IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-81

No. COA21-63

Filed 1 February 2022

Randolph County, Nos. 16 CRS 54746, 54748

STATE OF NORTH CAROLINA

v.

SHEILA MARIE NOUGIER

Appeal by defendant from judgments entered 17 January 2020 by Judge Kevin M. Bridges in Randolph County Superior Court. Heard in the Court of Appeals 20 October 2021.

*Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.*

*William D. Spence for defendant.*

DIETZ, Judge.

¶ 1 Defendant Sheila Nougier appeals her convictions for two counts of attempted first degree murder. She argues that the trial court should have granted her motion to dismiss the attempted murder charges because the State failed to present sufficient evidence of premeditation and deliberation. She also argues that the trial court erred by denying her request for an instruction on the lesser-included offense

of attempted voluntary manslaughter and an instruction on voluntary intoxication.

¶ 2 As explained below, there was substantial evidence of premeditation and deliberation and insufficient evidence to warrant either of Nougier's requested jury instructions. We therefore find no error in the trial court's judgments.

## Facts and Procedural History

¶ 3 Defendant Sheila Nougier's daughter, Christina Shafer, was in a relationship with Frank Palacios. During the relationship, Shafer became pregnant.

¶ 4 Before the child was born, Shafer ended the relationship with Palacios and explained that she "wanted nothing to do with" him. Nougier also told Palacios to stay away from Shafer.

¶ 5 After the child was born, Palacios brought a custody action because he wanted to be involved with his child. On 20 October 2016, the court awarded full custody of the child to Palacios, providing a transitional period where the child would gradually spend less time with Shafer and Nougier and more time with Palacios. The hearing ended at 11:30 a.m. that morning and Nougier was visibly angered by the ruling. Around 1:00 p.m. that afternoon, Palacios met up with his girlfriend, Arizona Dyer. At that point, Palacios began receiving calls from Nougier. Nougier told Palacios that she was going to drop the child off with Child Protective Services and accuse him of abandonment unless Palacios came to get the child from her. Palacios was suspicious because Nougier had previously showed him that she possessed a gun, so he

suggested they meet at a nearby Walmart because it was a public place where he believed he would be safe. Palacios and Dyer went to the Walmart to wait for Nougier.

¶ 6 After arriving at Walmart, Palacios received text messages from Nougier that again made him "feel uneasy," such as texts saying "you're gonna get it." In texts, Nougier repeatedly asked Palacios where he was and told him to meet her in a more secluded area of the parking lot. Palacios insisted that they meet by the store entrance.

¶ 7 Nougier drove toward the entrance where Palacios and Dyer waited in an "erratic" and "aggressive" manner, stopping about five feet from them. Palacios looked into Nougier's car and did not see the child. Nougier got out of her car, said "now, you'll never get her," and started shooting at Palacios and Dyer. Palacios recognized the gun as the one Nougier had shown him before. Palacios ran and hid behind some cars in the parking lot. He heard Nougier fire six shots, but he was not hit. After the shots, Nougier drove away and Palacios called the police.

¶ 8 While investigating at the scene of the shooting, police received a call about a woman who had suffered a self-inflicted gunshot wound in a vehicle stopped at a nearby gas station. One of the officers, Sergeant Lowe, left the Walmart to go to that location, where he learned that Nougier had been placed in an ambulance. Sergeant Lowe followed the ambulance to the hospital, where he heard Nougier speak to emergency personnel. Sergeant Lowe testified that Nougier "spoke clearly" in "a

normal voice." An EMS worker told Sergeant Lowe that, after arriving at the hospital, Nougier explained that she had taken 80 Klonopin pills and 20 hydrocodone pills. When Sergeant Lowe collected a gunshot residue sample from Nougier's left hand, she told him that "I'm mostly ambidextrous, but I'm pretty sure I shot with my right." Again, Lowe testified that Nougier "spoke clearly."

¶ 9 Police obtained Nougier's cell phone and extracted data of incoming and outgoing calls and text messages from 20 October 2016. Data from Nougier's phone showed that she sent multiple messages in the hours before the shooting stating: "Help your dad with the baby how many [*sic*] go away for a little while"; "Help your other [*sic*] with Leah I will be going away for a while"; "I am hunting Frankie down and killing him"; "I don't know where she [*sic*] staying I'll be in prison"; "I will be in prison in about 45"; "I'm going to prison in about 45 minutes do whatever you want with the baby"; "The only person I owe is that baby safety I put almost [*sic*] I would keep her safe and I am going to"; and "It's too late its done."

¶ 10 The State charged Nougier with attempted first degree murder of Palacios, attempted first degree murder of Dyer, and injury to personal property. The case went to trial. Nougier moved to dismiss the charges at the close of the State's evidence and again at the close of all evidence. The trial court denied both motions. The jury convicted Nougier of all three charges. The trial court sentenced Nougier to two consecutive terms of 180 to 228 months in prison. Nougier appealed.

## Analysis

### I. Motion to dismiss attempted murder charges

¶ 11 Nougier first argues that the trial court erred in denying her motion to dismiss the attempted first degree murder charges. Nougier contends that there was insufficient evidence of the elements of premeditation and deliberation with respect to both Palacios and Dyer.

¶ 12 "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). On a motion to dismiss, "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). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

¶ 13 "The elements of attempted first-degree murder are: (1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; (4) failure to complete the killing." *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004). The element of premeditation requires that the defendant formed the intent to kill "at some period of time, however short, before the attempted killing."

*State v. Peoples*, 141 N.C. App. 115, 120, 539 S.E.2d 25, 29 (2000). The element of deliberation requires that the intent to kill was formed "in a cool state of blood, without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose. The intent to kill must arise from a fixed determination previously formed after weighing the matter." *State v. Corn*, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981) (citations omitted).

¶ 14 With respect to Palacios, the State's evidence readily was sufficient to satisfy the substantial evidence standard. The State's evidence showed that Nougier formed a specific intent to kill Palacios after the custody hearing and planned to do so in advance of the shooting; that she lured Palacios to meet her under false pretenses; that she sent messages about her plan to others as well as threatening messages to Palacios; and that she fired multiple shots at Palacios and made a statement just before the shooting indicating that she was seeking revenge for the custody determination or seeking to prevent Palacios from having custody. This is substantial evidence of the premeditation and deliberation elements of attempted first degree murder. *Peoples*, 141 N.C. App. at 120, 539 S.E.2d at 29; *Corn*, 303 N.C. at 297, 278 S.E.2d at 223.

¶ 15 The State also presented substantial evidence of these elements with respect to Dyer. The State presented evidence that Palacios told Nougier that Dyer was with him at the Walmart entrance when they arranged to meet there. Video surveillance

footage from Walmart showed Nougier pointing the gun directly at Dyer. Dyer also testified that Nougier pointed the gun directly at her and fired at least three shots at her. This evidence, considered in the light most favorable to the State, is sufficient to support a reasonable inference that Nougier acted with premeditation and deliberation when she shot at Dyer. *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

¶ 16 Accordingly, the trial court did not err by denying Nougier's motion to dismiss the attempted first degree murder charges.

## II. Request for instruction on attempted voluntary manslaughter

¶ 17 Nougier next argues that the trial court erred by denying her request for an instruction on the lesser-included offense of attempted voluntary manslaughter. Nougier contends that there was evidence that she acted in the heat of passion due to "the unexpected loss" of custody of her granddaughter to Palacios.

¶ 18 We review the trial court's decision not to instruct the jury on this lesser-included offense *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

¶ 19 Attempted voluntary manslaughter is a lesser-included offense of attempted first-degree murder. *State v. Rainey*, 154 N.C. App. 282, 574 S.E.2d 25 (2002).

Voluntary manslaughter is "when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation." *State v. Jackson*, 145 N.C. App. 86, 90, 550 S.E.2d 225, 229 (2001). This type of voluntary manslaughter "is essentially a first-degree murder, where the defendant's reason is temporarily suspended by legally adequate provocation." *Rainey*, 154 N.C. App. at 289, 574 S.E.2d at 29. "The specific intent to kill does exist in the mind of such a defendant; however, the defendant is only legally culpable for the general intent because the specific intent is not based on cool reflection" but instead on "an adequate provocation that would cause an individual with an ordinary firmness of mind to become provoked, and which did, in fact, provoke the defendant." *Id.* Importantly, this "heat of passion" exists when the provocation arises and "before reason has time to subdue it." *Id.* at 290, 574 S.E.2d at 30. Thus, when there was a lapse in time after a provocation, in which the defendant searches out the victim, a voluntary manslaughter instruction based on heat of passion is inappropriate because the "defendant did not act immediately under a heat of passion, but rather under an indulgence of revenge or malice." *Id.* at 291, 574 S.E.2d at 30–31.

¶ 20 Here, Nougier contends that her testimony showed the unexpected custody ruling "completely devastated her," causing her to act in the heat of passion. She argues that the court's ruling in the custody matter earlier in the day, coupled with her "previous history" with Palacios, "pushed her over the edge." But undisputed

evidence showed that the court ruling on custody occurred many hours before the shooting. During that intervening time, Nougier actively sought out Palacios, lured him to meet her under false pretenses, and attempted to kill him and Dyer, his girlfriend. In light of this evidence, the trial court properly determined that it was not appropriate to provide an instruction on the lesser-included offense of voluntary manslaughter based on heat of passion. *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771.

### III. Request for jury instruction on voluntary intoxication

¶ 21 Finally, Nougier argues that the trial court erred by denying her request for a jury instruction on voluntary intoxication. As noted above, we review this question *de novo*. *State v. Meader*, 377 N.C. 157, 2021-NCSC-37, ¶ 15.

¶ 22 In general, one can be intoxicated "and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree." *State v. Mash*, 323 N.C. 339, 347, 372 S.E.2d 532, 537 (1988). But a defendant is entitled to an instruction on voluntary intoxication, explaining that the jury may find lack of premeditation and deliberation due to intoxication, if there was substantial evidence that the defendant was so intoxicated that she was "utterly incapable of forming a deliberate and premeditated intent to kill." *Id.* at 346, 372 S.E.2d at 536.

¶ 23 Thus, a defendant is not entitled to an instruction on voluntary intoxication merely upon a showing of intoxication. *Meader*, ¶ 16. Instead, there must be "some evidence tending to show that the defendant's mental processes were so overcome by

the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan." *Id.* ¶ 17.

¶ 24 Nougier's evidence did not meet this test. Nougier testified that she took a large amount of Klonopin pills, a drug that can produce intoxicating effects. She also testified that did not recall many of the details of the events that day. But the State's evidence showed that during the relevant time frame leading up to and during the shooting, Nougier was able to drive a car, speak coherently with Palacios by phone, formulate a deceptive plan to get Palacios to meet her, including negotiating the location, and then describe a plan to kill Palacios in a series of other text messages. Officers who spoke to Nougier after her arrest found her able to speak clearly and respond to questions. *See id.* ¶¶ 18–19. In light of this evidence, the trial court properly determined that a voluntary intoxication instruction was not appropriate because Nougier had not presented substantial evidence that she was "utterly incapable of forming a deliberate and premeditated intent to kill." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536.

## Conclusion

¶ 25 We find no error in the trial court's judgments.

NO ERROR.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).