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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-518

No. COA20-460

Filed 21 September 2021

New Hanover County, No. 18 CRS 52035

STATE OF NORTH CAROLINA

v.

HAKEEM SANDERS

Appeal by defendant from judgment entered 21 November 2019 by Judge Henry L. Stevens in New Hanover County Superior Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melissa H. Taylor, for the State.

Joseph P. Lattimore for defendant.

ARROWOOD, Judge.

¶ 1 Hakeem Sanders ("defendant") appeals from judgment entered following his conviction for second-degree murder. Defendant contends the trial court erred in denying his motion to dismiss for insufficient evidence. Defendant also assigns error to the trial court's computation of his prior record level for sentencing purposes. For

the following reasons, we hold that defendant received a fair trial free of error and that the trial court properly calculated his prior record level for sentencing.

I. Background

¶ 2 On 12 March 2018, Edward Allen Pearson ("Mr. Pearson") left work and stopped at a Safeway convenience store in Wilmington, North Carolina. When he arrived, Mr. Pearson observed a male (later identified at trial as defendant) and a female fighting in the parking lot. Defendant appeared to be choking the female. A Safeway employee witnessed the altercation and called 911.

¶ 3 Subsequently, defendant and the female entered the Safeway. Mr. Pearson, at this juncture, was standing in the check-out lane of the store, near the entrance. When defendant abruptly exited the Safeway, Mr. Pearson told the female not to exit the store with defendant. Immediately thereafter, defendant reentered the Safeway and without any provocation struck Mr. Pearson in the head, causing him to drop motionless to the ground. After the assault, the Safeway employee walked around the counter and observed Mr. Pearson unconscious on the floor; it appeared that Mr. Pearson was biting his tongue, and blood was coming out of his ears. These events were recorded by Safeway's video surveillance and introduced at trial—defendant stipulated that he was the person (that is, the assailant) captured in the video.

¶ 4 Mr. Pearson was transported to the emergency department at New Hanover Regional Hospital. He was in a deep coma upon his arrival and succumbed to his

head injuries shortly thereafter. The attending physician's assistant, Jeff Probst ("Mr. Probst"), who is a physician's assistant in the field of neurosurgery and the medical examiner for New Hanover and Pender Counties, testified that Mr. Pearson's condition was "not survivable" and that his cause of death was a severe closed-head injury, including blunt force trauma to the head, skull fractures, and bleeding in the brain. Consistent with Mr. Probst's opinion, the autopsy report concluded that Mr. Pearson's demise was "due to blunt force trauma to [the] head (including fall) with skull fractures and intracranial hemorrhage."

¶ 5 On 29 October 2018, defendant was indicted for second-degree murder. Following trial, the jury convicted defendant of second-degree murder on the malice theory of an inherently dangerous act. The trial court determined that defendant was a prior record level II and sentenced defendant to a term of 157 to 201 months imprisonment. Defendant proffered oral notice of appeal on 21 November 2019.

¶ 6 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat. § 15A-1444 (2019).

II. Discussion

¶ 7 Defendant contends that the State's evidence was insufficient to support his conviction for second-degree murder and therefore the trial court erred by denying his motion to dismiss. In addition, defendant contends that the trial court erred by

classifying him as a prior record level II offender for sentencing purposes. We address each issue in turn.

A. Motion to Dismiss

¶ 8 At the close of the State's evidence, defendant moved to dismiss the second-degree murder charge and renewed the motion after presenting evidence. The trial court denied both motions. On appeal, defendant argues that he should be convicted of involuntary manslaughter instead of second-degree murder. Defendant contends that the State's evidence was insufficient to support his conviction for second-degree murder and thus the trial court erred by denying his motion to dismiss. We disagree.

¶ 9 "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) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation and quotation marks omitted). Substantial evidence has been defined by the North Carolina Supreme Court as "evidence which a reasonable mind could accept as adequate to support a conclusion." *State v. Lee,* 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick,* 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). In reviewing the trial court's decision on appeal, the evidence must be viewed "in the light most

favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

¶ 10 In order to be submitted to the jury for determination of defendant's guilt, the evidence "need only give rise to a reasonable inference of guilt." *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citing *State v. Stone,* 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). This is true regardless of whether the evidence is direct or circumstantial. *State v. Trull,* 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965) (citations omitted). When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)).

¶ 11 In order to convict defendant of the subject offense, the State has the burden of presenting substantial evidence of each element of second-degree murder to warrant submitting its case to the jury. *See State v. Acklin*, 71 N.C. App. 261, 264, 321 S.E.2d 532, 534 (1984). The elements of second-degree murder are " 'the (1)

unlawful killing (2) of a human being (3) with malice, but without premeditation and deliberation.' " *State v. Mack*, 206 N.C. App. 512, 516, 697 S.E.2d 490, 493 (2010) (quoting *State v. Vassey*, 154 N.C. App. 384, 390, 572 S.E.2d 248, 252 (2002)). North Carolina recognizes at least three theories of establishing the essential element of malice. *See State v. Mosley*, 256 N.C. App. 148, 150-51, 806 S.E.2d 365, 367 (2017) (describing theories). One theory, depraved-heart malice, may be implied "when an act dangerous to others is done so recklessly or wantonly as to evince depravity of mind and disregard of human life[.]" *State v. Lail*, 251 N.C. App. 463, 473, 795 S.E.2d 401, 409 (2016) (citation and quotation marks omitted). "[M]alice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death." *State v. McNeill*, 346 N.C. 233, 238, 485 S.E.2d 284, 287 (1997) (citation omitted). Our Supreme Court has made clear that bodily appendages such as a defendant's hands and arms, depending upon the manner in which and the circumstances under which they are used, may constitute "deadly weapons." *State v. Steen*, 376 N.C. 469, 485, 852 S.E.2d 14, 25 (2020).

¶ 12 In the case at bar, the State presented substantial evidence showing that defendant acted intentionally with malice when he assaulted Mr. Pearson inflicting a head wound that proximately caused his death. The trial court properly instructed the jury that malice may be found if defendant's act was "inherently dangerous to human life, [wa]s intentionally done so recklessly and wantonly as to manifest a mind

utterly without regard for human life and social duty and deliberately bent on mischief." The evidence adduced at trial supported this instruction, and the jury found defendant guilty of second-degree murder under this malice theory.[1] Moreover, the trial court instructed the jury on the elements of involuntary manslaughter and that offense was one of the charges enumerated on the verdict sheet; however, the jury found defendant guilty of the greater offense of second-degree murder on the malice theory of an inherently dangerous act. *See State v. McCollum*, 157 N.C. App. 408, 414, 579 S.E.2d 467, 471 (2003), *aff'd*, 358 N.C. 132, 591 S.E.2d 519 (2004) ("A finding of malice precludes a finding of either voluntary manslaughter or involuntary manslaughter.").

¶ 13 In sum, the State presented substantial evidence of each essential element of second-degree murder, including malice. As such, we conclude that the trial court properly denied defendant's motion to dismiss the charge of second-degree murder.

B. Sentencing

¶ 14 We review alleged sentencing errors to determine whether the sentence imposed was supported by the evidence introduced at trial and at the sentencing hearing. *State v. Jeffery*, 167 N.C. App. 575, 578, 605 S.E.2d 672, 674 (2004) (citation omitted). However, the calculation of a defendant's prior record level is a question of

[1] The determination of whether a "deadly weapon" was used in the assault was within the province of the jury. *See Steen*, 376 N.C. at 485, 852 S.E.2d at 25.

law reviewed *de novo*. *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007). Under *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal. *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

¶ 15 Pursuant to N.C. Gen. Stat. § 15A-1340.14(e), "a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony[.]" N.C. Gen. Stat. § 15A-1340.14(e) (2019); *State v. Hinton*, 196 N.C. App. 750, 755, 675 S.E.2d 672, 675 (2009). But "[i]f the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points." N.C. Gen. Stat. § 15A-1340.14(e).

¶ 16 Here, the State presented the trial court with a certified copy of a judgment previously entered against defendant in New Jersey for unlawfully possessing a handgun, which is a second-degree felony in that jurisdiction. When the trial judge asked defense counsel for her position regarding the offense for calculating defendant's prior record level, she stated the following: "I would tell the court it appears to me that unlawful possession of a handgun or weapon is a misdemeanor in North Carolina and so I don't think we should classify it as a felony. And that is all

I have to say about it." Following this colloquy, the trial judge decided to count the out-of-state conviction as a felony in North Carolina and sentenced defendant as a prior record level II offender.[2]

¶ 17 While unlawful possession of a handgun may be a misdemeanor in North Carolina,[3] defendant failed to present *any* evidence that the out-of-state conviction was substantially similar to a North Carolina misdemeanor. Defense counsel merely stated that the New Jersey conviction "appears" to be equivalent to a misdemeanor in North Carolina. Because defendant failed to present any evidence, much less prove by the preponderance of the evidence, that the offense classified as a felony in New Jersey was substantially similar to an offense that is a misdemeanor in North Carolina, the trial court did not err by sentencing defendant as a prior record level II offender. *See* N.C. Gen. Stat. § 15A-1340.14(e).

III. Conclusion

¶ 18 For the foregoing reasons, we hold that defendant had a fair trial, free of error.

NO ERROR.

Judges COLLINS and JACKSON concur.

Report per Rule 30(e).

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[2] Defendant was assigned three prior record level points: two points for the New Jersey conviction and one point for a North Carolina conviction for assault on a female.

[3] *See* N.C. Gen. Stat. § 14-269(c).