IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-400

Filed 19 March 2024

Harnett County, Nos. 15CRS52730-32

STATE OF NORTH CAROLINA

v.

JESUS CALDERON

Appeal by defendant from judgments entered 17 June 2022 by Judge Charles W. Gilchrist in Harnett County Superior Court. Heard in the Court of Appeals 21 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General, M. Denise Stanford, for the State.

Kimberly P. Hoppin, for the defendant-appellant.

TYSON, Judge.

Jesus Calderon ("Defendant") appeals from judgments entered on a jury's verdict of guilty of first-degree murder, felonious entry, and possession of a firearm by a felon. Our review discerns no error.

I. Background

Defendant and Kassandra Kennedy engaged in a brief romantic relationship in 2008. Kennedy became pregnant with Defendant's child outside of marriage. Kennedy gave birth in February 2009 to a daughter after her relationship with Defendant ended. Defendant was not initially involved in his daughter's life.

Defendant and Kennedy rekindled their romantic relationship in 2013. Defendant was allowed by Kennedy to have contact with their daughter, but only supervised visits were allowed due to Defendant's continued drug use. Kennedy began dating James Jefferson in late 2014. Meanwhile, Defendant was dating Cindy Garcia at the same time.

Defendant visited Kennedy's new residence on 15 June 2015, as their daughter wanted to show Defendant her room. Defendant unexpectedly returned to Kennedy's residence on 17 June 2015 around four in the afternoon to take their daughter to meet Defendant's father. Defendant saw their daughter's school ID badge and became upset over their daughter's race being identified as white and not Hispanic. Defendant left Kennedy's residence within fifteen minutes.

Kennedy and Jefferson were in bed talking when Kennedy saw Defendant standing in the bedroom doorway on the night of 17 June 2015 around 11:30 p.m. Defendant failed to leave Kennedy's residence despite being ordered to leave. Instead he told Kennedy and Jefferson that he had done something and was "trying to lay low." Jefferson asked Defendant why he had a gun in his hand. Defendant replied, "for my protection" and fired three shots in the direction of Jefferson. Jefferson

suffered two gunshots wounds on his lower back. Defendant left Kennedy's residence in his white and gold Camry vehicle. Kennedy called 911 at 11:36 PM to report Defendant had shot Jefferson. Harnett County Sheriff's Deputies ("HCSD") and emergency medical services ("EMS") reported to Kennedy's residence. Jefferson was transported to the hospital, but he "died from gunshot wounds to the torso."

HCSD executed a search warrant on 18 June 2015 and found an unfired .357 magnum round in Defendant's closet which matched shells contained in a .357 caliber magnum revolver recovered during a search of the auto yard and buildings adjacent to the Jackpot Mini-Mart on 19 June 2015. Defendant was indicted for first-degree murder, first-degree burglary, and possession of firearm by a felon on 6 July 2015. Defendant was tried by jury *nearly seven (7) years later* on 6 June 2022.

The State asked Kennedy on direct examination how Defendant had acted prior to firing the gun, to which she responded, "he seemed nervous, but when he spoke, he was calm." Defendant left his house with a gun wrapped in a bandana while wearing all black clothing between 10:30 to 11:00 PM on 17 June 2015. Defendant's girlfriend, Garcia, testified Defendant stated he "had to go take care of business" as he left.

Jose Benitez testified he observed Defendant at the Jackpot Mini-Mart between 11:30 PM and 12:00 AM on 17 June 2015. Surveillance cameras from the convenience store showed Defendant dressed in black and his car in the parking lot at 12:09 AM on 18 June 2015. When Defendant returned to his house, he told Garcia

that "he had killed somebody" prior to washing his hands with bleach and taking a shower.

Defendant was also known by the nickname "Chewy." Before EMS transported Jefferson to the hospital, HCSD Sergeant David Stone asked Jefferson who had shot him. Jefferson responded "Chewy."

Forensic firearms examiner testified that projectiles recovered in Kennedy's bedroom wall and from Jefferson's body had been fired from the .357 magnum revolver recovered from the auto yard. Defendant moved to dismiss all charges for sufficiency of the evidence at the close of the State's evidence. The trial court denied the motion.

Defendant testified he had given his gun to Kennedy on 15 June 2015. Defendant admitted he went to Kennedy's residence during the afternoon of 17 June 2015, but he denied returning later that night or shooting Jefferson.

Defendant moved to dismiss the charges of first-degree murder and first-degree burglary again at the close of all evidence. The trial court denied the motion to dismiss the charge of first-degree murder, but dismissed the charge of first-degree burglary and allowed and amended lesser charge of felonious entry instead. A jury convicted Defendant on all three charges on 6 June 2022.

Defendant was sentenced to life imprisonment without possibility of parole for first-degree murder and to consecutive active terms of 14 to 26 months for possession of a firearm by a felon and 8 to 19 months for felonious entry. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Issue

Defendant argues the trial court erred by denying his motion to dismiss the first-degree murder charge for insufficiency of the evidence.

IV. Motion to Dismiss

A. Standard of Review

This Court reviews denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). "Under a *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and internal quotation marks omitted).

When ruling on a 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. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). This Court reviews whether sufficient evidence exists to support a criminal conviction by considering the evidence "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable

inference to be drawn therefrom." *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020).

"The denial of a motion to dismiss for insufficient evidence is a question of law which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted).

B. Analysis

Defendant argues his motion to dismiss the first-degree murder charge should have been allowed based on lack of proof of premeditation and deliberation. "Premeditation and deliberation are necessary elements of first-degree murder." *State v. Bradley*, 279 N.C. App. 389, 413, 864 S.E.2d. 850, 868 (2021) (citing N.C. Gen. Stat. §14-17(a) (2019)).

To sustain a conviction for first-degree murder, the State must prove: "(1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (citations omitted). Premeditation means the defendant thought out the murder "beforehand for a length of time, however short, but no particular amount of time is necessary for the mental process of premeditation." *State v. Bullock*, 326 N.C. 253, 257, 388 S.E.2d 81, 83 (1990). "[A] defendant who initiates a situation without the requisite intent to kill may form such intent [while] in the midst of a situation." *State v. Taylor*, 362 N.C. 514, 532, 669 S.E.2d 239, 257 (2008).

"Deliberation means the intent to kill was formed while a defendant was in a cool state of blood and was not under the influence of a violent passion suddenly aroused by sufficient provocation." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981) (citations omitted). Premeditation and deliberation do not require proof of a "fixed length of time." *State v. Walters*, 275 N.C. 615, 623, 170 S.E.2d 484, 490 (1969). *See also Bullock*, 326 N.C. at 257, 388 S.E.2d at 83.

Our Supreme Court has "recognized that it is difficult to prove premeditation and deliberation and that these factors are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence." *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994) (citation omitted).

Our Supreme Court has long held:

> Premeditation and deliberation are processes of the mind. In most cases, they are not subject to proof by direct evidence but must be proved, if at all, by circumstantial evidence. Among other circumstances from which premeditation and deliberation may be inferred are (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Vause, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991) (citation omitted).

When evidence of whether the defendant was the perpetrator of the crime is circumstantial: "courts often [look towards] proof of motive, opportunity, capability, and identity to determine whether a reasonable inference of [a] defendant's guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator." *State v. Hayden*, 212 N.C. App. 482, 485, 711 S.E.2d 492, 494 (2011) (citation and quotation marks omitted). To survive a motion to dismiss, "[t]he evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

This Court has also held:

> The real problem lies in applying the test to the individual facts of a case, particularly where the proof is circumstantial. One method courts use to assist analysis is to classify evidence of guilt into several rather broad categories. Although the language is by no means consistent, courts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime. In most cases these factors are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime. . . . While the cases do not generally indicate what weight is to be given evidence of these various factors, a few rough rules do appear. It is clear, for instance, that evidence of either motive or opportunity alone is insufficient to carry a case to the jury. On the other hand, when the question is whether evidence of both motive and opportunity will be sufficient to survive a motion to dismiss, the answer is much less clear. The answer appears to rest upon the strength of the evidence of

> motive and opportunity, as well as other available evidence, rather than an easily quantifiable "bright line" test.

State v. Lowry, 198 N.C. App. 457, 466, 679 S.E.2d 865, 870-71 (2009) (internal citations and quotation marks omitted).

This Court has resolved an issue of premeditation and deliberation by holding "[t]he number of gunshot wounds inflicted is probative on the issue, as there is 'some amount of time, however brief, for thought and deliberation . . . between each pull of the trigger.'" *State v. Walker*, 286 N.C. App. 438, 442, 880 S.E.2d 731, 736 (2022) (citing *State v. Austin*, 320 N.C. 276, 296, 357 S.E.2d 641, 653 (1987)).

The State presented evidence tending to show Defendant's motive, method, opportunity, and means to murder Jefferson. Testimony was presented tending to show Defendant and Kennedy argued the afternoon of the shooting. Testimony was also presented tending to show Defendant: (1) had stated to Garcia late that night he "had to go take care of business;" (2) left his house with the murder weapon; (3) showed up uninvited at Kennedy's residence on the night of the shooting; (4) was calm before the shooting and stated he was "laying low;" (5) shot at Kennedy and Johnson without provocation; (6) shot multiple times at and hit the victim; and, (7) admitted to Garcia that "he had killed somebody" prior to washing his hands with bleach and taking a shower.

Physical evidence also supported this testimony. The State presented evidence that showed no signs of prior struggle, violent passion, or provocation by either

victim. Physical evidence of the projectiles found in Defendant's bedroom and recovered from Jefferson's body matched the .357 magnum revolver recovered in the auto yard. Physical evidence of two gunshot wounds tends to show Defendant had decided to murder Jefferson and wanted to achieve that end. *Id.*

The jury could reasonably find and conclude Defendant had the motive, method, means, and opportunity to commit premediated murder. The trial court properly denied Defendant's motion to dismiss the first-degree murder charge based upon premeditation and deliberation. Defendant's argument is overruled.

V. Conclusion

The State presented sufficient evidence to sustain the first-degree murder charge based upon the theory of premeditation and deliberation to allow submission to the jury. The trial court properly denied Defendant's motion to dismiss the charges and properly submitted the charges to the jury, after viewing the evidence in the light most favorable to the State including all reasonable inferences thereon.

Defendant received a fair trial, free from prejudicial errors he preserved or argued. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge WOOD concurs.

Judge MURPHY concurs in the result only.

Report per Rule 30(e).