jail and the two spoke for 12 minutes. Mr. Mosley understood the call to be an apology from Mr. Rivers for shooting him in the back, as Mr. Rivers had realized Mr. Mosely was not the person who had previously shot at his home.

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Trial began on 6 April 2022, with much of the testimony coming from Mr. Mosley. He testified consistent with the above recitation of the facts and was clear that Mr. Rivers was the only other person on the street at the time of the shooting. He did not testify pursuant to any plea deal; he was present in court only because he was in custody for defying an earlier subpoena compelling his appearance.

The police officer who investigated the shooting also testified. On direct, he initially testified that Mr. Mosely reported being shot from a car that had pulled up to the scene. The trial court held a bench conference immediately thereafter, at which time Mr. Rivers' counsel expressed an interest in potentially recalling Mr. Mosley as a witness. The officer returned to the stand before the jury and clarified that, based on his review of his investigation notes, no car was involved in this shooting and that he had simply confused Mr. Mosley's shooting with another case he was working. Defense counsel did not cross-examine the officer regarding this misstatement and did not recall Mr. Mosley to testify regarding the presence of any car.

The State also moved to admit the jailhouse call in which Mr. Rivers apologized for the shooting. Defense counsel objected to the admission of the jailhouse call on the grounds that it had not been properly authenticated. The trial court ultimately overruled that objection.

Following the close of all evidence and closing arguments from counsel, the trial court instructed the jury, without objection, on the elements of attempted first-degree murder and ADWIKISI. The trial court included the pattern instruction on

the following presumption applicable in attempted first-degree murder cases involving a firearm:

If the State proves beyond a reasonable doubt that the Defendant intentionally inflicted a wound upon the alleged victim with a deadly weapon, you may infer first the Defendant acted unlawfully, and second that it was done with malice, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the Defendant acted unlawfully and with malice.

A firearm is a deadly weapon.

On 7 April 2022, the jury found Mr. Rivers guilty on both counts. He was sentenced to consecutive terms of 273 to 340 and 127 to 165 months' imprisonment by written judgments entered 7 April 2022. Mr. Rivers filed a notice of appeal on 18 April 2022.

II. ANALYSIS

Mr. Rivers presents two principal arguments on appeal: (1) the trial court's instruction that the jury could apply the entirely optional presumption of malice from Mr. Rivers' intentional shooting of Mr. Mosley for purposes of first-degree murder violated Mr. Rivers' double jeopardy rights, as it allowed the jury to convict him of first-degree murder and ADWIKISI based on the shared act of using a firearm to accomplish the crimes; and (2) prejudicial error resulted from the admission of the jailhouse call into substantive evidence. We address each argument in turn.

A. Double Jeopardy

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Mr. Rivers candidly concedes that his first argument was not preserved for appellate review, as counsel did not lodge any double jeopardy objection at trial. N.C. R. App. P. 10(a)(1). He nonetheless asks that we exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to suspend Rule 10(a)(1)'s preservation requirement and reach the merits of his appeal. *See* N.C. R. App. P. 2 (“To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party . . .”). Said discretion should only be exercised in “*exceptional circumstances*,” *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted), and we decline to do so here.

Mr. Rivers’ case does not present exceptional circumstances that warrant invoking Rule 2. The assertion of a double jeopardy argument does not disclose, in and of itself, any manifest injustice. *See, e.g., State v. Harding*, 258 N.C. App. 306, 315, 813 S.E.2d 254, 261-62 (2018) (declining to employ Rule 2 to reach an unpreserved double jeopardy argument). That the jury may have relied on the shared fact that a firearm was used to establish malice for first-degree murder and convict Mr. Rivers of ADWIKISI likewise does not disclose any injustice warranting the exceptional step of invoking Rule 2. *See, e.g., State v. Peoples*, 141 N.C. App. 115, 118-20, 539 S.E.2d 25, 28-29 (2000) (holding that a jury could rely on inferred malice from a shooting to convict a defendant of attempted first-degree murder while also

holding that convicting and sentencing him for ADWIKISI under the same facts did not constitute double jeopardy). We dismiss this argument. *Harding*, 258 N.C. App. at 315, 813 S.E.2d at 262.

B. Jailhouse Call

Mr. Rivers next argues that the jailhouse call was erroneously admitted under Rule 901 of the North Carolina Rules of Evidence, contending that it was inadequately authenticated. The State disagrees on the merits, and further argues that even if the jailhouse call was erroneously admitted, the error is not prejudicial. The State specifically contends that Mr. Mosley's testimony provided such overwhelming proof of Mr. Rivers' guilt that any error in the admission of the jailhouse call is harmless. We agree with the State.

“The test for prejudicial error is whether there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial. The burden of showing such prejudice . . . is upon the defendant.” *State v. Pabon*, 380 N.C. 241, 260, 867 S.E.2d 632, 645 (2022) (citations and quotation marks omitted). Even if Mr. Rivers can prove the admission of the jailhouse call was erroneous, “the presence of other overwhelming evidence can render the erroneous admission of evidence harmless.” *State v. McCanless*, 234 N.C. App. 260, 262, 758 S.E.2d 474, 477 (2014) (cleaned up). Overwhelming evidence beyond the jailhouse call supports both convictions here.

1. Attempted First-Degree Murder

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Attempted first-degree murder consists of the following elements:

- (1) 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. Davis, 287 N.C. App. 456, 463, 883 S.E.2d 98 (2023) (citation omitted).

“The specific intent to kill is a necessary component of deliberation; deliberation requires ‘an intent to kill, carried out in a cool state of blood, in furtherance of . . . an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.’” *State v. Kill*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992) (citation omitted). The “cool state of blood” requirement is used to exclude those instances in which “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) (citation omitted).

Prior to the shooting, Mr. Rivers and Mr. Mosely engaged in a 15-minute discussion in which the former accused the latter of shooting up his home. It is not contradicted that immediately following the interaction, Mr. Mosely was shot twice in the back and then twice on the ground. The only person identifiable who would have been capable of shooting Mr. Mosely was Mr. Rivers.¹ Mr. Rivers’ use of a deadly

¹ Mr. Mosley’s credibility was not impeached by Mr. Rivers’ counsel on this point and, if anything, the circumstances surrounding his compulsory appearance and testimony buttress his reliability. The investigating officer’s apparently mistaken testimony concerning the presence of a car

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weapon reveals a clear intent to kill. Independent of the jailhouse call, the evidence overwhelmingly supports the existence of the first element.

The second element of attempted first-degree murder—an overt act calculated to carry out that intent, going beyond premeditation—is clearly supported by the evidence that Mr. Rivers shot Mr. Mosely with a deadly weapon. The evidence provided by the State to this point includes Mr. Mosely’s testimony that they were the only two on the street, that they had a conversation lasting 15 minutes, and that Mr. Mosely was shot approximately four times within three steps of walking away from the encounter. As with intent to kill, the evidence presented overwhelmingly establishes the second element.

The third element is broken into three parts: (1) the existence of malice, (2) premeditation, and (3) deliberation. The jury could clearly infer malice from the evidence that Mr. Rivers intentionally inflicted a wound upon the alleged victim with a deadly weapon. *State v. Hough*, 61 N.C. App. 132, 134, 300 S.E.2d 409, 411 (1983). Evidence that Mr. Rivers accused Mr. Mosley of shooting at his house several days prior further establishes malice, premeditation, and deliberation. *See, e.g., Peoples*, 141 N.C. App. at 118, 539 S.E.2d at 28 (“[A]n intent to kill and the existence of malice, premeditation and deliberation may be inferred from . . . ill-will or previous difficulty

does not materially contradict Mr. Mosley’s testimony either, as all evidence indicates that the officer confused the matter with another case and the issue was not pressed by Mr. Rivers, either with the officer or with Mr. Mosley.

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between the parties[.]” (citation omitted)). The jury could have come to this conclusion based solely on the testimony of Mr. Mosley, all of which was elicited prior to the introduction of the jailhouse phone call.

Premeditation requires Mr. Rivers to have formed the intent to kill “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). Again, there is overwhelming evidence of this fact. The conversation between Mr. Rivers and Mr. Mosely lasted over 15 minutes, concerned allegations by Mr. Rivers that Mr. Mosely had previously shot at his home, and culminated in the shooting within three steps of leaving the discussion. This included shooting Mr. Moseley twice on the ground after he had already been shot twice in the back while walking away. Mr. Rivers had ample time to form the specific intent to kill required for premeditation. *Peoples*, 141 N.C. App. at 118, 539 S.E.2d at 28.

Deliberation requires showing a fixed intent to kill absent a “suddenly aroused violent passion.” *State v. Walker*, 286 N.C. App. 438, 445, 880 S.E.2d 731, 738 (2022). Factors relevant to a finding of deliberation can include ill-will and the nature and number of injuries. *Id.* at 442, 880 S.E.2d at 736. Thus, Mr. Rivers’ expressed belief that Mr. Mosley had previously shot at his home and the numerous gunshot wounds inflicted to Mr. Mosley’s back after the conclusion of the discussion both support premeditation. *Id.* All the above evidence, taken together, overwhelmingly establishes malice, premeditation, and deliberation.

Lastly, there must have been failure to complete the murder, which in this case occurred based on Mr. Mosely's uncontested survival. We therefore hold that the evidence presented overwhelmingly supports a guilty verdict on attempted first-degree murder even when completely discounting the information obtained through the jailhouse call.

2. ADWIKISI

The above evidence also overwhelmingly supports the jury's conviction for ADWIKISI. The crime's essential elements 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). Mr. Mosely's testimony that Mr. Rivers—as the only other person present at the scene—non-fatally shot him from behind four times after a disagreement over whether he shot at Mr. Rivers' home dispels any prejudice arising from any assumed error in the jailhouse call's admission.

III. CONCLUSION

For the foregoing reasons, we dismiss Mr. Rivers' double jeopardy argument and hold that he received a fair trial, free from prejudicial error.

DISMISSED IN PART; NO PREJUDICIAL ERROR IN PART.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).