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NO. COA01-1100

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v.

JAMES EARL CARVER

Haywood County
Nos. 00CRS005639
00CRS005686
00CRS007294

Appeal by defendant from judgment entered 14 February 2001 by Judge Charles C. Lamm in Haywood County Superior Court. Heard in the Court of Appeals 28 May 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General William R. Miller, for the State.

Janna D. Allison for defendant-appellant.

HUNTER, Judge.

James Earl Carver ("defendant") was indicted for assault with a deadly weapon with intent to kill inflicting serious injury for the alleged shooting of Dewey Fowler, Jr. He was also charged with two counts of assault with a deadly weapon with intent to kill for allegedly firing a handgun at Melvin Smith and William Conrad. The jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury. On the remaining counts, it found defendant guilty of the lesser included offense of assault with a deadly weapon. The trial court consolidated defendant's convictions for judgment, sentencing him to 84 to 110 months'

imprisonment. Defendant filed timely notice of appeal. We find no error.

The State's evidence may be briefly summarized as follows: On 24 August 2000, defendant spent the afternoon drinking beer and liquor with Fowler, Smith and Conrad. Defendant became "rowdy" and argued with Fowler. When Smith attempted to intervene, defendant punched him in the jaw. Conrad then hit defendant in the face. Fowler broke up the fighting. Defendant, who was "pretty drunk," laid down on the hood of his car. Fowler and Smith led defendant to his residence and put him to bed. As Fowler and Smith left the residence, defendant followed them outside with a handgun. He fired twice at Smith as Smith ran across the road. Defendant then put the gun to Fowler's chest and shot him. Defendant fired additional rounds at Smith and at Conrad as they got into a vehicle to drive away. Defendant phoned 911 and surrendered to police.

On the issue of defendant's intoxication, the trial court gave the following instruction to the jury:

Now there is evidence which tends to show the Defendant was intoxicated at the time of the crimes alleged in this case. And generally, voluntary intoxication is not a legal excuse for crime. However, if you find that the Defendant was intoxicated, you should consider whether this condition affected his ability to formulate a specific intent to kill, which is required for a conviction of either assault with a deadly weapon with intent to kill inflicting serious injury or assault with a deadly weapon with intent to kill.

In order for you to find the Defendant guilty of any of these crimes . . . , you must find beyond a reasonable doubt that he had the required specific intent to kill either

Fowler, Smith and/or Conrad as the case may be.

If as a result of intoxication the Defendant did not have the required specific intent to kill, then you must find the Defendant not guilty of those crimes.

However, the law does not require any specific intent to kill[] for the Defendant [to] be guilty of assault with a deadly weapon inflicting serious injury or assault with a deadly weapon. Thus, the Defendant's intoxication can have no bearing on your determination of his guilt or innocence of either of those crimes.

The trial court also instructed the jury on the elements of the charged offenses and the lesser included offenses as set forth above.

Defendant claims on appeal that the trial court erred in denying his motion to dismiss, because the evidence conclusively established a level of voluntary intoxication that rendered him incapable of forming a specific intent to kill. In a slight variation of this claim, defendant also argues that the trial court erred in entering judgment on the "inconsistent verdicts" reached by the jury. He concedes that inconsistent verdicts are not *per se* invalid. However, he contended that the verdicts in this case reflect the jury's determination that his intoxication prevented him from forming a specific intent to kill.

Initially, we note that defendant's convictions for assault with a deadly weapon required no finding of an intent to kill and are thus unaffected by his argument here. See *State v. Smith*, 110 N.C. App. 119, 135, 429 S.E.2d 425, 433 ("[i]ntent is not an

element of assault with a deadly weapon") (citing *State v. Curie*, 19 N.C. App. 17, 198 S.E.2d 28 (1973)), *affirmed*, 335 N.C. 162, 435 S.E.2d 770 (1993).

Turning to defendant's remaining conviction for assault with a deadly weapon with intent to kill inflicting serious injury, we find defendant's claim to be without merit. Whether a defendant's voluntary intoxication left him unable to form an intent to kill is a jury question and cannot be established as a matter of law by the trial court. See *State v. Robertson*, 138 N.C. App. 506, 507-08, 531 S.E.2d 490, 492 (2000). "Because the intoxication defense focuses not just on the level of intoxication, but on its effect on a defendant's state of mind as well, its validity necessarily involves matters for a jury to decide." *Id.* at 507, 531 S.E.2d at 492. In this case, the trial court gave a detailed instruction on the defense of voluntary intoxication and properly left to the jury the question of defendant's state of mind during the shooting. Moreover, we discern no inconsistency in the verdicts returned in this case. The jury could logically have found that defendant intended to kill Fowler, who he shot in the chest at point-blank range, but did not intend to kill Smith or Conrad, at whom he fired from a distance without striking. Defendant's assignments of error are overruled.

No error.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).