2019 IL App (4th) 160916-U

NO. 4-16-0916

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 16, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KELVON NAKOLIS WILKES, Defendant-Appellant.	))))))))	Appeal from the Circuit Court of McLean County No. 14CF491 Honorable Scott D. Drazewski, Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court properly found defendant possessed a specific intent to kill when he shot Derrick Willingham.

¶ 2 In April 2014, the State charged defendant, Kelvon Nakolis Wilkes, by information with one count of attempt (first degree murder). After a bench trial in November 2016, the trial court found defendant guilty of attempt (first degree murder), sentencing him to 40 years of imprisonment.

¶ 3 On appeal, defendant argues the trial court failed to find him guilty beyond a reasonable doubt because the court found he had a lesser mental state than specific intent to kill. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In April 2014, Derrick Willingham woke up around 9:45 a.m. and walked to the Red and Blue Mart to buy eggs. Unable to find eggs there, he decided to go to Pop's Grocery

store. As he was about to exit the store, he saw a white Dodge Avenger in the parking lot of the Red and Blue Mart and recognized the driver and another passenger, called "L." Though he did not see defendant initially, he recognized defendant once he exited from the backseat on the driver's side of the car. Defendant had been at Willingham's house the month prior for a dice game and Willingham previously had seen him in pictures on Facebook, so he was familiar to Willingham. During the dice game the month before, Willingham asked defendant and some other individuals to leave because he thought there was a "confrontation going on."

¶ 6 On this day in April 2014, "L" exited the car, and he and defendant walked to the Red and Blue Mart, where Willingham opened the door for them as he left. When Willingham started walking to Pop's Grocery store, which is "catty-corner" from the Red and Blue Mart, he saw defendant and "L" get back into the Dodge Avenger. As he continued walking to Pop's Grocery store, the Dodge Avenger pulled up alongside him and then passed him. When he left Pop's Grocery store, he saw the car turn and defendant hop out of the vehicle and then hop back in. After seeing this, Willingham called his girlfriend, and she met him.

¶ 7 Willingham and his girlfriend began walking home when Willingham saw defendant leaning against the apartment building next to his own building. Defendant was wearing a hooded sweatshirt that was partially covering his head and was holding a gun, which Willingham said looked like a .44-caliber revolver. Defendant raised the gun and shot at Willingham six times while standing approximately 15 feet away. Willingham said the last shot hit him in the back of the head on the right side. Willingham's girlfriend ran away, and Willingham used his shirt to stop the bleeding. Willingham did not run and was facing defendant from an angle. Ten minutes later, the police arrived, and Willingham told them, "Kelvon shot me. He shot me in the head." Before being transported to the emergency room, Willingham also

gave them a description of defendant, stating he had dreadlocks with tan or brown in them and was wearing a bandana around his neck.

¶ 8 In April 2014, the State charged defendant with one count of attempt (first degree murder) (720 ILCS 5/8-4, 9-1(a)(2) (West 2014)), alleging he knowingly took a substantial step toward killing an individual by committing acts which he knew created a strong probability of death or great bodily harm to Willingham in that he fired shots toward Willingham, one of which struck Willingham in the head. Defendant waived his right to a jury trial and requested a bench trial, which was granted.

¶ 9 At trial, Scott Mathewson, a Bloomington police officer, said Willingham's wound was a "through and through," which meant there was "an entrance and exit hole that seemed to link up together." He said it appeared the bullet did not enter the skull but "traveled underneath the skin and came right back out." Officer Mathewson said a .44 is a large caliber round that could cause substantial damage.

¶ 10 Defendant testified he and the occupants of the car drove by Willingham instead of pulling alongside him and it was his friend, Lanard, not defendant, who exited the vehicle shortly before the shooting. Defendant said they drove to a side street, and Lanard stepped out of the car to make a phone call and buy some marijuana. After Lanard left the vehicle, defendant heard "some pows" in the distance, which sounded like fireworks. Lanard returned to the car, and they left. That day, Lanard was wearing a hooded sweatshirt with a shirt wrapped around his face. Defendant claimed it was not unusual for them to wrap a shirt around their face to block the sun when it was hot outside. In April 2014, Lanard had a "mini-fro," while defendant had long, two-toned dreadlocks that reached the middle of his back. According to defendant, they were both 5 feet and 10 inches tall and shared clothes.

¶ 11 The trial court found defendant guilty of attempt (first degree murder). While making its finding, the court noted a defendant charged with attempt (murder) rarely says they are acting with specific intent to kill, which is the reason specific intent may be proved by the "character of the assault and accompanying circumstances." The court stated:

> "What better set of circumstances, from the Court's perspective in this case, could there be to establish specific intent than, you're 15 feet away from the individual that you are firing on, not one, not two, not three, not four, not five, but six shots towards, from a .44-caliber weapon, aimed at an individual's head, but to establish that one's purpose and specific intent was to kill that person, or at the very least cause great bodily harm. And therefore, there is a specific intent demonstrated by those facts and circumstances."

¶ 12 In October 2016, defendant filed a posttrial motion for a new trial, claiming, *inter alia*, the indictment upon which defendant was convicted was defective for failing to allege the proper mental state and the trial court erred by failing to base its finding on the specific intent to kill, which is necessary to sustain a conviction for attempt (first degree murder). The court denied the motion for a new trial, first concluding defendant failed to show the requisite prejudice to obtain relief from a defective indictment when the issue is raised for the first time posttrial. Addressing its claimed error regarding the mental state of defendant, the court noted its "finding was, that yes, specific intent to kill was shown by the State to exist under the facts and circumstances of this case." The court further explained its reference to a lesser mental state of "great bodily harm" arose as a result of the language of the indictment as it existed at that time

and was not to be misconstrued as a lesser finding. The court sentenced defendant to 40 years' imprisonment in the Illinois Department of Corrections.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant does not contest the sufficiency of the evidence nor the indictment or its posttrial amendment. Instead, he argues the trial court's finding of a lesser mental state requires this court to grant a new trial or vacate the conviction and impose a conviction on the lesser-included offense of aggravated battery. We disagree.

¶ 16 "Constitutional due process rights require that a person may not be convicted in state court unless the State meets its burden of proving all of the elements of the offense beyond a reasonable doubt." *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 64, 967 N.E.2d 910. "An individual commits the offense of attempted murder when, with specific intent to kill, he does any act which constitutes a substantial step toward the commission of murder. [Citation.] Proof of a specific intent to kill is an indispensable element of attempted first degree murder." *People v. Hill*, 276 Ill. App. 3d 683, 687, 658 N.E.2d 1294, 1297 (1995).

¶ 17 Here, the trial court stated the circumstances in this case presented perhaps the best case to establish specific intent to kill. Standing within 15 feet of someone and firing six rounds from a .44-caliber revolver while aiming at the victim's head gives any rational trier of fact cause to find defendant had the requisite intent to kill. This was a bench trial, and the court clearly expressed its conclusion the State had proved specific intent to kill. The facts were not in dispute, a point defendant concedes in his brief. Further, this case did not involve a need to weigh defendant's claimed mental state against the State's circumstantial evidence of intent. The defense was defendant was not the shooter—it was someone else. The trial court merely needed

to weigh the overwhelming evidence against defendant. After first seeing the victim at a store, defendant exited the vehicle he had been riding in and placed himself in the victim's path of travel. Once approached, defendant, who had a hood over his head, immediately began shooting at the victim without saying a word. Firing six shots from a .44-caliber revolver (which would normally carry only six rounds), while aiming at the victim's head from a distance of 15 feet, he hit the victim in the head with one shot. It was not difficult for the trial court, or any reasonable person, to glean what defendant's intent was. At the posttrial hearing, the court further explained its finding by noting the reference to a lesser mental state was merely a recitation of the language of the indictment and not reflective of the court's finding. The court found specific intent demonstrated by the acts of the defendant and "specific intent to kill was shown by the State to exist under the facts and circumstances of this case."

¶ 18 Having based its finding on the proper mental state necessary for attempt (first degree murder), the trial court did not err. Therefore, defendant is not entitled to a new trial.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 21 Affirmed.