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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-733

No. COA22-268

Filed 6 December 2022

Mecklenburg County, No. 17 CRS 229949

STATE OF NORTH CAROLINA

v.

XAVIER JAMEL UNDERWOOD

Appeal by defendant from judgment entered on 9 September 2021 by Judge Louis A. Trosch, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kenzie M. Rakes, for the State.

Marilyn G. Ozer for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Xavier Jamel Underwood ("defendant") appeals from judgment entered upon his conviction for accessory after the fact to first-degree murder. Defendant contends that the trial court erred by failing to instruct the jury on the defense of duress and denying defendant's motion to dismiss the charge. For the following reasons, we hold that the trial court did not err.

I. Background

¶ 2 On 24 June 2016, around midnight, a 911 call was placed alerting responders to a "drive-by shooting" on Tuckaseegee Road with two victims. Tony Russell ("Russell") was pronounced dead at 12:09 a.m. at the scene. Russell had been shot in the "left side of his chest[.]" Quaysean Lane was treated for "a gunshot wound to her right thigh" and "ultimately released" from the hospital.

¶ 3 Upon arrival, detectives discovered shell casings "scattered throughout the crime scene from where the victim was located and where the other victim had r[u]n across the street in the middle of the roadway" and "a magazine that had been kicked from a gun." Both the magazine and bullets belonging to a .22 caliber and a 9-millimeter firearm were collected from the scene and sent for testing. Of the fifteen casings, four were "determined to be 22 long/ long rifle caliber[,]" and "11 of the cartridge cases were determined to be 9[-]millimeter Luger caliber."

¶ 4 Witnesses from the scene told investigators "the suspects were in a white Crown Victoria[,]" and that the "[the suspect's] car [initially] passed the victims then immediately turned around and came back to where they were" and started shooting. A witness also told detectives that Zhaymilik Phillips ("Phillips"), also known as "Joc[,]" was one of the suspects. This witness information led investigators to defendant, whom they believed to be the driver and owner of the white Crown Victoria, and Jordan Ardrey ("Ardrey"), also known as "Savage" or "Dread Head Savage."

¶ 5 During the investigation, detectives obtained phone and Facebook records of defendant, an account which defendant maintained under the name "Pablo Escobar." Cell phone data placed the phone numbers affiliated with defendant and Phillips near the crime scene around 11:53 p.m. on 23 June 2016. Additionally, phone records from 23 June to 30 June 2016 showed multiple calls between the cell phones of defendant, Phillips, and Ardrey. Although some calls went to voicemail, there were still "dozens of completed calls" between defendant and Phillips and "numerous calls" between defendant and Ardrey.

¶ 6 Defendant's Facebook page also showed multiple pictures with Phillips and Ardrey. One such photograph of defendant with Ardrey had been uploaded to defendant's Facebook account on 30 June 2016, four days after the shooting. In one Facebook message dated 27 June 2016, defendant said to Ardrey, "[a]in't no way [you] been hiding . . . dat [sic] gun dat [sic] long[,]" to which Ardrey replied, "[h]aven't seen it since." The Facebook messages between Ardrey and defendant continued from 27 June 2016 to 4 July 2016. Detectives never saw any threats or attempts by Phillips or Ardrey to intimidate defendant in these communications.

¶ 7 DNA from the "extended magazine" was entered into the Combined DNA Index System ("CODIS") and "[t]he partial major DNA profile from the . . . magazine was consistent with the DNA profile from . . . Phillips." The DNA match was confirmed

on 6 April 2017, and Phillips and Ardrey were subsequently arrested on 14 April 2017 based on the DNA evidence and witness testimony.

¶ 8 Around 10 May 2017, detectives started looking for defendant at previous addresses. Detectives eventually contacted defendant and "asked him to come [to the police department] . . . voluntarily" to speak with them regarding Russell's murder. When defendant did not come to speak with detectives, they "obtained a warrant for his arrest."

¶ 9 On 8 August 2017, defendant was arrested for accessory after the fact to first-degree murder. Defendant was interviewed by Detective Bryan Overman and Detective Lou Peden later that day. This was one of three "interactions" defendant had "with the Charlotte Mecklenburg Police . . . ." During this interview, defendant "initially denied know[ing] anything at all about [the shooting][,]" or "being with [the principals]." Furthermore, defendant stated that he "didn't go to th[e] area of town" where the shooting occurred and did not own a white Crown Victoria. Later, when confronted with some of the evidence against him, defendant identified Phillips and Ardrey by their nicknames, "Joc" and "Savage." On 21 August 2017, a Mecklenburg County grand jury indicted defendant for accessory after the fact to first-degree murder.

¶ 10 Defendant was present at the courthouse to testify in the case against Phillips on 12 July 2021, but ultimately notified the district attorney's office that he was not

going to testify on 14 July 2021. After the jury could not "reach a verdict on the murder[,]" Phillips was offered, and accepted, a plea to voluntary manslaughter. Ardrey also accepted a plea to voluntary manslaughter. Although defendant was also offered a plea, this case against defendant ultimately proceeded.

¶ 11 On 16 August 2021, defendant's counsel filed a Notice of Defense pursuant to N.C. Gen. Stat. § 15A-905. The defense listed was duress. The matter came to trial on 14 September 2021 in Mecklenburg County Superior Court, Judge Trosch presiding.

¶ 12 During the trial, defendant testified in his own defense. Defendant testified that on 23 June 2016, Phillips and Ardrey, who defendant had met earlier that year, contacted defendant to purchase marijuana. Defendant sold marijuana and would sometimes deliver marijuana to customers or have them pick it up. On this occasion, defendant went to Phillips and Ardrey to sell them marijuana.

¶ 13 After the sale, defendant was going to deliver marijuana to the Tuckaseegee area; Phillips and Ardrey "asked for a ride to the store[,]" so defendant "let them ride with [him]." Defendant knew Phillips and Ardrey to carry firearms and to be affiliated with the Avalon Crips, a gang, but testified that he "didn't see" Ardrey with an assault rifle that night and he "didn't know [Ardrey] had [the rifle] until he was in the car."

¶ 14 While "coming down Tuckaseegee Road[,]" defendant saw "the victim and his girlfriend in the middle of the street arguing" so he "had to slow down [his] car a little bit." When he slowed down, "the person in [his] passenger seat rolled down the window and started letting off shots." Defendant was "frightened[,]" "scared[,]" and "wanted to get up out of there." Defendant accelerated the car while Phillips and Ardrey were "bragging" about the shooting and "arguing about who shot who." Defendant was "angry" with Ardrey and Phillips and was "cussing them out."

¶ 15 After the shooting, defendant took Phillips and Ardrey to the Hidden Valley community and dropped Ardrey off at a house. Defendant then drove Phillips "back to Freedom Drive[,]" passing the scene "trying to make sure the victim wasn't seriously hurt[.]" When defendant "got close" and saw the street was taped off, he kept going and "dropped . . . Phillips off."

¶ 16 Defendant testified that he felt threatened by Phillips and Ardrey that night and was "getting threats" as soon as 24 June, the day after the shooting. Defendant stated that he "didn't want to get involved with police" because "[Phillips and Ardrey] knew where" his grandfather and mother lived. Defendant further testified that he spoke with Phillips and Ardrey "for his own personal safety" and he wanted "to explain to them and let them know [his] anger and frustration about" the "situation they had put [him] in." Defendant stated he was "trying to keep [his] distance[,]" and "trying to play it off and play cordial" because of the threats.

¶ 17 Defendant testified that he never went to the police because "[t]hey would have known if [he] did"; and he denied knowing Phillips and Ardrey and being at the scene during his initial interview because he was fearful. Defendant further explained that he never "ha[d] a problem" with speaking to the police but he "wanted [his] mother to be there with [him] before" he talked to anyone.

¶ 18 Defendant was also concerned about the associates of Phillips and Ardrey. He was subpoenaed to testify "during the trial of . . . Phillips or Joc" and stated that while sitting outside the courtroom he was confronted by some of Phillips's associates. Defendant claimed those associates were "mean mugging" him, and "[four] individuals" approached him and said: "I know you're not going to rat, is you [sic]? If you do, we got something for you."

¶ 19 Defendant never filed a police report about any of these threats. Despite the phone records and Facebook evidence presented by the State, defendant still testified that he did not have "any personal contact" with Phillips after the shooting and that he "never had any in-person contact [with Phillips or Ardrey] after the situation really[.]"

¶ 20 During the charge conference, the State presented several cases to show that the instruction on duress was inappropriate because defendant did not "surrender" to law enforcement. Although defense counsel made an argument that the duress

instruction was appropriate during the charge conference, he did not renew his objection to the court's decision thereafter.

¶ 21 At the close of the State's evidence, defense counsel made a motion to dismiss for insufficient evidence "on the issue of first[-]degree murder." Defense counsel renewed the motion to dismiss at the close of all evidence. Both motions were denied.

¶ 22 On 23 September 2021, the jury returned a verdict of guilty of accessory after the fact to first-degree murder. Defendant was sentenced in the mitigated range to 59 to 83 months imprisonment. Defendant appealed on 24 September 2021 in open court.

II. Discussion

¶ 23 On appeal, defendant argues that the trial court erred in not allowing the jury instruction for duress and in denying his motion to dismiss.

A. Jury Instructions

¶ 24 Defendant first argues that the trial court erred by refusing to instruct the jury on duress. We disagree.

¶ 25 To preserve an issue for review on appeal, a defendant "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2021). Here, although defendant's counsel did not object when the trial judge stated they would not be giving

the duress instruction, nor at the close of the instruction, they did request the duress instruction during the charge conference. Our Supreme Court's recent decision in *State v. Hooper* has held that such a request is sufficient to preserve a challenge to a trial court's refusal to provide jury instructions for purposes of appellate review. *State v Hooper,* 2022-NCSC-114, ¶ 26. However, we find that defendant's requested instruction, while preserved for appellate review, was properly rejected.

¶ 26 "We review a challenge to the trial court's decision regarding jury instructions de novo." *State v. Parks*, 264 N.C. App. 112, 114, 824 S.E.2d 881, 884 (2019) (citations omitted). To prevail in such a challenge, the defendant must demonstrate the trial court erred and that "there is a reasonable probability that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.* (citing N.C. Gen. Stat. § 15A-1443(a))

¶ 27 To successfully invoke a duress defense, a defendant must demonstrate:

> (1) that a defendant's illegal actions were caused by [the defendant's] reasonable fear that [the defendant or another] would suffer (2) immediate death or serious bodily injury[,] (3) if [the defendant had] not so act[ed][,] and (4) the defendant had no reasonable opportunity to avoid doing the [illegal] act without undue exposure to death or serious bodily harm.

State v. Whitmore, 264 N.C. App. 136, 823 S.E.2d 167, 168 (2019) (unpublished) (citing *State v. Miller*, 258 N.C. App. 325, 329, 812 S.E.2d 692, 696 (2018)). Additionally, "once the crime was committed under duress[,]" the defendant is "under

a duty to surrender himself . . . to the police. The defendant as a matter of law is not entitled to an instruction on the theory of duress until he has proffered evidence in satisfaction of this element." *State v. Henderson*, 64 N.C. App. 536, 540, 307 S.E.2d 846, 849 (1983) (citing *United States v. Bailey*, 444 U.S. 394, 62 L. Ed. 2d 575 (1980); *State v. Watts*, 60 N.C. App. 191, 298 S.E.2d 436 (1982)); *State v. Rouse*, 255 N.C. App. 859, 805 S.E.2d 539, 540 (2017) (unpublished) ("*Henderson* stands for the proposition that defendant also had the burden of showing that he surrendered to law enforcement."); *State v. Whitmore*, 264 N.C. App. 136, 823 S.E.2d 167, 168 (2019) (unpublished) ("Also relevant . . . is that there was a reasonable opportunity for defendant to seek assistance . . . .") (citations omitted)).

¶ 28 Here, defendant presented no evidence that he made any attempts to surrender himself to the police or seek any assistance. In fact, defendant acknowledged in his testimony that there were three instances where he spoke with police and could have reported the threats, that he could have gone to the police with a friend or his mother anytime, and that he failed to file any report of the threats he was receiving.

¶ 29 Assuming *arguendo* that defendant had satisfied the elements of duress, defendant was also required to show there is a reasonable probability that had the jury been instructed on duress, "a different result would have been reached." *State v. Parks*, 264 N.C. App. 112, 114, 824 S.E.2d 881, 884 (2019) (citations omitted).

Although the trial court declined to give the instruction, defendant's testimony that he was scared by the principals and their associates was "heard and considered by the jury." *See State v. Harris*, 255 N.C. App. 653, 660, 805 S.E.2d 729, 735 (2017).

> Moreover, the trial court specifically instructed that the jury would have to find that [d]efendant 'knowingly and willfully' assisted the principal before it could find him guilty as an accessory-after-the-fact to first-degree murder. The concept of 'knowingly and willfully' giving assistance is contrary to the concept of duress; therefore, the jury necessarily found that [d]efendant did not act under duress . . . .

State v. Best, 196 N.C. App. 220, 228, 674 S.E.2d 467, 473-74 (2009). Here, defendant cannot show there was an error nor can he show that, even if there was an error, a different result would have been reached by the jury. Accordingly, the trial court did not err when it refused to instruct the jury on duress.

B. Motion to Dismiss

¶ 30 Defendant next argues that the trial court erred in denying his motion to dismiss the charge of accessory after the fact to first-degree murder because there was inadequate evidence that the principals committed the felony of first-degree murder due to "insufficient evidence of premeditation and deliberation as to the principals."

¶ 31 Our "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) (citation omitted).

"Upon 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 (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (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) (citations omitted).

¶ 32 "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), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995) (citation omitted).

¶ 33 "In order to convict defendant of being an accessory after the fact, the State must prove: (1) the principal committed the underlying felony, (2) defendant gave personal assistance to the principal to aid in his escaping detection, arrest, or punishment, and (3) defendant knew the principal committed the felony." *State v. McGee*, 197 N.C. App. 366, 372, 676 S.E.2d 662, 667 (2009) (citing *State v. Jordan*, 162 N.C. App. 308, 312, 590 S.E.2d 424, 427 (2004)).

¶ 34 Here, the underlying felony was murder in the first-degree. "Murder in the first[-]degree is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Robbins*, 275 N.C. 537, 542, 169 S.E.2d 858, 861 (1969). Premeditation is a "thought beforehand for some length of time, however short." *State v. Corn*, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981). "Deliberation does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation" or resolve to kill another "pursuant to a fixed design to kill." *State v. Britt*, 285 N.C. 256, 262, 204 S.E.2d 817, 822 (1974) (citations omitted).

¶ 35 "[P]remeditation and deliberation are not usually susceptible of direct proof and are therefore, susceptible of proof by circumstances from which the facts sought to be proven may be inferred." *State v. Faust*, 254 N.C. 101, 107, 118 S.E.2d 769, 772-73 (1961) (citations and quotation marks omitted), *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961). Factors relevant to the determination of whether the defendant acted with premeditation and deliberation include:

> Want of provocation on the part of deceased. The conduct of defendant before and after the killing. Threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased. The dealing of lethal blows after deceased has been felled and rendered helpless.

Id., 118 S.E.2d at 773 (citations omitted). "Additional factors include the nature and number of the victim's wounds, whether the defendant left the deceased to die without attempting to obtain assistance for the deceased, whether he disposed of the murder weapon, and whether the defendant later lied about what happened." *State v. Horskins*, 228 N.C. App. 217, 222, 743 S.E.2d 704, 709 (2013) (citing *State v. Hunt*, 330 N.C. 425, 428-29, 410 S.E.2d 478, 481 (1991) (citations and quotation marks omitted)). "Premeditation and deliberation may [also] be inferred from the multiple shots fired by defendant." *State v. Chapman*, 359 N.C. 328, 376, 611 S.E.2d 794, 828 (2005) (citations omitted).

¶ 36 In our present case, there was enough evidence to support the first element of first-degree murder. First, the State presented evidence that fifteen shots were fired at the two victims, and bullets were "scattered throughout the crime scene from where the victim was located and where the other victim had r[u]n across the street[.]" As in *Chapman*, deliberation can be inferred by the number of shots here. *See id.*

¶ 37 Second, the State presented evidence that the principals were "bragging" about the shooting and "arguing about who shot who." Such declarations can create circumstances by which the jury can infer premeditation and deliberation. *See Faust*, 254 N.C. at 107, 118 S.E.2d at 773. Furthermore, the jury could have inferred by Ardrey's Facebook messages to defendant that he had disposed of the murder weapon

when he stated that he had not seen it since the night of the shooting. Lastly, there was no evidence that either principal attempted to assist or call for assistance for the victims; leaving the victim "to die without attempting to obtain assistance for the deceased" is yet another fact by which the jury could have concluded the principals were acting with premeditation and deliberation. *Horskins*, 228 N.C. App. at 222, 743 S.E.2d at 709. Accordingly, the State presented more than enough evidence from which a reasonable jury might find sufficient to support a conclusion that the principals were acting with premeditation and deliberation.

¶ 38 Defendant's additional claims that the State had "admitt[ed] . . . it could not convince a jury to convict either . . . Phillips or . . . Ardrey of first-degree murder" and his likening of the principal's plea to an acquittal are likewise without merit. Both Phillips and Ardrey were offered plea deals to voluntary manslaughter, which they accepted. Neither was acquitted; although Phillips trial ended in a hung jury, he was offered and accepted the plea thereafter.

¶ 39 An "accessory after the fact must be acquitted" if the named principal is acquitted; however, this Court has made it clear that a principal's plea to a lesser-included offense is distinguishable from an acquittal. *State v. McGee*, 197 N.C. App. 366, 371, 676 S.E.2d 662, 666 (2009) ("Defendant reasons that because a person cannot be convicted of being an accessory after the fact if the principal is acquitted, that [principal]'s plea to a lesser offense is the functional equivalent of an acquittal.

This is not correct."). In the present case, the principal's pleas to the lesser-included offense of voluntary manslaughter were not acquittals and thus have no consequence on defendant's conviction of accessory after the fact. *Id.*; *State v. Camacho*, 337 N.C. 224, 232, 446 S.E.2d 8, 12 (1994) (explaining that voluntary manslaughter is a lesser-included offense of first-degree murder). Accordingly, defendant's second argument is without merit.

III. Conclusion

¶ 40 For the foregoing reasons, we conclude defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).