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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-210

Filed: 5 November 2019

Nash County, No. 17CRS001782, 17CRS053012

STATE OF NORTH CAROLINA

v.

CHRISTOPHER WILLIS JENKINS, Defendant.

Appeal by Defendant from judgment entered 12 June 2018 by Judge Benjamin G. Alford in Nash County Superior Court. Heard in the Court of Appeals 3 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Stephanie C. Lloyd, for the State.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for the Defendant.

BROOK, Judge.

Christopher Willis Jenkins ("Defendant") appeals from judgment entered upon jury verdicts finding him guilty of assault with a deadly weapon with intent to kill and possession of a firearm by a felon. We hold that he received a trial free from prejudicial error.

I. Background

Defendant's charges arise out of a shooting incident that occurred around 5:00 p.m. 21 July 2017, at Rolling Meadows apartment complex in Rocky Mount, North Carolina. Rolling Meadows maintains a surveillance system comprised of security cameras that record video footage of the various outdoor areas and parking lots at the apartment complex. The encounter among Defendant, Kelvin Davis, Kahlil Davis (Kelvin Davis's brother), and Marquise Jefferson, was recorded on several security cameras, absent audio, and the jury watched the video at trial.

The testimony at trial tended to show the following facts. Defendant was waiting at the complex in his friend Fred Pitts's home for his mother, Mary Jenkins, to pick him up and take him home at the end of a work day. When his mother arrived, Defendant exited Mr. Pitts's home and encountered three men, Mr. Davis and two companions. The men became engaged in argument. Davis and his associates were armed with guns. Defendant went back inside Mr. Pitts's home to retrieve a gun and then came back outside. Ms. Jenkins got out of her car, and, along with Mr. Pitts, attempted to push Defendant into the car as Mr. Davis walked away. Defendant did get into his mother's car, and Ms. Jenkins began to pull the car out of its parking spot. However, while the car was in motion, Defendant got out of the car and began to speak again to Mr. Davis and his companions. By this time, Mr. Davis and his

companions had crossed to the other end of the parking lot, and Defendant yelled to them from beside the car.

The responding officer, Detective Jace Coon of the Rocky Mount Police Department, reviewed the video prior to trial and testified as the jury watched at trial. He testified that Defendant crouched between two vehicles from "a defensive position" and fired his gun; the police recovered shell casings from both ends of the parking lot, indicating that both Defendant and one or more of Mr. Davis and his companions fired guns. Three apartment buildings located behind Defendant sustained damage from gunshots fired from across the parking lot. No damage was located to any buildings behind Mr. Davis and his companions. Detective Coon also testified that, in the video, he saw Kahlil Davis "take a shooting position with his arms outstretched" toward Defendant. In total, five shell casings were recovered from Defendant's position.

Defendant took the stand in his own defense. He testified that, based on the reputation and body language of Mr. Davis and his associates, he "was afraid that they would hurt [him] and [his] mother." Defendant also testified that three months before this encounter, Mr. Davis shot and killed Defendant's friend, Tim Arrington,[1] outside Defendant's mother's home. He testified that Mr. Davis made threatening statements to him by his mother's car on 21 July 2017, and that, because Mr. Davis

[1] Defendant mistakenly testified that the deceased's name was Tim Davis; however, police reports from the incident indicate that his name was in fact Arrington.

had previously shot and killed Defendant's friend, Defendant believed that Mr. Davis would do the same to him. In response to the threats, he went inside Mr. Pitts's apartment to retrieve a gun "to scare them away so [his] mother and [he] could get away." Defendant further testified that he jumped out of the car because he believed that Mr. Davis and his associates would "shoot the car" because he heard the first shot fired while he was in the car. Defendant's mother also testified that she heard the first shot fired while she and Defendant were in the car. In response, he put himself in a position where he believed he could not be shot, and he shot back. After Mr. Davis and his companions dispersed, Defendant also left the scene on foot.

Defendant called the police the following morning. Together with his mother, he made a statement to police. He testified at trial that he told the police

> that I was trying to get in my mother's car and I couldn't get into the car because I know that I was going to be harmed and I knew my mother was going to be harmed. So, what I did I just got away from my mother so I could be alone instead of her. So, I tried to separate myself from my mother so at least shots fired at me instead of her.

Defendant was not placed under arrest after making this statement. A warrant for Defendant's arrest for the charge of possession of a firearm by a felon was issued on the date of the offense, 21 July 2017, and an order for Defendant's arrest for the charge of assault with a deadly weapon with intent to kill was issued on 11 September 2017 after a grand jury indicted him on this charge. Defendant was placed in custody at his first court appearance.

After a trial, a Nash County jury convicted Defendant on both charges. Judge Alford sentenced Defendant to a term of 33 to 52 months in prison on the charge of assault with a deadly weapon with intent to kill, and a term of 17 to 30 months in prison on the charge of possession of a firearm by a felon, to run consecutively. Defendant timely noticed appeal when judgment was entered against him.

II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

A. Motion to Dismiss for Insufficiency of the Evidence

Defendant first argues that the evidence was insufficient to submit the charge of assault with a deadly weapon with intent to kill to the jury and that the trial court erred in denying his motion to dismiss for insufficiency of the evidence at the close of the evidence.

1. Standard of Review

In reviewing denials of motions to dismiss for insufficiency of the evidence, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000). "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).

"When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the

offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. "[T]he defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict may be used to explain or clarify the evidence offered by the State." *Id.* (internal marks and citation omitted). The trial court may and should consider circumstantial evidence, and it should consider whether "a reasonable inference of defendant's guilt may be drawn from the circumstances[.]" *Id.* (citation omitted). The trial court need not "determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss." *State v. Powell*, 299 N.C. 95, 101, 261 S.E.2d 114, 118 (1980). Indeed, a trial court may properly deny a motion to dismiss for insufficiency of the evidence "even though the evidence also permits a reasonable inference of the defendant's innocence." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (internal marks and citation omitted). "[T]he trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455-56. "In borderline or close cases, our courts have consistently expressed a preference for submitting issues to

the jury[.]" *State v. Manning*, 184 N.C. App. 130, 137, 646 S.E.2d 573, 577 (2007) (internal marks and citation omitted).

2. Analysis

The charge of felonious assault with deadly weapon with intent to kill is defined in N.C. Gen. Stat. § 14-32(c): "Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon." N.C. Gen. Stat. § 14-32(c) (2017. A conviction on this offense requires the jury to find that the defendant possessed an intent to kill and not "only an intent to inflict great bodily harm" because intent to kill is "an essential element of" the charge. *State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 628 (1964); *see also State v. Irwin*, 55 N.C. App. 305, 309, 285 S.E.2d 345, 349 (1982) (articulating that a finding of an intent to kill, not merely an intent to intimidate, must support a verdict of guilty of assault with deadly weapon with intent to kill). "The law will not ordinarily presume a murderous intent . . . . This is a matter for the State to prove." *Ferguson*, 261 N.C. at 561, 135 S.E.2d at 628. Such an intent often "must be proved, if proven at all, by circumstantial evidence[.]" *Id.*, 135 S.E.2d at 629. "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." *Id.* (internal marks and citation omitted). The jury should consider circumstantial evidence, including that "an assailant must

be held to intend the natural consequences of his deliberate act." *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (internal marks and citation omitted).

Here, the State presented evidence that Defendant, when he encountered Mr. Davis and his companions, went into Mr. Pitts's home to retrieve a gun, leaving his mother outside with Mr. Davis. The evidence showed that Defendant, after getting into his mother's car, got out of the car to walk across the parking lot toward Mr. Davis and his companions. The State presented evidence that he shot at Mr. Davis and his companions five times, through both video evidence and evidence of five shell casings recovered where Mr. Davis was standing and crouching behind a vehicle.

This is evidence from which a jury could draw "a reasonable inference of defendant's guilt[.]" *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. While Defendant testified that he intended only to "scare" Mr. Davis and not to harm him, and that he was afraid for his and his mother's life, the trial court may properly deny a motion to dismiss "even though the evidence also permits a reasonable inference of" an absence of intent to kill. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (internal marks and citation omitted). Additionally, "[D]efendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. Defendant's testimony that he intended only to "scare" Mr. Davis conflicts with the State's evidence. Because "the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not

about the weight of the evidence[,]" *id.* at 379, 526 S.E.2d at 455-56, it was proper for the trial court to deny the motion to dismiss for insufficiency of the evidence.

B. Jury Instructions

Defendant also claims that the trial court erred in failing to instruct the jury on the lesser included offense of misdemeanor assault with a deadly weapon, defined in N.C. Gen. Stat. § 14-33(c): "any person who commits any assault . . . is guilty of a Class A1 misdemeanor if, in the course of the assault, . . . he or she: (1) Inflicts serious injury upon another person or uses a deadly weapon[.]" N.C. Gen. Stat. § 14-33(c) (2017).

1. Standard of Review

Where defense counsel does not request a particular jury instruction, this Court reviews a failure to include such an instruction for plain error. *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005). A conviction shall be reversed for plain error only if the defendant suffered prejudice; the "defendant must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict." *Goforth*, 170 N.C. App. at 587, 614 S.E.2d at 315.

2. Analysis

Defendant has not shown he was prejudiced by the failure to give a jury instruction on the lesser included offense of misdemeanor assault with a deadly

weapon. Defendant is not able to show that the jury probably would have returned a verdict of guilty of misdemeanor assault instead of a verdict of guilty of felonious assault with a deadly weapon with intent to kill for the following reasons.

First, as discussed *supra*, the evidence was sufficient to support a finding that Defendant possessed an intent to kill. The evidence at trial showed that Defendant entered Mr. Pitts's house to retrieve a gun and went back outside to re-confront Mr. Davis and his companions. It also showed that Defendant's mother and Mr. Pitts tried to push Defendant into his mother's car in order to leave the area; however, Defendant got out of the car to again confront Mr. Davis and his companions. And the jury heard testimony that Defendant fired five shots toward Mr. Davis.

Relatedly, the verdict the jury returned showed that they found, beyond a reasonable doubt, that Defendant possessed an intent to kill. Such a verdict is inconsistent with a finding that Defendant did not possess an intent to kill, a finding necessary to support a verdict of guilty of the lesser included offense.

For these reasons, Defendant has not met his burden of establishing that "the instructional error had a probable impact on the jury's finding of guilt." *Goforth*, 170 N.C. App. at 587, 614 S.E.2d at 315.

III. Conclusion

Defendant has failed to prove that the evidence was insufficient to support a verdict of guilty on the charge of felonious assault with a deadly weapon with intent

to kill. Defendant has also failed to prove that the trial court committed plain error in failing to instruct the jury on the lesser included offense of misdemeanor assault with a deadly weapon. Therefore, we hold that Defendant received a trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).