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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-771

Filed 18 April 2023

Nash County, No. 19 CRS 50078

STATE OF NORTH CAROLINA

v.

TRACY LAMONT COLLINS, JR., Defendant.

Appeal by Defendant from judgment entered 19 August 2021 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 8 March 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel O'Brien, for the State.

Jonathan Rosenberg, pro hac vice, and Thomas Maher, sponsoring counsel, for Defendant.

GRIFFIN, Judge.

Defendant Tracy Lamont Collins, Jr., appeals from a jury verdict finding him guilty of first-degree murder. Defendant argues the trial court erred by: (1) failing to grant Defendant's motion to dismiss; (2) not giving an instruction on the lesser included offense of second-degree murder; and (3) giving an instruction on acting in

concert. We find no error.

I. Factual and Procedural Background

This case arises from the murder of Mikell Sheridan in Rocky Mount. The evidence at trial tended to show as follows:

On 6 January 2019, Tanika Wynn, Naveah Royal, and Wynn's brother, Raekwon, were in their mother's house at 212 Cedar Street when they heard gunshots. After hearing the noises from an upstairs bedroom, Wynn and Royal went over to a window that overlooked a parking lot and a dumpster. Royal testified that, when speaking to the police after the incident, she told them the person she saw shooting was someone in a blue hoodie with dreadlocks. When asked about the color of the hoodie the shooter was wearing, Royal testified, "I didn't say 'dark blue,' I just 'said blue.'" Additionally, when asked whether Royal remembered anything else about the person who had on the blue hoodie she responded, "They had dreads." Lastly, Royal testified that the shooter was "[b]y that dumpster, behind it" and they "shot again and they ran."

From the bedroom window, Wynn saw four males running away and a person lying on the ground. Wynn explained one of the fleeing men had dreadlocks when she testified, "I do remember one looking back at me was a dread-head." After seeing a body on the ground, Wynn went downstairs while her brother went outside. Raekwon identified the person on the ground as Mikell Sheridan, who Wynn knew because Sheridan was her boyfriend's brother.

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Officer McFadden went to the scene of the incident after ShotSpotter, an outdoor gunfire detection system, sent an alert to his patrol car laptop. Once on the scene, Officer McFadden found a cellphone lying on the ground that was “actively recording on a social media site.” The cell phone belonged to Defendant. Officer McFadden picked up the cellphone while wearing gloves and saved the video to the phone’s camera roll to preserve it for evidence. Two days after the incident, on 8 January 2019, Defendant went to the Rocky Mount Police Station after officers reached out to talk to Defendant about the cell phone they found at the scene. Once at the station, Defendant provided the passcode to his phone to the officers.

Police accessed Defendant’s phone and preserved the phone’s contents using a forensics program called Cellebrite. Sergeant Joyner pulled the phone’s content, including call logs, text messages, photos, videos, and browsing history, among other data. Sergeant Joyner testified that text messages showed Defendant was in Greenville on 14 October 2018. Notably, Sergeant Joyner found photographs of a tan Glock pistol and text messages dated 18 October 2018 regarding Defendant’s possession of the tan Glock. One of the photographs yielded from the phone legibly displayed the tan Glock’s serial number.

Using this information, Agent Antill, a criminal investigator with the Rocky Mount Police Department, traced the Glock to its original purchaser, Shyheem Johnson. Johnson reported the tan Glock stolen to the Greenville Police Department on 14 October 2018. Johnson told law enforcement agents that he believed Defendant

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stole his tan Glock. Attempting to find shell casings from a location where Johnson had previously shot the tan Glock, Agent Antill used a metal detector where he found thirty-one nine-millimeter shell casings. Officer Glass, a forensics firearms examiner with the Cumberland County Sheriff's Department, used these shell casings and compared them with shell casings found at the scene of Sheridan's death. Officer Glass concluded that the shell casings found from the location where Johnson had test-fired the tan Glock matched six of the nine-millimeter casings found at the scene near Sheridan's body.

Sergeant Joyner was also able to retrieve the video that was recording on Defendant's phone when it was discovered after the incident. Based on this video evidence, Detective Whichard, a homicide detective with the Rocky Mount Police Department, testified that Defendant possessed the tan Glock. Detective Whichard further testified that evidence from a different video showed Defendant flaunting the tan Glock and that this video was created on the same date Sheridan was killed, 6 January 2019.

One of the videos shows Defendant and three friends walking around the Cedar Street area not long before the incident occurred. In this video Defendant brandishes a tan weapon with a clear clip in his waistline. Defendant then says, "what you gonna do, put that 40 in your face," likely referring to the 40-caliber pistol one of the other males is waving in the video at this time. After this, Defendant says, "we strapped up," as he brandishes the weapon in his waistline once again. The group was forced

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to turn around at one point to avoid law enforcement when Defendant says, “y’all boys be careful police on this block so we got to turn around.” Defendant then says, “you know where I’m at, all this money on my head pull up.” Defendant also says, “I’m out here in a blue sweater.” Defendant can clearly be seen wearing a blue hoodie with dreadlocks. Defendant then once again brandishes the tan weapon and waves it in the camera.

Detective Whichard testified that the group was walking east down Union Street when the incident occurred. One of the other males in the video is heard saying “buck em down” before Defendant and the three others run towards Sheridan. Sheridan can be heard saying “chill” multiple times before gun shots are heard. Detective Whichard also testified that the first shot fired was attributed to Khalil Davis, one of the males in the video, then there is a nine-second pause before another seven shots are heard.

Dr. O’Neill, a medical examiner in Raleigh, conducted an autopsy on Sheridan and created a report with his findings. When discussing the angle of one of the bullets, Dr. O’Neill answered in the affirmative that Sheridan was either likely “on all four[s]” or “bent over at the waist” when the bullet entered his body. Dr. O’Neill’s report yielded that the cause of Sheridan’s death was “multiple gunshot wounds.”

Defendant was indicted on one count of first-degree murder for the 6 January 2019 incident that led to the death of Sheridan. A jury found Defendant guilty of first-degree murder and the trial court sentenced him to life imprisonment without

the possibility of parole. Defendant timely appeals.

II. Analysis

Defendant argues the trial court erred by: (1) failing to grant Defendant's Motion to Dismiss; (2) not giving an instruction on the lesser-included offense of second-degree murder; and (3) giving an instruction on acting in concert.

A. Motion to Dismiss

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Pastuer*, 205 N.C. App. 566, 571, 697 S.E.2d 318, 385 (2010) (citation and quotation marks omitted). In conducting this review this Court must determine 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." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence means "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). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Id.* at 78, 265 S.E.2d at 169. To resolve this question, we must view the evidence in the light most favorable to the State, "drawing all reasonable inferences from the evidence in favor of the State's case." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). If such substantial evidence exists, the motion is properly denied. *State v. Mason*, 279 N.C. 435, 439, 183 S.E.2d 661, 663 (1971).

1. Identity

Defendant argues that the trial court erred by failing to grant Defendant's motion to dismiss because the state failed to supply evidence as to the perpetrator's identity. We disagree.

Here, two witnesses each testified that the person who shot Sheridan was a black male with dreadlocks. Further, one of the witnesses testified that the perpetrator was wearing a blue hoodie. The video yielded from Defendant's phone showed there were four males present, and Defendant was the only person with dreadlocks wearing a blue hoodie on the day of the incident. The video also showed Defendant in possession of a tan Glock pistol. Photographs yielded from Defendant's phone legibly displayed the tan Glock's serial number which was used to trace the gun to its original purchaser. The original purchaser helped law enforcement find shell casings from the tan Glock which were compared to shell casings at the scene of the crime. Six of the nine-millimeter casings found at the scene matched shell casings from the tan Glock. A reasonable mind might accept such evidence as adequate to support the State's case that each element of first-degree murder was established and that Defendant was the perpetrator. *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. Therefore, since such substantial evidence exists, the motion was properly denied. *Mason*, 279 N.C. at 439, 183 S.E.2d at 663.

2. Premeditation and Deliberation

Defendant next argues that the trial court erred because the state failed to

present evidence that satisfied the “premeditation and deliberation” elements of first-degree murder. We disagree.

“The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation.” *State v Strickland*, 283 N.C. App. 295, 310, 872 S.E.2d 594, 606 (2022) (citation and quotation marks omitted). “Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation.” *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citation and quotation marks omitted). “Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.” *Id.* Premeditation and deliberation usually are not proved by direct evidence but by actions and circumstances surrounding the killing. *State v. Truesdale*, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995). Our courts typically use the following circumstances to determine whether a killing was done with premeditation and deliberation:

Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled

and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Hamlet, 312 N.C. 162, 170, 321 S.E.2d 837, 843 (1984).

Here, Defendant stole the tan Glock pistol before the murder was carried out. *See State v. Washington*, 277 N.C. App. 576, 578, 859 S.E.2d 246, 249 (2021) (discussing that the defendant stole the weapon used to carry out the murder which supported a conviction of first-degree murder based on premeditation and deliberation); *see also State v. Ginyard*, 334 N.C. 155, 159, 431 S.E.2d 11, 13 (1993) (discussing evidence that a defendant who carried a pistol several days prior to committing the murder supported the inference that the defendant anticipated a confrontation). Additionally, Defendant was walking around the Cedar Street area saying things like “pull up” and “we strapped up” indicating Defendant was anticipating a confrontation. Further, Defendant was seen in the video brandishing the tan Glock multiple times while walking around the Cedar Street area clearly looking for Sheridan, with no indication Sheridan provoked Defendant. *See State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992) (holding that evidence of the defendant shooting the victim without warning was substantial evidence tending to show that the defendant acted after premeditation and deliberation). Lastly, there was a ten-second period where Sheridan can be heard pleading for Defendant and the other males to “chill” before multiple gunshots are heard. Sheridan was not armed and one of the witnesses testified that Defendant shot Sheridan multiple times after

he was felled. *See State v. McCray*, 342 N.C. 123, 129–30, 463 S.E.2d 176, 180 (1995) (discussing that evidence which tended to show that many of the wounds were inflicted while the victim was lying helpless on the ground was sufficient to establish the defendant acted with premeditation and deliberation).

Based on the analysis above, we hold that the State presented sufficient evidence to satisfy the “premeditation and deliberation” elements of first-degree murder. The trial court did not err in denying Defendant’s motion to dismiss.

B. Jury Instructions

Defendant next argues that the trial judge committed plain error by only instructing the jury on first-degree murder and, additionally, by instructing the jury on acting in concert. Neither of Defendant’s arguments were properly preserved for our review.¹ .

“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4). The North Carolina Supreme Court “has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge’s instructions to the jury, or (2) rulings on the admissibility of evidence.” *State v.*

¹ During trial, defense counsel objected to the State’s proposed acting in concert jury instruction, but later withdrew his objection and acquiesced to the instruction.

Gregory, 342 N.C. 580, 584, 467 S.E. 2d 28, 31 (1996) (citations omitted). “Under the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.” *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

1. Second-Degree Murder Instruction

Defendant argues that the trial court erred because the court usurped the jury’s role in determining whether Defendant committed first-degree or second-degree murder in violation of N.C. Gen. Stat. §15-172. We disagree.

“The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation.” *Strickland*, 283 N.C. App. at 310, 872 S.E.2d at 606 (citation and quotation marks omitted). “Murder in the second degree . . . is the unlawful killing of a human being with malice and without premeditation and deliberation.” *State v. Brown*, 300 N.C. 731, 735, 268 S.E.2d 201, 204 (1980) (citation omitted).

“Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree.” N.C. Gen. Stat. §15-172 (2021). “[T]he trial court must determine ‘whether the State’s evidence is positive as to each element of [first-degree murder] and whether there is any conflicting evidence relating to any of these elements.’” *State v. Taylor*, 362 N.C. 514,

531, 669 S.E.2d 239, 256 (2008) (citation omitted). If the State's evidence established all elements of first-degree murder and there is no evidence to negate these elements, it is proper for the trial court to exclude second-degree murder from the jury's consideration. *State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983), *abrogated by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

As discussed above, the State's evidence established all elements of first-degree murder. Therefore, we must next turn to whether Defendant produced any evidence to negate the claims of first-degree murder, outside of Defendant's denial that he committed premeditated and deliberated murder. *See id.* (discussing that if the only evidence present to negate the elements of first-degree murder is defendant's denial that he committed the offense, the trial judge should properly exclude from the jury an instruction of second-degree murder).

Defendant argues that "the State failed to present evidence of premeditation or deliberation in [Defendant's] actions." However, Defendant has failed to present any evidence, other than Defendant's denial that he committed the offense, that shows (1) he should be acquitted of first-degree murder and (2) there is evidence to support a conviction of second-degree murder. *See State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (holding that "[a]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find [the] defendant guilty of the lesser offense and to acquit him of the greater").

Furthermore, Defendant argues that the "State's evidence allowed the jury to

believe that he may have possessed a firearm at some point on January 6, 2019, and that he was in the crime scene area at some point but little else.” However, this argument lacks the sufficiency required to instruct on second-degree murder. *See State v. Annadale*, 329 N.C. 557, 567–68, 406 S.E.2d 837, 843–44 (1991) (holding that a defendant who raised a similar argument was not entitled to a second-degree murder instruction simply because there was a “mere possibility of a negative finding” of premeditation and deliberation (citation omitted)). Therefore, because the State presented sufficient evidence of each element of first-degree murder and there was no competent evidence to negate these claims, we hold the trial court did not err, much less commit plain error, in only instructing the jury on first-degree murder.

2. Acting in Concert Instruction

Defendant next argues that the trial court erred in issuing the acting in concert charge for the jury. We disagree.

“Under the principle of acting in concert, a person may be found guilty of an offense if he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.” *State v. Wilson*, 322 N.C. 117, 141, 367 S.E.2d 589, 603 (1988) (citation omitted). “The two essential elements of acting in concert are: (1) being present at the scene of the crime, and (2) acting together with another person who commits the acts necessary to constitute the crime pursuant to a common plan or purpose.” *State v. Poag*, 159 N.C. App. 312, 320,

583 S.E.2d 661, 667 (2003) (citation omitted).

Here, Defendant does not dispute his presence at the crime scene. However, Defendant does dispute whether he was acting together with another person pursuant to a common plan or purpose. The video yielded from Defendant's phone shows all four males waving weapons in the camera at some point in the video. Further, one of the other males can be heard saying "buck em down" when Sheridan is spotted unarmed riding his bike. It is upon this command that all four males begin to run towards Sheridan before taking his life. It can hardly be said walking around together as a group, brandishing weapons, and shooting Sheridan upon command of one of the males in the video is not acting pursuant to a common plan or purpose. *See id.* Defendant was both (1) present at the scene of the crime and (2) acting together with the three other males. *See id.* Accordingly, we hold that the trial court did not err in submitting the acting in concert charge to the jury.

Further, even assuming the trial court erroneously instructed the jury, the overwhelming evidence of first-degree murder discussed above indicates that a juror would likely not have reached a different result absent the instruction. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E. 2d 375, 378 (1983) (discussing that plain error review is to be "applied cautiously and only in exceptional cases" and that "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court" (citations and quotation marks omitted)). Accordingly, we hold that the trial court did not commit

plain error.

III. Conclusion

For the foregoing reasons, we hold the trial court did not err by denying Defendant's motion to dismiss, instructing the jury on first-degree murder and not second-degree murder, and instructing the jury on acting in concert.

NO ERROR.

Judges COLLINS and STADING concur.

Report per Rule 30(e).