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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-680

Filed: 4 February 2020

Robeson County, No. 14 CRS 51181

STATE OF NORTH CAROLINA

v.

DAMION MCCORMICK

Appeal by defendant from judgment entered 5 March 2018 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Katherine A. Murphy, for the State.*

*William D. Spence for defendant.*

ARROWOOD, Judge.

Damion McCormick (“defendant”) appeals from judgment entered on his conviction for assault with a deadly weapon with intent to kill inflicting serious injury. Defendant contends the trial court erred by denying his motion to dismiss the charge against him and plainly erred in instructing the jury on flight. Defendant also

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raises an ineffective assistance of counsel claim. For the following reasons, we find no error and decline to review his claim of ineffective assistance of counsel.

I. Background

On 11 August 2014, defendant was indicted on charges of assault with a deadly weapon with intent to kill inflicting serious injury, attempted robbery with a dangerous weapon, and attempted first-degree murder. On 6 September 2016, a grand jury issued a superseding indictment for assault with a deadly weapon with intent to kill inflicting serious injury and attempted first-degree murder. The matter came on for trial on 19 February 2018. The evidence at trial tended to show the following.

On 20 February 2014, William T. Washington, Jr. (“Mr. Washington”) hosted a cookout at the mobile home he lived in with his son, his girlfriend Kimberly Turpin (“Ms. Turpin”), and Ms. Turpin’s three children. Around 6:30 p.m., Adrienna McCormick (“Ms. McCormick”), defendant’s mother, went into the mobile home and began speaking with Ms. Turpin. Defendant went over as well and asked his mother what she was doing there. Ms. McCormick and Mr. Washington had previously had a sexual relationship which had ended prior to the date of the cookout. Ms. McCormick told defendant she would return home soon. While Ms. Turpin and Ms. McCormick continued their conversation, Mr. Washington went into the kitchen to make himself a salad.

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As Mr. Washington was making his salad, defendant asked to speak with him about his mother. Mr. Washington told defendant there was nothing to talk about because their relationship was over. Defendant then asked Mr. Washington to step outside with him, so they went out onto the small back porch. While on the porch, defendant asked Mr. Washington if he was selling drugs to his mother, and Mr. Washington said that he was not. Defendant then asked Mr. Washington what was in his pockets, and began reaching for them. Mr. Washington had by then noticed defendant was carrying a gun, so he pushed defendant back and reached for the doorknob to his home. Before he could return inside, defendant shot at him several times. Mr. Washington collapsed onto the porch when the first bullet hit his leg, and then felt more bullets strike his body. Ultimately, defendant shot Mr. Washington five times, hitting him three times in the leg, once in the stomach, and once in the wrist. Defendant then took off running. Mr. Washington called out for his son, telling him that he had been shot.

Ms. Turpin witnessed some of the altercation between defendant and Mr. Washington. She noticed them “tussling” with each other shortly before she heard several gunshots. Once the gunfire stopped, Ms. Turpin went out onto the porch and found Mr. Washington sitting on the porch steps bleeding from several wounds. She called 911 and instructed her children to bring towels and place pressure on the wounds until an ambulance arrived. Mr. Washington was transported to the hospital

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and treated for gunshot wounds to his leg, abdomen, and wrist. Doctors were unable to remove the bullet from his abdomen. Mr. Washington was unable to recover full use of his arm, and he required several months of physical therapy before he was able to walk again.

On 5 March 2014, Mr. Washington identified defendant from a photo lineup, but the Robeson County Sherriff's Office was unable to locate defendant because he had so many addresses. On 13 March 2014, defendant was apprehended following a traffic stop. During the traffic stop, defendant ran from the car and was chased by Officer Joseph Smith ("Officer Smith") of the Lumberton Police Department. Officer Smith saw defendant toss a gun onto a nearby roof as he was running. Officer Smith was able to apprehend defendant and retrieve the .38 caliber gun, which was the same type of gun used to shoot Mr. Washington. Defendant's case was originally set for trial on 22 May 2017, but was rescheduled after defendant failed to appear on that date. On 23 February 2018, a jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was sentenced to a minimum of 70 months to a maximum of 96 months in prison. On 27 September 2018, we granted defendant's petition for *writ of certiorari* to review the trial court's judgment.

II. Discussion

Defendant raises three arguments on appeal, contending that the trial court erred in the first place by denying his motion to dismiss the charges against him for insufficient evidence. In the event this Court deems his motion to dismiss was not properly made, defendant argues he was denied effective assistance of counsel. Lastly, defendant contends the trial court committed plain error by instructing the jury on flight. We disagree.

1. Motion to Dismiss for Insufficient Evidence

This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 623 (2007) (citations omitted). The motion is properly denied if “there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.” *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citing *State v. Mercer*, 317 N.C. 87, 96, 343 S.E.2d 885, 890 (1986)). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (quotation marks and citations omitted). “When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence.” *State v. Rouse*, 198 N.C. App. 378, 381, 679 S.E.2d 520, 523 (2009) (citing *State v. Mitchell*, 109 N.C. App. 222, 224, 426 S.E.2d 443, 444 (1993)).

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At trial, defendant properly made a general motion to dismiss the charges against him for insufficient evidence at both the close of the State's evidence and at the close of all the evidence. The trial court denied both motions. Upon his conviction of assault with a deadly weapon with intent to kill inflicting serious injury, defendant now argues the trial court erred in denying his motion because the State failed to present sufficient evidence of his intent to kill, an essential element of the crime charged. *See State v. McLean*, 211 N.C. App. 321, 324, 712 S.E.2d 271, 275 (2011) (quoting *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994)) (explaining that "[t]he essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are: '(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death.'").

An intent to kill is a mental attitude that may be proven by circumstantial evidence, "that is, by proving facts from which the fact sought to be proven may be reasonably inferred." *State v. Stewart*, 231 N.C. App. 134, 146, 750 S.E.2d 875, 882 (2013) (quoting *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956)). Such intent "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.*, (quoting *Cauley*, 244 N.C. at 708, 94 S.E.2d at 921).

In *State v. Wilkes*, we held the evidence presented at trial was sufficient to support an inference that the defendant intended to kill his victim where the

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defendant repeatedly hit his then-wife over the head with a baseball bat until she lost consciousness. 225 N.C. App. 233, 237, 736 S.E.2d 582, 586 (2013). The evidence showed the wounds could have been fatal, the victim did not fight back, and the assault continued even after she fell to her knees. *Id.* at 237-38, 736 S.E.2d at 586. In addition, the parties' volatile domestic relationship and the defendant's admission he assaulted his wife out of fear he would lose her to another man following her petition for divorce further supported an inference of the defendant's intent to kill. *Id.* at 238, 736 S.E.2d at 586.

In *State v. Maddox*, the defendant shot at the victim five times as the victim attempted to flee. 159 N.C. App. 127, 132, 583 S.E.2d 601, 604 (2003). Reasoning that the nature and manner of the assault and the weapon used constituted substantial evidence that the defendant intended to kill the victim, we upheld the denial of the defendant's motion to dismiss for insufficient evidence of intent to kill. *Id.* We reached a similar conclusion in *State v. Cain*, holding that the defendant's "requisite 'intent to kill' can be reasonably inferred by the defendant's use of a .357 magnum revolver, fired numerous times." 79 N.C. App. 35, 47, 338 S.E.2d 898, 905 (1986).

In the present case, the evidence showed defendant shot Mr. Washington five times, at close range. In keeping with our reasoning in *Cain* and *Maddox*, defendant's intent to kill can be reasonably inferred from his use of a handgun, fired numerous

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times at Mr. Washington. Though that alone suffices, other facts provide further evidence of defendant's intent to kill. Similar to the facts of *Wilkes*, Mr. Washington's wounds could have been fatal and defendant continued his assault even after Mr. Washington collapsed on the porch steps after the first gunshot to his leg. The evidence also showed defendant had motive, because he believed Mr. Washington was selling drugs to his mother. Thus, the nature and manner of the assault, the weapon used, and the fact defendant had a motive all support an inference that defendant intended to kill Mr. Washington.

Defendant, citing to a number of cases, contends that some showing of ill will, hatred, uncontrollable rage, or an evil, murderous spirit is required in order to prove an intent to kill. Defendant asserts that there was no evidence he expressed a desire for Mr. Washington's death or that he had a motive or reason to kill him. Even if we were to find there was insufficient proof defendant had motive, North Carolina appellate courts have never held that proof of intent to kill turns on these factors alone. Indeed, while such a showing may be useful in proving intent to kill, it is by no means the only way. As the cases discussed *supra* demonstrate, an intent to kill may be inferred from the nature and manner of the assault, the parties' conduct, and any other relevant circumstances. *Stewart*, 231 N.C. App. at 146, 750 S.E.2d at 882. We therefore overrule defendant's assignment of error. Because we determined



defendant properly moved to dismiss the charges against him, we need not review his contingent ineffective assistance of counsel claim.

2. Jury Instruction on Flight

Defendant next contends the trial court committed plain error when it instructed the jury that it could consider defendant's flight as evidence of his guilt. Defendant argues the instruction on flight was unwarranted because it was not supported by the evidence. We disagree.

Where, as here, the defendant fails to object to the jury instruction at trial, we review for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Plain error is error that is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done" and which "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation marks and citations omitted) (emphasis in original).

At the close of all the evidence, the trial court instructed the jury on the issue of flight as follows:

Flight. The State contends and the defendant denies that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances, admit to an admission or show of consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt.

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A flight instruction is appropriate where “there is some evidence in the record reasonably supporting the theory that [the] defendant fled after commission of the crime[.]” *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). “Mere evidence that [the] defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that [the] defendant took steps to avoid apprehension.” *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991) (citing *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 434 (1990)). In *State v. Anthony*, our Supreme Court held an instruction on flight was proper where, after shooting the victim, the defendant “immediately entered his car and quickly drove away from the crime scene without rendering any assistance to the victims or seeking to obtain medical aid for them.” 354 N.C. 372, 425, 555 S.E.2d 557, 591 (2001). *See also State v. Beck*, 346 N.C. 750, 758, 487 S.E.2d 751, 757 (1997) (holding an instruction on flight proper where the “defendant fired two gunshots at the victim and then left the residence without rendering any assistance to the victim or seeking to obtain any medical aid for him” and avoided the police officers parked outside his home).

Moreover, in *State v. Robertson*, this Court held a jury instruction on flight was proper where the evidence showed defendant failed to appear for his first appearance in court. 57 N.C. App. 294, 297, 291 S.E.2d 302, 304 (1982). Later, in *State v. Williamson*, we reasoned that “[the] defendant, by failing to appear for trial,

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attempted to avoid prosecution for the offenses charged,” and noted that such failure to appear would support an instruction on flight. 122 N.C. App. 229, 232, 468 S.E.2d 840, 843 (1996). Though this Court in *Williamson* did not actually reach the question of a jury instruction on flight, our reasoning still stands. In *State v. Rainey*, we reiterated our position on the matter, holding that “[the] defendant’s failure to appear on the 6 February 2006 court date amounted to evidence that [the] defendant took steps to avoid apprehension” and thus the trial court did not err in instructing the jury on flight. 198 N.C. App. 427, 443, 680 S.E.2d 760, 772 (2009).

We hold the evidence presented in this case, considered in the light most favorable to the State, was sufficient to warrant a jury instruction on flight. Here, the evidence showed defendant shot Mr. Washington numerous times and then fled the scene without attempting to render any assistance or obtain medical aid for him. Pursuant to the holding in *Anthony*, this alone would support a jury instruction on flight. However, defendant also took other steps to avoid apprehension. During a traffic stop on 13 March 2014, defendant took off running when the officer conducting the stop informed the driver he was going to search the car. While being chased by police, he tried to discard the weapon he used to shoot Mr. Washington so that police would not find it. In addition, defendant failed to appear for his original trial date on 22 May 2017, and a warrant was subsequently issued for his arrest. These facts all support a theory of flight sufficient to warrant a jury instruction. Furthermore, “the

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trial court's instruction accurately informed the jury that proof of flight alone was insufficient to establish guilt[.]” *Anthony*, 354 N.C. at 426, 555 S.E.2d at 591. Accordingly, it was not error for the trial court to instruct the jury on flight.

Defendant argues four years passed between the commission of the crime and his failure to appear, however, “this temporal consideration goes to the weight of the evidence,” not to whether evidence of flight should be admitted for consideration by the jury. *Rainey*, 198 N.C. App. at 440, 680 S.E.2d at 770. We therefore reject his argument.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).