IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-200

No. COA20-163

Filed 4 May 2021

Henderson County, No. 18 CRS 202

STATE OF NORTH CAROLINA,

v.

PAUL BRYAN KILLIAN, Defendant.

Appeal by Defendant from judgment entered 24 May 2019 by Judge William H. Coward in Henderson County Superior Court. Heard in the Court of Appeals 26 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph E. Elder, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Paul Bryan Killian ("Defendant") appeals his May 24, 2019 conviction for attempted first-degree murder. For the reasons stated below, we find no error.

I. Factual and Procedural Background

¶ 2 In 2016, Defendant underwent a knee replacement surgery and was prescribed Percocet. On November 18, 2017, Defendant's wife, "Mrs. Killian," believed

Defendant was abusing his pain management prescription and staged an intervention in their home. Defendant became angry and informed Mrs. Killian she would regret staging the intervention. Mrs. Killian threatened to "file for separation" if Defendant did not agree to stop taking his prescription. As Mrs. Killian did not want to witness Defendant's withdrawal symptoms that occurred over the next several days, Defendant stayed in the couple's guest bedroom. Two days after the intervention, Defendant threatened to burn down their home. Shortly thereafter, Mrs. Killian requested Defendant temporarily move out of their marital home. Defendant temporarily stayed with his daughter, before moving to reside with one of his friends, Scott Francis ("Francis"). Francis was in the process of obtaining a divorce and resided separately from his spouse.

¶ 3 After Defendant left their home, Mrs. Killian changed the locks to the residence. On November 24, 2017, Defendant sent Mrs. Killian a text message expressing his desire to reconcile. Mrs. Killian replied that she believed they should both attend therapy before reconciling. While staying with Francis, Defendant and Francis spoke to each other about their spouses. When Francis complained about his divorce, Defendant reportedly stated, "it's nothing that a 25-cent bullet wouldn't take care of your problem." On November 28, 2017, Mrs. Killian spoke with her friend, Ann Sorrels ("Sorrels"). Sorrels relayed a conversation she had with Defendant, causing Mrs. Killian to become fearful. Based on Defendant's statements to Francis

and Sorrels, Mrs. Killian sought a restraining order. Defendant discovered Mrs. Killian was also going to obtain a restraining order against him, and he sought to reassure her that he meant her no harm. Although Mrs. Killian went to the Buncombe County courthouse to inquire about the restraining order, she ultimately decided not to obtain one.

¶ 4 On December 15, 2017, approximately one month after the intervention, Defendant and Mrs. Killian met at their insurance agent's office to discuss their insurance premiums and Defendant's disabled status. During this meeting, Defendant asked about the status of their relationship. Mrs. Killian did not have an answer for Defendant at that time. In response, Defendant told Mrs. Killian, "[y]ou might as well tear up that [expletive omitted] form, you won't need it after today." Mrs. Killian believed Defendant was irritated and asked Robert Gibson ("Gibson"), the insurance agency manager, to watch her as she left the office as she believed Defendant was armed. Gibson watched as Mrs. Killian handed Defendant packages that had been mailed to the marital home, during which time Defendant became agitated and yelled expletives. Mrs. Killian then entered her Mercedes and watched Defendant walk to his truck. She waited in her vehicle for Defendant to leave the insurance office parking lot. Mrs. Killian observed Defendant enter his truck, and drive "aggressively" out of his parking spot. Defendant came to a stop in the middle of the parking lot, and Mrs. Killian decided to leave. As Mrs. Killian attempted to

drive out of the parking lot and down the street, Defendant drove towards her, hitting the rear bumper of her Mercedes two or three times.

¶ 5 These collisions caused several warning lights to turn on and the vehicle's engine to enter a low power mode. Defendant exited his truck and brandished his handgun as he approached his wife's vehicle. Mrs. Killian testified that when Defendant was approximately ten feet away from her Mercedes, he fired two or three shots at her car. Mrs. Killian fled in her vehicle. Defendant reentered his truck, pursued her, and drove his truck into the rear and side of her Mercedes. The collisions caused Mrs. Killian's glasses to fall off her face, her phone to fall to the floorboard, and the vehicle's pop-up roll bar and air bags to deploy. Mrs. Killian called 911, and an operator directed Mrs. Killian to pull into a parking lot where several law enforcement officers awaited her. As Mrs. Killian entered the lot, Defendant continued driving past the parking lot to their home. Sometime afterwards, law enforcement traveled to the couple's marital home. Defendant was found at the home holding a handgun towards his torso. Defendant eventually surrendered to law enforcement and was taken into custody.

¶ 6 Defendant was arrested for discharging a firearm into a moving vehicle and assault with a deadly weapon with intent to kill on December 15, 2017. Defendant's arrest warrant states the deadly weapon used to assault Mrs. Killian was Defendant's 1995 Nissan truck. Trial counsel was appointed to Defendant on December 18, 2017.

Both Mrs. Killian's and Defendant's vehicles were impounded and inspected. Mrs. Killian's Mercedes had large holes in the bumper area. Law enforcement took two gunshot residue stubs from the rear of the Mercedes. One stub revealed significant gunshot residue. Law enforcement concluded that a gun had been fired within close range of the vehicle.

¶ 7 On February 2, 2018, law enforcement released Mrs. Killian's Mercedes. Defendant's expert did not inspect the Mercedes and the record does not demonstrate that the defense ever requested to physically inspect the vehicle prior to its release. Defendant's expert was provided with the gunshot residue stubs and photographs of the vehicle. In the photographs, there were no visible signs of bullet holes in the Mercedes. No bullets or fragments were recovered from the vehicle. On March 19, 2018, Defendant was indicted for attempted first-degree murder. Defendant's original two charges of discharging a firearm into a moving vehicle and assault with a deadly weapon with intent to kill were dismissed upon his indictment for attempted first-degree murder.

¶ 8 Prior to trial, Defendant filed a motion to dismiss based on the State's release of the Mercedes before the defense could perform independent testing.[1] After a

[1] The record does not demonstrate defense counsel requested an opportunity for independent testing. On appeal, Defendant contends the vehicle was released before defense counsel could anticipate the need for further testing.

hearing, the trial court denied the motion, finding that "[i]n the 46 days between counsel's appointment and the release of the Mercedes, there was no evidence that Defendant's counsel ever requested access to the Mercedes for inspection or testing, or that she was ever denied access to the Mercedes."

¶ 9 At trial, Defendant's expert testified that had he physically inspected the vehicle, he would have concluded that no bullets had punctured its exterior. He further testified that "a novice would [have] hit" the vehicle, had they so intended, given the close range at which Defendant discharged his firearm. Relying on his expert's testimony, Defendant argues that had the expert physically inspected the vehicle, he would have been able to refute the intent to kill element of attempted first-degree murder. Defendant renewed his motion to dismiss at the close of the State's evidence. This motion was denied. Defendant was convicted of attempted first-degree murder on May 24, 2019.

II. Analysis

¶ 10 On appeal Defendant argues the trial court erred in denying his motion to dismiss the charge of attempted first-degree murder. Specifically, Defendant contends his right to due process was violated when law enforcement released Mrs. Killian's Mercedes prior to his indictment. We disagree.

¶ 11 The standard of review for a motion to dismiss is *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Under *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, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). To withstand a motion to dismiss, "each element of the crime charged must be supported by 'substantial evidence,' which is that amount of evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Peoples*, 141 N.C. App. 115, 117-18, 539 S.E.2d 25, 28 (2000) (citing *State v. Grigsby*, 351 N.C. 454, 456, 526 S.E.2d 460, 462 (2000). In considering a motion to dismiss "the evidence is to be considered in the light most favorable to the State and [] the State is entitled to every reasonable inference to be drawn therefrom." *Peoples*, 141 N.C. App. at 118, 539 S.E.2d at 28 (citing *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994)).

¶ 12 A criminal defendant's right to discovery is regulated by statute. A defendant has a statutory right to discovery once a probable cause hearing has been held, or the defendant has been indicted. N.C. Gen. Stat. § 15A-902(d) (2020). N.C. Gen. Stat. § 15A-258 requires seized property to be held in the custody of the person who applied for the warrant, the officer who executed it, or the agency by which the officer is employed or of any other law enforcement agency for purposes of evaluation or analysis. N.C. Gen. Stat. § 15A-258 (2020). N.C. Gen. Stat. § 15-11.1 provides

> [i]f a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary

> to assure that the property will be produced at and may be used as evidence in any trial. Upon application by the lawful owner or a person, firm or corporation entitled to possession or upon his own determination, the district attorney may release any property seized pursuant to his lawful authority if he determines that such property is no longer useful or necessary as evidence in a criminal trial and he is presented with satisfactory evidence of ownership.

N.C. Gen. Stat. § 15-11.1(a) (2020). When N.C. Gen. Stat. § 15-11.1(a) is violated, this Court "must focus on the question of whether defendant was thereby deprived of his right to due process under the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 32 of the North Carolina Constitution." *State v. Mlo*, 335 N.C. 353, 372, 440 S.E.2d 98, 107 (1994).

¶ 13 "The Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment." *California v. Trombetta*, 467 U.S. 479, 480-81, 104 S. Ct. 2528, 2529-30, 81 L. Ed. 2d 413, 417 (1984) (citing *U.S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218; *see also Arizona v. Youngblood*, 488 U.S. 51, 55, 109 S. Ct. 333, 336, 102 L. Ed. 2d 281, 287 (1988).

Evidence is material if there is a "reasonable probability" of a different result at trial had the evidence been disclosed. *See Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490, 505-06 (1995) (citations omitted); *Williams*, 362 N.C. at 636, 669 S.E.2d at 296.

¶ 14 The constitutional duty to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." *Trombetta*, 467 U.S. at 488, 104 S. Ct. at 2534, 81 L. Ed. 2d at 422. "To meet this standard of constitutional materiality . . . evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489, 104 S. Ct. at 2529-30, 81 L. Ed. 2d at 417. The materiality standard does not require a criminal defendant to show "by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 434, 115 S. Ct. at 1565-66, 131 L. Ed. 2d at 506. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 U.S. at 58, 115 S. Ct. 337, 102 L. Ed. 2d at 289; *see also Mlo*, 335 N.C. at 373, 40 S.E.2d at 108 (no error where defendant failed to allege bad faith on behalf of law enforcement and the exculpatory value of the evidence was speculative). The trial court must "dismiss the charges stated in a criminal pleading if . . . [t]he defendant's

constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2020).

¶ 15 Here, Defendant was arrested for discharging a firearm into an occupied vehicle and assault with a deadly weapon with intent to kill on December 15, 2017. Defendant's arrest warrant states the deadly weapon used was his truck, not his firearm. Mrs. Killian's Mercedes was released to her insurance company on February 2, 2018. Defendant was indicted for attempted first-degree murder on March 19, 2018. The charges of discharging a firearm into an occupied vehicle and assault with a deadly weapon with intent to kill were dismissed upon Defendant's indictment for attempted first-degree murder. The Mercedes was released by law enforcement without consultation with the district attorney or by order of the court; however, a dismissal of Defendant's charges is not warranted as Defendant was not irreparably prejudiced by the release of the vehicle.

¶ 16 The elements of an attempt crime are: "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). The essential elements of attempted first-degree murder are (1) a 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. Cozart*, 131 N.C. App. 199, 202-03, 505 S.E.2d 906, 909 (1998).

¶ 17 Here, Defendant contends he would not have been convicted of attempted first-degree murder had his expert been able to physically inspect the Mercedes because the lack of bullets or bullet holes defeats the "specific intent to kill" element of attempted first-degree murder. We disagree.

¶ 18 Mrs. Killian's Mercedes was not material to Defendant's defense in his attempted first-degree murder trial as there was not a reasonable possibility that the outcome would have been different had his expert been able to physically inspect the vehicle. Further, as Defendant was able to establish a lack of bullets or bullet holes in the Mercedes through witness testimony, he was not irreparably prejudiced by the premature release of the vehicle. *See Mlo*, 335 N.C. at 373, 440 S.E.2d at 108; *Youngblood*, 488 U.S. at 57, 109 S. Ct. at 337, 102 L. Ed. 2d at 289 (no violation of the Defendant's constitutional right to due process where law enforcement failed to preserve evidence that "might have exonerated the defendant."); *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149-50 (2002) (no *Brady* violation where the defendant "received the substance of" the evidence through discovery); *State v. Lewis*, 365 N.C. 488, 501-02, 724 S.E.2d 492, 502 (2012) (the State's failure to preserve the weapon used in the attempted murder did not violate the defendant's right to due process

where defense counsel attacked the victim's identification of the knife through cross-examination); *State v. Banks*, 125 N.C. App. 681, 683-84, 482 S.E.2d 41, 43 (1997) ("absen[t] [] a showing of 'bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law . . . ' ").

¶ 19 As the trial court noted, the findings of the defense expert would have been merely speculative:

> In this case, if the defendant had been able to find bullet holes in the bumper of the Mercedes, that could have been *incriminating* (proving he definitely shot at the car) or *exculpatory* (proving he didn't shoot at the victim herself). If the defendant had not been able to find bullet holes in the bumper, that could have been incriminating (proving he was aiming at the victim herself and just missed everything) or exculpatory (proving he fired "warning shots" high over her car and was only trying to scare her). Such rank speculation cannot be the basis for finding that this case falls within the rule of *Brady*. (emphasis in original).

¶ 20 Further, Defendant was able to bolster his expert's testimony without a physical inspection of the vehicle. At trial, Defendant had access to extensive photographs of the Mercedes. Through examination of law enforcement officers involved in the inspection of the vehicle, Defendant was able to confirm there were no bullets or bullet holes in the Mercedes. Defendant's expert testified that the gunshot residue collected from the vehicle indicated Defendant shot from a close range and opined that – given Defendant's experience with firearms – had Defendant

intended to kill Mrs. Killian with the firearm, he would have hit the car when firing from such a close range.

¶ 21 However, the State presented substantial evidence to establish all elements of attempted first-degree murder. *See Peoples*, 141 N.C. App. at 118-19, 539 S.E.2d at 28-30. Taking the evidence in the light most favorable to the State, the evidence demonstrated Defendant fired several shots within close range of the Mercedes after rear-ending the car at least twice. Witness testimony confirmed Defendant not only discharged his firearm multiple times in Mrs. Killian's direction, but when Mrs. Killian attempted to flee, Defendant pursued her. Defendant repeatedly and purposefully drove his truck into Mrs. Killian's vehicle from the rear and side. The collisions caused the Mercedes' air bags and pop-up roll bar to deploy and the vehicle to enter a low power mode with several warning lights engaged. Further, Mrs. Killian's glasses fell off and her phone fell to the floor. Additionally, prior to their meeting at their insurance office, Defendant informed Mrs. Killian she would regret staging an intervention and told her she would not need the new life insurance paperwork after December 15, 2016. Although law enforcement did not recover any bullets from the vehicle, it is evident that the car was only one piece of evidence used to demonstrate Defendant's intent on December 15, 2016. *See State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982) (intent to kill may be inferred from "the nature of the assault, the manner in which it is made, the weapon, if any, used, and the

surrounding circumstances[]"); *State v. Coplen*, 138 N.C. App. 48, 59-60, 530 S.E.2d 313, 321 (2000) (intent to kill and the existence of malice, premeditation, and deliberation for attempted first-degree murder may be inferred from a defendant's actions, including previous difficulty between the parties). The burden is on Defendant to show irreparable prejudice to the preparation of his case. *Williams*, 362 N.C. at 640, 669 S.E.2d at 298. Given the speculative nature of the evidence Defendant argues would have refuted the specific intent element of attempted first-degree murder, and the testimony of law enforcement officers confirming the lack of bullet holes in the vehicle, Defendant was not irreparably prejudiced in the preparation of his case by release of the Mercedes. *See Mlo*, 335 N.C. at 373, 440 S.E.2d at 108.

¶ 22 Although Defendant's expert did not physically inspect the Mercedes, defense counsel's request to do so is absent from the record. Defendant contends law enforcement acted in bad faith when it released Mrs. Killian's Mercedes to her insurance company but retained possession of his truck. However, Defendant does not argue this was done with the intent to deprive him of the opportunity to inspect Mrs. Killian's vehicle, or that it was against law enforcement's policy. Further, "[f]or the purposes of due process, the presence or absence of bad faith by the police turns on whether the police had knowledge of the exculpatory value before the evidence was destroyed." *Banks*, 125 N.C. App. at 684, 482 S.E.2d at 43 (citation omitted). Where

law enforcement has "no reason to conclude" the evidence "ha[s] any exculpatory value," the destruction or release of that evidence does not constitute bad faith. *See id.*, at 684, 482 S.E.2d at 43. As Defendant was charged with assault with a deadly weapon with intent to kill, with his truck being the deadly weapon, law enforcement lawfully retained his vehicle as a deadly weapon used in the assault. *See State v. Jackson*, 74 N.C. App. 92, 95, 327 S.E.2d 270, 272 (1985) ("We note that a motor vehicle may be a deadly weapon if used in a dangerous and reckless manner."); *State v. Coffey*, 43 N.C. App. 541, 543, 259 S.E.2d 356, 357 (1979)); *State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 778 (1955). Mrs. Killian's vehicle and the lack of bullets therein was not material to Defendant's defense, as his charge arose from using his truck as a deadly weapon, and the vehicle's exculpatory value was merely speculative. Thus, he cannot demonstrate law enforcement acted in bad faith by releasing the Mercedes and preventing a physical inspection of his wife's vehicle.

III. Conclusion

¶ 23 After careful review, we hold Defendant has failed to prove irreparable prejudice in the preparation of his case or that a different outcome would have occurred had his expert physically inspected his wife's vehicle prior to its release by law enforcement. *See* N.C. Gen. Stat. § 15A-954(a)(4); *see also Kyles*, 514 U.S. at 419, 115 S. Ct. at 1565, 131 L. Ed. 2d at 505. As Defendant did not demonstrate law enforcement acted in bad faith when it prematurely released the vehicle to Mrs.

Killian's insurance company, we hold Defendant failed to meet his burden under N.C. Gen. Stat. § 15A-954 to dismiss the charge against him. Accordingly, we find no error.

NO ERROR.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).