NO. COA01-1206

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v. Rowan County
No. 00CRS052112

SCOTT HARRISON McCLAIN

Appeal by defendant from judgment entered 12 April 2001 by Judge W. Erwin Spainhour in Rowan County Superior Court. Heard in the Court of Appeals 28 May 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Michael C. Warren, for the State.

Nancy R. Gaines for defendant-appellant.

HUNTER, Judge.

Scott Harrison McClain ("defendant") was charged with the attempted first degree murder of Deputy Steve K. Fortune with the Rowan County Sheriff's Department. The State's evidence tended to show that prior to 2 June 2000, defendant called the home of Thomas Gregory Hinson and spoke to his babysitter, Mae Selvey. Defendant told Selvey that "somebody was going to get hurt" and that he "[w]as going to whip Greg's ass." On 2 June 2000, defendant went to Hinson's home to collect money that defendant believed he was owed for work he had done during the construction of a house. The

Hinson home was occupied by defendant's wife, Selvey, and Hinson's two children. Defendant loaded his double-barreled shotgun, walked to the back of the house, hid in the shrubbery and threatened to kill someone. He then climbed into a pine tree with his shotgun.

Officer David Allen, who was, at that time, the Chief of the Cleveland Police Department, parked his patrol vehicle in the Hinson front yard, exited the vehicle and stood at the front left corner of the house. Defendant yelled to Officer Allen, "you better get you[r] ass back in that car, and back out of here or I'll shoot." Officer Allen heard defendant state that Hinson owed him $850.00, and that if Hinson would give the money to defendant's wife, who was at the Hinson house, then defendant would leave and no one would be hurt. Defendant then yelled: "Call your backup[,] I've got plenty of ammunition, Tommy owes me money."

A neighbor, Richard Current, witnessed the events unfold from his own property. Deputy Fortune parked his vehicle at the end of Current's driveway and exited his vehicle. Current saw Deputy Fortune proceed down the right side of the Hinson house and situate himself at the rear of the house. Deputy Fortune located defendant in a pine tree and heard defendant yell something at Officer Allen, and shortly thereafter defendant fired two shots in the direction of Deputy Fortune. The second shot struck Deputy Fortune in the face, resulting in serious and permanent injuries. Pellets from defendant's shotgun fell on Current's patio. Despite having been shot in the face, Deputy Fortune returned fire, struck defendant, and dislodged him from the tree.

Defendant presented evidence that he had a history of substance abuse and was able to read and write at only the third or fourth grade level. Before the incident, defendant used valium, marijuana, and cocaine. Defendant's drug screen performed at the hospital on the day in question showed a positive reading for cocaine and opiates. Dr. Jerry Noble, a psychologist, testified that defendant had an I.Q. of seventy-two, had a poly-substance dependancy, and had a personality disorder. He further testified that on the day of the incident, defendant "was much impaired in terms of his ability to plan a course of action and follow through with it." Dr. Noble also testified that, in his opinion, defendant went to the Hinson home to obtain money, not intending to harm anyone.

Defendant was charged with (1) attempted first degree murder, (2) assault with a deadly weapon with intent to kill inflicting serious bodily injury, and (3) assault with a firearm on an officer. A jury found defendant guilty as charged, and the trial court arrested judgment on the second and third charges. The trial court further found the aggravating factor that defendant "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." The trial court found two mitigating factors: that defendant "was suffering from a[] mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense," and that defendant "has a support system in the community." After

determining that the aggravating factor outweighed the mitigating factors, the trial court sentenced defendant to 237 to 294 months' imprisonment for attempted first degree murder. Defendant appeals. We find no error.

Defendant first contends the trial court erred by denying his motion to dismiss the charges against him because the State failed to present sufficient evidence of intent to support the charges of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury. Specifically, defendant argues that he suffered from significant mental impairment that diminished his capacity to form the specific intent element for these charges. We disagree.

The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Id.* In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. *Id.* at 215-16, 393 S.E.2d at 814. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal. *Id.* at 216, 393 S.E.2d at 814.

We now apply the foregoing principles to the convictions for attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury. To prevail on the charge of attempted first degree murder, the State must present substantial evidence that defendant: (1) specifically intended to kill another person unlawfully; (2) committed an overt act calculated to carry out that intent, going beyond mere preparation; (3) acted with malice, premeditation, and deliberation; and (4) fell short of committing the murder. *State v. Cozart,* 131 N.C. App. 199, 202-03, 505 S.E.2d 906, 909 (1998), *disc. review denied*, 350 N.C. 311, 534 S.E.2d 600 (1999). N.C. Gen. Stat. § 14-32(a) lists the elements of assault with a deadly weapon with intent to kill inflicting serious injury as: (1) an assault; (2) with a deadly weapon; (3) with intent to kill; and (4) inflicting serious injury not resulting in death. N.C. Gen. Stat. § 14-32(a) (1999). Intent to kill is a mental attitude which must normally be proven by circumstantial evidence. *State v. Cauley,* 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956).

Here, defendant called the Hinson home indicating his intent to harm Mr. Hinson and others. A couple of days later, defendant arrived at Hinson's home with a shotgun, made verbal threats to law enforcement officials, stated that Hinson owed him money, and then situated himself high in a tree with his shotgun. This evidence shows that defendant planned to retrieve money from Hinson with force and that defendant followed through with the plan, resulting in the shooting of Deputy Fortune. Although defendant presented

evidence demonstrating his history of substance abuse and his intoxication at the time of the incident, we conclude that the witnesses' testimony, and the nature of the assault itself, when considered in the light most favorable to the State, constitute sufficient evidence to adequately support the conclusion that defendant had the requisite intent to kill. Accordingly, the trial court properly denied defendant's motion to dismiss.

Defendant also contends the trial court erred in sentencing him within the aggravated range when the mitigating factors outweighed the aggravating factor. Defendant argues there were insufficient facts to support the aggravating factor that defendant "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." Specifically, defendant asserts that he did not knowingly create a great risk of death to more than one person by shooting twice towards Deputy Fortune and the house next door from his vantage point in the tree.

Our Supreme Court has stated that this statutory aggravating factor "addresses essentially two considerations: a great risk of death knowingly created and the weapon by which it is created." *State v. Moose,* 310 N.C. 482, 497, 313 S.E.2d 507, 517 (1984). "[A] shotgun falls within the category of weapon envisioned [by the statute]." *Id.* at 498, 313 S.E.2d at 518. The "risk element" requires that the defendant "knowingly created a great risk of death to more than one person" in using the weapon. *Id.* at 496, 313 S.E.2d at 517. In *Moose,* the Court found there was a great

risk of death knowingly created where the shotgun was fired into a vehicle occupied by two persons. *Id.* at 497, 313 S.E.2d at 517.

Here, defendant sat high in a tree approximately 100 feet from Deputy Fortune. Deputy Fortune was at the right rear corner of the Hinson house. Defendant pointed a double-barrel shotgun in the direction of Deputy Fortune and fired twice. Hinson's neighbor, Current, watched the events unfold from his backyard, and testified that the corner of the Hinson house where Deputy Fortune was shot is located "right directly in front of [his] backyard," and that the tree in which defendant was situated is so close to his property that pellets from defendant's shotgun landed on Current's backyard patio. This evidence is sufficient to show that defendant "knowingly created a great risk of death to more than one person" with the shotgun, and, therefore, we hold that the trial court did not abuse its discretion in finding this aggravating factor.

No error.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).