An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-897

Filed: 5 November 2019

Alamance County, Nos. 15CRS055932-35

STATE OF NORTH CAROLINA

v.

JEAN CHRISTOPHER JEREZ

Appeal by Defendant from judgment entered 23 January 2018 by Judge James K. Roberson in Alamance County Superior Court. Heard in the Court of Appeals 6 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General I. Faison Hicks, for the State.

Mark Hayes for Defendant-Appellant.

McGEE, Chief Judge.

Jean Christopher Jerez ("Defendant") appeals from a judgment entered after a jury found him guilty of assault with a deadly weapon with the intent to kill inflicting serious injury ("AWDWIKISI"). Defendant contends the trial court erred in denying his motion to dismiss because there was no evidence presented that

Defendant intended to kill Nelson Pacheco. We hold the trial court did not err in denying Defendant's motion to dismiss.

I. Factual and Procedural History

Defendant and his friend from high school, Becky Villalobos ("Becky"), drove in Becky's car to Club Tsunami in Burlington in the late hours of 6 November 2015 to celebrate a friend's birthday. Once they arrived, Defendant and Becky sat down at a booth reserved for their friend's birthday. Raul Flores ("Raul") also sat down at the booth. Prior to that night, Raul and Defendant had never met. The two men did not speak throughout the duration of the night. At one point, Raul extended his leg and accidently kicked Defendant.

Defendant stood up, walked outside the club, and started jogging to his car. Becky followed Defendant out of the club and was "yelling and screaming" at him in the parking lot. Becky caught up to Defendant at her car. Defendant unlocked the car and removed a gun from under the front passenger's seat. He placed the gun in his pants and put on a hoodie sweatshirt. Becky asked Defendant what he was doing and attempted to reason with him. Defendant instructed Becky to tell Raul that Raul needed to apologize to him. Becky returned to the club and Defendant stayed by the parked car.

Raul testified that Becky approached him and suggested he apologize to Defendant. Becky testified that she warned Raul not to go outside the club. However,

at that time, the lights in the club started to dim, "mean[ing] everybody has to go home."

Raul exited the club and approached Defendant, gesturing with his hands like "what's the problem." Defendant pulled a gun out of the pocket of his hoodie and shot Raul in the leg. Raul fell back between the parked cars. Bryon Fields ("Fields"), a security guard at Club Tsunami, testified Defendant kept the gun pointed at Raul "like he[was] going to go in for another shot again." At this point, Fields tackled Defendant and the two men began to wrestle. Defendant shot Fields in his left bicep.

Nelson Pacheco ("Nelson") grabbed Defendant from the back. After an unidentified person hit Nelson from behind, he lost his grip on Defendant, and began to fall backward. Defendant turned around and shot Nelson. Oscar Pacheco ("Oscar"), Nelson's brother, testified that Defendant tried to shoot Nelson again, so Oscar jumped in the fray and grabbed Defendant's gun. Defendant and Oscar both fell to the ground. Defendant continued to pull the trigger over and over; however, Oscar's hand was stuck on the trigger, "stopping that trigger from actually firing the weapon[.]" Defendant bit Oscar and Oscar shoved Defendant. At that point, Defendant's grip on the gun loosened and Oscar was able to slide the gun under a car, away from Defendant. Officers promptly arrived at the scene and attended to the injured.

Defendant was charged with possession of a firearm by a felon, attempted first degree murder, and AWDWIKISI in regard to Raul, Fields, and Nelson. The charges were heard on 8 January 2018. Defendant's counsel moved the trial court to dismiss the charge of AWDWIKISI as to Nelson at the close of the State's evidence and renewed the motion at the close of all evidence. The trial court denied the motions.

Defendant did not present evidence. The jury returned verdicts finding Defendant guilty of possession of a firearm by a felon, guilty of assault with a deadly weapon inflicting serious injury as to Raul and Fields, and AWDWIKISI as to Nelson. Defendant appeals.

II. Analysis

Defendant's sole issue on appeal is the trial court erred in denying his motion to dismiss the charge of AWDWIKISI as to Nelson. Specifically, Defendant contends the State failed to present any evidence establishing that Defendant intended to kill Nelson.

A motion to dismiss for insufficiency of the evidence is reviewed *de novo*. *State v. English*, 241 N.C. App. 98, 104, 772 S.E.2d 740, 744 (2015). "'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, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451,

455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "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).

"'The elements of assault with a deadly weapon with intent to kill inflicting serious injury 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. Wilkes*, 225 N.C. App. 233, 237, 736 S.E.2d 582, 586 (2013) (quoting *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004)). "Proof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill. Such intent must be found by the jury as a fact from the evidence." *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972) (citation omitted). "However, the nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred." *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982) (citation omitted).

Defendant contends there was no evidence presented that Defendant had a plan to kill Nelson or time to consider his options. However, the State's evidence tended to show that Defendant was afforded a period of time to ruminate prior to

taking any violent action. *See State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) ("[A]n assailant must be held to intend the natural consequences of his deliberate act.") (internal quotation marks and citation omitted). After Raul kicked Defendant in the leg, Defendant left the table, exited the club, and went to his friend's car, where he retrieved a .357 magnum gun and a hoodie. Defendant refused to listen when his friend attempted to reason with him but, instead, waited in the parking lot, armed with a gun.

Defendant also argues the State's evidence only gives rise to the inference that Defendant was trying to repel Nelson, not that he was trying to kill Nelson. However, the State presented evidence that once Defendant opened fire in the parking lot, Nelson grabbed Defendant from behind in an attempt to stop him. Nelson was subsequently hit from behind by an unidentified person, causing him to lose his grip on Defendant and fall backwards. As Nelson fell back, Defendant pulled the trigger, releasing a bullet that pierced Nelson's skin. Therefore, Nelson could not have been perceived as an imminent physical threat at the time Defendant shot him.

Defendant also argues that "[h]e did not engage in the sort of repeated action which would indicate that he wished Nelson dead" and, because the gunshot did not penetrate the muscle, "it was intentionally *non*-lethal." However, the State's evidence showed that Defendant attempted to shoot Nelson multiple times. Oscar testified that immediately after Defendant shot Nelson, Defendant "tr[ied] to shoot again."

The placement of Oscar's hand on the trigger was the sole force preventing Defendant from firing more shots at Nelson. Moreover, the severity of Nelson's injury was in no way indicative that Defendant's shot was "intentionally non-lethal." The emergency room attending surgeon testified that Nelson presented at the emergency room as a level one trauma, which is usually "a penetrating injury or someone who's unstable from a hemodynamic standpoint." Nelson was rushed into surgery and received staples in his stomach and, for two months following his surgery, Nelson physically could neither work nor drive.

In sum, the State's evidence, considered in the light most favorable to the State, reasonably supports the inference that Defendant intended to kill Nelson when he shot him.

III. Conclusion

The State presented substantial evidence that Defendant intended to kill Nelson. Accordingly, the trial court did not err in denying Defendant's motion to dismiss the charge of AWDWIKISI as to Nelson.

NO ERROR.

Judges BERGER and COLLINS concur.

Report per Rule 30(e).