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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-545

Filed 4 June 2024

Carteret County, No. 18 CRS 53879

STATE OF NORTH CAROLINA

v.

JAMES WILLIAM DURNER, Defendant.

Appeal by Defendant from judgment entered 2 September 2021 by Judge Thomas R. Wilson in Carteret County Superior Court. Heard in the Court of Appeals 11 April 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.*

*Law Office of Lisa Miles, by Lisa Miles, for Defendant-Appellant.*

CARPENTER, Judge.

James William Durner (“Defendant”) appeals after a jury found him guilty of second-degree murder. On appeal, Defendant asserts the trial court erred by denying his motions to dismiss and excluding relevant evidence. Defendant also argues he was deprived of his right to effective assistance of counsel. After careful review, we discern no error.



## **I. Factual & Procedural Background**

In October 2018, Defendant was residing at The Hostess House Inn & Suites in Newport, North Carolina. Casey Orr and his girlfriend were staying in the room next door, and the group often socialized together.

On 20 October 2018, Defendant and Orr began drinking early in the afternoon and were significantly intoxicated when Ronald Priester, a neighbor who worked as a contractor, returned from work at around 6:00 p.m. Defendant and Orr approached Priester in the parking lot and offered him a drink. Priester declined and eventually retired to his room to work on time sheets. Defendant followed Priester inside, continuing to talk loudly and acting “macho.” Priester requested that Defendant go outside, and he did so. Meanwhile, Orr was outside attempting to sell marijuana to one of Priester’s employees.

Shortly thereafter, Priester heard arguing and opened his door and observed Orr “on top of” Defendant. Defendant testified Orr was upset because the crew member did not buy his marijuana, and Defendant advised Orr to be “more respectful to strangers.” Orr then struck Defendant in the face. Defendant’s nose “exploded,” and he testified that he could not see due to his injuries. Orr continued to hit and kick Defendant in the face. As Orr walked away from the fight, Priester saw Defendant pull a pistol out of his pocket and attempt to fire at Orr. When his gun misfired, Defendant rechambered and fired again, striking Orr in the chest.

Defendant testified that, during the fight, he was choking on his blood, blinded



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by tears, and feared for his life. He stated that he could not see Orr, and therefore, did not know that he had walked away. Priester testified that, in his opinion, Defendant had no need to shoot Orr because the fight was over, and Orr was walking away. Defendant then stood up and walked into his apartment. He attempted to unload the gun but could not eject the magazine. He dropped the gun at the doorway and called 911.<sup>1</sup>

Orr passed away before first responders arrived at the scene. Detective Sergeant Joseph Bishop of the Pine Knoll Shores Police Department, a local medical examiner who responded to the scene, “did not note any signs of trauma” to Orr’s head or neck but did note a “very close contact gunshot wound” to the chest. Orr’s forearms, hands, and feet showed signs of bruising and minor abrasions.

At the scene, Defendant admitted he shot Orr and led law enforcement to the firearm in his room. Detective Sergeant Justin Ferrell of the Newport Police Department searched the room and found two firearm magazines. Ferrell also collected .38 caliber rounds in the bedroom and recovered surveillance footage of the incident. Officers also recovered a 9 millimeter firearm, a holster, and a box of 9 millimeter ammunition. After the fight, Defendant’s medical records showed several broken bones that required surgery.

On 13 January 2020, a Carteret County grand jury indicted Defendant for

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<sup>1</sup> Priester testified Defendant told the 911 operator that “[Orr] was breaking into his house.” The recorded call demonstrated that Defendant stated “I tried to get in my house.”



murder, and the State proceeded with a second-degree murder theory pursuant to N.C. Gen. Stat. § 14-17(b). Defendant filed two motions to dismiss before trial, arguing his use of deadly force in self-defense was justified. The trial court denied both motions, reasoning Defendant's immunity defense would turn on a "determination of the facts" best developed at trial.

On 30 August 2021, the trial commenced before the Honorable Thomas R. Wilson in Carteret County Superior Court. At trial, the defense sought to admit affidavits obtained by a private investigator, Leslie Horan, from two unavailable witnesses, Edward Coates and Brian Thompson. Each affidavit included general and specific allegations of prior incidents of unprovoked violence by Orr. Coates died before trial, and Thompson failed to appear in court despite being subpoenaed. The court excluded both affidavits and a recitation of the contents based on a "plain reading" of the residual hearsay exception and Horan's lack of personal knowledge.

At the close of the State's evidence and at the close of all evidence, Defendant moved to dismiss. The trial court denied both motions. On 2 September 2021, the jury found Defendant guilty of second-degree murder, and the trial court imposed a mitigated sentence of between 108 and 142 months' imprisonment. On the same date, Defendant filed timely written notice of appeal. On 2 November 2022, Defendant filed a motion for appropriate relief ("MAR") concerning his claim for ineffective assistance of counsel.

## **II. Jurisdiction**



This Court has jurisdiction to address Defendant's appeal from a final judgment pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

### **III. Issues**

The issues before this Court are whether: (1) the trial court erred by denying Defendant's motions to dismiss; (2) the trial court erred by excluding evidence of prior similar assaults committed by Orr that were relevant to show his modus operandi; and (3) Defendant was deprived of his right to effective assistance of counsel where his trial counsel cited incorrect law in seeking to admit evidence.

### **IV. Analysis**

#### **A. Motions to Dismiss**

Defendant contends that his motions to dismiss were wrongfully denied by the trial court, arguing the State failed to present sufficient evidence of malice and sufficient evidence to overcome self-defense. The State avers malice is implied with the intentional use of a deadly weapon, and it presented substantial evidence of each element of the crime. We agree with the State.

On appeal, the sufficiency of evidence is reviewed de novo. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). 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, 632–33, 669 S.E.2d 290, 294 (2008)



(quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Upon a defendant's motion to dismiss, the question is whether there is substantial evidence of each element of the offense and of the defendant being the perpetrator. *State v. Tucker*, 380 N.C. 234, 236–37, 867 S.E.2d 924, 927 (2022). Substantial evidence is the amount of “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 357 N.C. 604, 615, 588 S.E.2d 453, 461 (2003). In reviewing challenges to the sufficiency of evidence, the court must determine if the evidence, taken in the light most favorable to the State, is sufficient to allow a jury to find every element of the offense beyond a reasonable doubt. *See State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020).

For second-degree murder, the essential elements are “an unlawful killing with malice, but without premeditation or deliberation.” *State v. Neville*, 202 N.C. App. 121, 124, 688 S.E.2d 76, 79 (2010).

Concerning self-defense, it is the State's burden to prove that the defendant did not act in self-defense beyond a reasonable doubt. *State v. Herbin*, 298 N.C. 441, 446, 259 S.E.2d 263, 267 (1979). Nevertheless, the State is “entitled to have [that] question[ ] put before a jury if its own evidence supports reasonable inferences of [guilt].” *State v. Laws*, 345 N.C. 585, 595, 481 S.E.2d 641, 646 (1997).

A person is justified in using deadly force and has no duty to retreat from a place he has a lawful right to be if he reasonably believes such force is necessary to



prevent imminent death or great bodily harm. N.C. Gen. Stat. § 14-51.3(a) (2023). A person who uses such force is immune from criminal liability. *Id.*; see *State v. Austin*, 279 N.C. App. 377, 381, 865 S.E.2d 350, 354 (2021). A defendant's evidence can be considered on a motion to dismiss where it clarifies or rebuts permissible inferences, but it cannot contradict the State's evidence. *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994).

Here, Defendant's argument that he could not have killed with malice because he shot Orr during a "one-sided fight," is misplaced. In a case with the intentional use of a deadly weapon, malice may be properly inferred. *E.g.*, *State v. Camacho*, 337 N.C. 224, 233, 446 S.E.2d 8, 13 (1994); *State v. Fisher*, 318 N.C. 512, 525–26, 350 S.E.2d 334, 342 (1986); *State v. Chamberlain*, 307 N.C. 130, 150, 297 S.E.2d 540, 552 (1982). At the time of the incident, Defendant knew he had a firearm on his person, intentionally removed the firearm from his pocket, pointed it in Orr's direction, and squeezed the trigger. When the gun misfired, Defendant rechambered and fired at Orr again, killing him. Defendant's intentional use of a deadly weapon is sufficient evidence of malice to survive a motion to dismiss. See *Golder*, 374 N.C. at 246, 839 S.E.2d at 788; *Camacho*, 337 N.C. at 233, 446 S.E.2d at 13.

Defendant's argument that the State failed to present sufficient evidence to overcome self-defense is similarly without merit. Defendant contends the charge should have been dismissed under the Castle Doctrine. See N.C. Gen. Stat. § 14-51.2(b) (2023) ("The lawful occupant of a home . . . is presumed to have held a



reasonable fear of imminent death or serious bodily harm . . . when using defensive force . . . .”). Although it is the State’s burden to disprove self-defense beyond a reasonable doubt, it is for the jury to determine which competing theory of the incident took place. *See Laws*, 345 N.C. at 595, 481 S.E.2d at 646. Thus, Defendant’s testimony that he feared for his life while in the parking lot of his home does not warrant dismissal; rather, the trial court properly submitted the case to the jury to resolve the disputed facts. *See id.* at 595, 481 S.E.2d at 646.

Next, Defendant’s argument that the trial court improperly failed to reconsider his motion to dismiss “prior to submitting the case to the jury” is unfounded. Defendant did not renew his motion before the case was submitted to the jury. Therefore, this contention is not preserved for review. *See* N.C. App. R. P. 10(a)(1) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request . . . stating the specific grounds for the ruling . . . .”). In denying Defendant’s pretrial motion, the trial court reasoned the question of immunity turned on a “determination of facts” best made at trial. The trial court instructed the jury on self-defense, and the jury returned a guilty verdict.

Because the State presented sufficient evidence of malice and Defendant was not entitled to a pretrial ruling on self-defense, the trial court did not err in denying Defendant’s motions to dismiss.

#### **B. Exclusion of Prior Similar Assault Evidence**

Next, Defendant argues the trial court erred by excluding evidence of prior



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similar assaults committed by Orr, which Defendant contends was relevant to Orr's modus operandi. The State maintains the statements were inadmissible hearsay, lacked a foundation for admission, and the testimony was not based on personal knowledge. We agree with the State.

"We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). A trial court's determinations concerning the admissibility of hearsay statements under Rules 803(24) and 804(b)(5) are reviewed for abuse of discretion. *State v. Corbett*, 376 N.C. 799, 819, 855 S.E.2d 228, 244 (2021); *State v. Blankenship*, 259 N.C. App. 102, 111, 814 S.E.2d 901, 910 (2018) (citing *State v. Brigman*, 178 N.C. App. 78, 87, 632 S.E.2d 498, 504 (2006)).

Assuming without deciding that the specific acts contained in the affidavits were admissible under Rule 404(b), the affidavits still constitute hearsay, which as a general rule is inadmissible in the absence of an applicable exception. *State v. Valentine*, 357 N.C. 512, 515, 591 S.E.2d 846, 851 (2003). Neither party disputes that the affidavits contained hearsay involving unavailable declarants.

The residual hearsay exception of Rule 804(b)(5) provides that, if the declarant is unavailable, the following is not excluded as hearsay:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that  
(A) the statement is offered as evidence of a material fact;  
(B) the statement is more probative on the point for which



it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, *a statement may not be admitted under this exception unless the proponent of it gives written notice* stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (emphasis added).

Once a party has proffered evidence under Rule 804(b)(5), the trial court must determine whether the above conditions have been met. *See State v. Smith*, 315 N.C. 76, 92, 337 S.E.2d 833, 844 (1985). If the court fails to conduct the required analysis prior to excluding the proffered evidence, it is an abuse of discretion. *Id.* at 92, 337 S.E.2d at 844.

Here, Defendant's argument that the proffered evidence satisfied the residual hearsay exception of Rule 804(b)(5) lacks merit. Under the hearsay exception in Rule 804(b)(5), the affidavits were inadmissible in the absence of prior written notice. *See id.* at 92, 337 S.E.2d at 844 ("Should the trial judge determine notice was not given, was inadequate, or was untimely provided, his inquiry must cease and the proffered hearsay statement must be denied admission under Rule [804(b)(5)]."). Both the prosecutor and the trial court observed Defendant failed to provide "prior written notice" of his intent to offer the affidavits. *See State v. Hester*, 343 N.C. 266, 271, 470 S.E.2d 25, 28 (1996) (concluding evidence offered under the residual hearsay



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exception was properly excluded where the defense “failed to give the prosecutor timely, written notice of her intent to use [the] testimony, which is a prerequisite to admission of evidence under Rule 804(b)(5)”. Therefore, no further findings were required, and the evidence was properly excluded. *See Smith*, 315 N.C. at 92, 337 S.E.2d at 844; *Hester*, 343 N.C. at 271, 470 S.E.2d at 28.

Second, Defendant’s argument that the trial court erred by excluding the non-specific allegations concerning Orr’s character in the affidavits, because the hearsay rule does not exclude the “[r]eputation of a person’s character among his associates or community,” also fails. *See* N.C. Gen. Stat. § 8C-1, Rule 803(21). A reputation must be “held by an appreciable group of people who have had adequate basis upon which to form their opinion.” *State v. McEachern*, 283 N.C. 57, 67, 194 S.E.2d 787, 793–94 (1973).

As a threshold for admission, evidence as to Orr’s reputation required a “foundation . . . showing that the testifying witness has sufficient contact with the community to enable him to be qualified as knowing the general reputation of the person in question.” *State v. Morrison*, 84 N.C. App. 41, 47, 351 S.E.2d 810, 814 (1987); *see State v. Bush*, 289 N.C. 159, 169, 221 S.E.2d 333, 339 (1976) (“[W]hen a character witness is called he must first state that he knows the general reputation of the party about whom he proposes to testify.”), *vacated in part on other grounds*, 429 U.S. 809 (1976).

In this case, neither affidavit contained foundational information sufficient to



establish the admissibility of the non-specific character statements as reputation evidence. And because both affidavits were prepared by unavailable declarants, neither was present to lay a foundation at trial. Therefore, the trial court did not err by excluding the affidavits under Rule 803(21).

Defendant's related contention that, even if the trial court properly excluded the affidavits, Horan should have been allowed to testify or narrate their substance into the record similarly lacks merit. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that [she] has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602. The defense and Horan herself each acknowledged that Horan was not personally familiar with Orr or his reputation in the community. And to the extent Defendant asserts Horan should have been permitted to testify regarding her personal opinion of Orr's reputation in the community, Horan addressed this precise issue during the proffer:

**Q.** Okay. You don't have any personal knowledge as to whether anything they told you was true, false, or otherwise, correct?

**A.** I don't ever have that knowledge. I just take—mine's a fact investigator, I ask people, I take notes, and I report it.

**Q.** Okay.

**A.** Whether they're telling me the truth or not, I have no idea.

Therefore, the trial court properly excluded Horan's proffered testimony based on her investigation and the affidavits because "any reputational knowledge [Horan] had of Mr. Orr was not first-hand . . . ." Consequently, we reject Defendant's



argument because Horan lacked personal knowledge as to either Orr's prior bad acts or reputation. *See id.*

We discern no error in the trial court's exclusion of the affidavits or Horan's testimony concerning their contents. Because the affidavits and Horan's testimony were inadmissible, we do not reach Defendant's argument concerning prejudice.

### **C. Ineffective Assistance of Counsel ("IAC")**

In his MAR, Defendant asserts he received IAC when, in arguing for the admission of the affidavits, defense counsel cited the residual hearsay exception under Rule 804(b)(5) rather than the exception for reputation evidence under Rule 803(21). The State contends the trial court did not err because the evidence was inadmissible.

For IAC claims, we review the record de novo to determine if counsel's performance fell below an objective standard of reasonableness, and, if so, whether there is a reasonable likelihood that the defendant was prejudiced by counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 248 (1985). Specifically, a defendant must:

first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's



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unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867 (2006). Where a defendant fails to establish both elements, we cannot say the conviction resulted from a “breakdown in the adversary process that renders the result unreliable.” *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Claims of IAC “brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004) (citation omitted), *cert. denied*, 546 U.S. 830 (2005). If the appellate court finds the claim has been prematurely brought on direct appeal, it shall dismiss the claim without prejudice. *State v. Long*, 354 N.C. 534, 540, 557 S.E.2d 89, 93 (2001).

Here, Defendant acknowledges the cold record is sufficient to review his claim, and the State agrees. *See Thompson*, 359 N.C. at 122–23, 604 S.E.2d at 881. Although a proffer under Rule 803(21) instead of Rule 804(b)(5) may have reduced the likelihood of the trial court excluding the information gathered by Horan on hearsay grounds, a citation to Rule 803(21) would not have appreciably increased its



likelihood of admission. As previously discussed, the affidavits lacked the necessary foundation for admission, and Horan lacked personal knowledge to testify or narrate their contents. Indeed, once defense counsel realized that Thompson was not going to appear, he made a full proffer of Horan as a potential reputation witness under Rule 803(21). Nevertheless, because the proffer failed to establish that Horan had formed her own opinion as to Orr's reputation in the community, let alone that she had developed sufficient knowledge of Orr's reputation to do so, her testimony was inadmissible. Therefore, defense counsel's performance in seeking to admit the information gathered by Horan was not deficient on any basis.

Because the affidavits themselves and Horan's related testimony were inadmissible, defense counsel was not deficient in his proffer, regardless of the basis asserted. Consequently, Defendant's IAC claim fails, and we deny his MAR.

## **V. Conclusion**

Because the State presented sufficient evidence of malice and Defendant's self-defense claim was properly submitted to the jury, the trial court did not err by denying Defendant's motions to dismiss. Next, the trial court did not err in excluding the affidavits or Horan's testimony because they were inadmissible. Finally, the cold record reveals defense counsel's performance was not deficient. Therefore, Defendant's IAC claim fails, and we deny his MAR.

NO ERROR.

Judges ZACHARY and MURPHY concur.



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Report per Rule 30(e).