NO. COA01-165

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 98 CRS 46654
99 CRS 121831
MARK DWAYNE HARRY and 99 CRS 015387
KENDRICK DERON WALDEN, 99 CRS 015388

Defendants-appellants.

Appeal by defendants from judgments entered 16 May 2000 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 January 2002.

Attorney General Roy Cooper, by Assistant Attorneys General Jay L. Osborne and Kimberly Weaver Duffley, for the State.

Leslie Carter Rawls, for defendant-appellant Mark Dwayne Harry.

Ron Everhart, for defendant-appellant Kendrick Deron Walden.

BRYANT, Judge.

Defendants appeal from one count each of assault with a deadly weapon and assault with a deadly weapon with intent to kill inflicting serious injury.

The State's evidence tended to show the following. The victim was a regular patron at a bar and restaurant called LaJoy Restaurant for about a year leading up to November 1998. The restaurant was owned by Tommy Tran. Defendants Harry and Walden were also patrons. A fight broke out in the early morning of 24

November 1998. The victim approached Tran and told him that Harry said that he did not like the way the victim was looking at him. When Tran went to investigate, Harry pushed the victim against the wall. When the victim pushed Harry back, approximately five of Harry's friends, including Walden, began to beat the victim. The victim was knocked face down onto a pool table as the five men punched him. Harry hit the victim three or four times with the steel part of a barstool in the back of the shoulders and head. Walden also hit the victim in the head with a barstool. The victim stopped moving after somebody else hit him with a chair in the top of the back and shoulders.

Tran also testified that someone other than the defendants hit the victim four or five times with a cue ball above his right temple. Tran attempted to aid the victim, but was kicked and hit in the head with a chair or barstool. Tran went to call the police. When he returned to tell the assailants that the police were on the way, four of the assailants ran away. Harry and Walden remained and continued to kick the victim. After Harry and Walden left, Walden returned and told Tran that he wanted to make sure the victim was okay. Walden then "powerfully" kicked the victim in the chin. When Walden finally left, he kicked the door and mooned the people inside.

Harry and Walden were indicted on one count each of assault with a deadly weapon and assault with a deadly weapon with intent to kill inflicting serious injury. The jury returned guilty verdicts on both counts for each defendant. The trial court found

three aggravating factors as to both defendants: 1) the defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy; 2) the offense was especially heinous, atrocious or cruel; and 3) the victim suffered serious injury that is permanent and debilitating. The trial court also found three mitigating factors, but found that the aggravating factors outweighed the mitigating factors. Both defendants were sentenced to 75 days imprisonment for assault with a deadly weapon and 125-159 months for assault with a deadly weapon with intent to kill inflicting serious bodily injury. Both defendants appealed.

Defendant Harry argues that the trial court: 1) erred by overruling Harry's objection to testimony that the victim's mother could not bear to be in the hospital room with him; 2) erred by overruling Harry's objections with regard to jury instructions and failure to give instructions requested by Harry; 3) committed plain error in its instructions by removing the element of a deadly weapon from the jury's findings of fact in the charge of assault with a deadly weapon with intent to kill inflicting serious injury; and 4) erred by denying his motion for appropriate relief on the grounds that the jurors were improperly subjected to an outside influence.

Defendant Walden argues that the trial court erred in its sentencing by findings in four separate factors in aggravation. We disagree as to both defendants and address each defendant in turn.

I. Mark Dwayne Harry

A.

Harry first argues that the trial court erred by overruling his objection to testimony that Anthony Bragg's mother could not bear to be in the hospital room with him. Relevant evidence is admissible at trial unless its probative value is substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 402, 403 (2001); *State v. Wallace*, 104 N.C. App. 498, 410 S.E.2d 226 (1991), *dismissal allowed and review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2001). Although trial judges must apply the standard of Rule 401, they have much discretion in determining the relevance of the evidence. *Wallace*, 104 N.C. App. at 502, 410 S.E.2d at 228. "Thus, even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *Id.*

Assuming the evidence of which Harry complains is irrelevant, "[t]he admission of irrelevant evidence is generally considered harmless error." *State v. Melvin*, 86 N.C. App. 291, 297, 357 S.E.2d 379, 383 (1987). The burden rests on the defendant to show that the admission of the evidence was prejudicial. *Id.* (citing

State v. Alston, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983)). "A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2001); *see State v. Harper*, 96 N.C. App. 36, 384 S.E.2d 297 (1989) (holding that, although officer's summaries of drug transactions with defendant were inadmissible as hearsay, there was no reasonable possibility that a different result would have been reached had summaries not been admitted). In this case, Harry objected to the admission of Delrece Bragg's statement that one of the reasons she was in town at the hospital was because her mother "couldn't handle my brother being in the hospital and everything that was going on . . ." so she had to send her mother home. Harry argues that this evidence is "irrelevant to the criminal charges at hand and highly prejudicial."

Just prior to the testimony Harry now challenges, the victim's sister gave similar testimony without objection, stating: "My brother looked awful. And his face was — I want to say his face was wrapped. They had tubes and he was just laying there. I had to — basically my mom was — my mom couldn't stay in the room. I had to send her out." As we stated above, the standard regarding whether the admission of irrelevant evidence is prejudicial is whether a different result would have been reached had the irrelevant evidence not been admitted. Harry had the burden of showing prejudice, and he has failed to meet that burden. We fail

to see any prejudice to Harry by the trial court in overruling Harry's objection. This assignment of error is without merit.

B.

Harry next argues that the trial court erred in overruling his objections regarding jury instructions and failing to give instructions requested by him.

If a party requests a jury instruction that is a correct statement of the law and is supported by the evidence, the trial court must give the instruction. *State v. Conner*, 345 N.C. 319, 480 S.E.2d 626, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997). However, the requested instruction does not have to be given verbatim; rather, the instruction is sufficient if it gives the substance of the requested instruction. *Id.*; *State v. Hooker*, 243 N.C. 429, 90 S.E.2d 690 (1956). A defendant appealing the trial court's failure to give a requested instruction "must show that substantial evidence supported the omitted instruction and that the instruction was correct as a matter of law." *State v. Farmer*, 138 N.C. App. 127, 133, 530 S.E.2d 584, 588, *review denied*, 352 N.C. 358, 544 S.E.2d 550 (2000) (citing *State v. Thompson*, 118 N.C. App. 33, 454 S.E.2d 271 (1995)).

In this case, Harry requested an instruction on acting in concert that included the following:

> If additional and more serious crimes outside the original purpose were committed, a particular Defendant may not be found guilty of those additional crimes unless the State proves that those additional crimes were in pursuance of the common purpose, or were a natural and probable consequence thereof. If you so find beyond a reasonable doubt, you

> must return a verdict of guilty as to the more serious crime(s). However, if you do not so find, or have a reasonable doubt as to whether the additional crimes were in pursuance of the common purpose, or were a natural and probably [sic] consequence thereof, then it would be your duty to return a verdict of "not guilty" as to those more serious crimes.

Instead, the trial court gave in relevant part this instruction:

> Members of the Jury, for a person to be guilty of a crime, it is not necessary that he himself do all the acts necessary to constitute the crime. If two or more persons join in a purpose to commit an assault, each of them, if actually or constructively present, is not only guilty of that crime if the other commits the crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose to commit an assault or as a natural or probable consequence thereof.

The trial court's instruction is substantially similar to the Pattern Jury Instruction for Acting in Concert. The Pattern Jury Instruction for Acting in Concert states:

> For a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons join in a purpose to commit (*name crime*), each of them, if actually or constructively present, is (not only) guilty of that crime if the other commits the crime(.) (, but he is also guilty of any other crime committed by the other in pursuance of the common purpose to commit (*name crime*), or as a natural or probable consequence thereof.)
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about (*name date*), (*name defendant*) acting either by himself or acting together with another (*other persons*) . . . (*continue with appropriate mandate*).

N.C.P.I.--Crim. 202.10 (1998). This instruction was upheld by our

Supreme Court in *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Harry argues that the Pattern Jury Instruction is insufficient because he withdrew; therefore, Harry's instruction should have been given. We disagree.

Harry had the burden of showing: 1) substantial evidence in support of the requested instruction; and 2) that the instruction was correct as a matter of law. *Farmer*, 138 N.C. App. at 133, 530 S.E.2d at 588. He failed to do so. In *State v. Wilson*, 354 N.C. 493, 556 S.E.2d 272 (2001), the defendant requested a jury instruction on second-degree murder as a lesser-included offense to first-degree murder. The trial court refused. On appeal, our Supreme Court concluded that "[a]ny withdrawal by defendant was done silently in his own mind without any outward manifestation or communication to [his confederate]," and held that when a person acts in concert with another to perpetrate a felony, he may not quietly withdraw from the scene. *Id.* at 508, 556 S.E.2d at 283. Rather, he must renounce the common purpose, and make it clear to others that he has done so and that he no longer wishes to participate. *Id.*

In this case, Harry presented no evidence that he said anything to Walden or the other assailants that would support his requested instruction. In fact, he testified that he did not do anything to break up the fight because he was unable to do so. A restaurant employee testified that he saw Harry standing on the outside of the fight. Harry testified that he did not do anything

to the victim after they initially shoved each other. However, the State produced evidence that Harry had not withdrawn, but, in fact, participated in the beating after all assailants but Walden had left. "The trial court, not the appellate court, weighs the credibility of evidence. Therefore, '[w]here there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence.'" *State v. Coronel*, 145 N.C. App. 237, 250, 550 S.E.2d 561, 570 (2001) (alteration in original) (citations omitted), *review denied*, 355 N.C. 217, 560 S.E.2d 144 (2002). We find no error in the trial court's instruction to the jury on acting in concert. Accordingly, this assignment of error is overruled.

C.

Harry next argues that the trial court committed plain error by removing the element of a deadly weapon from the jury's findings of fact in the charge of assault with a deadly weapon with intent to kill inflicting serious injury. We disagree.

Our Rules of Appellate Procedure require that "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . . ." N.C. R. App. P. 10(b)(2). Because Harry failed to raise an objection to the charge of assault with a deadly weapon with intent to kill inflicting serious injury, this Court may review this assignment of error only by applying the plain error standard. Our Supreme Court has

adopted the plain error standard as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done. . . ."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alteration in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Our Supreme Court has further stated that "[i]n deciding whether a defect in the jury instruction constitutes 'plain error', the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." Odom, 307 N.C. at 661, 300 S.E.2d at 378-79 (citing *United States v. Jackson*, 569 F.2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L. Ed. 2d 1137 (1978)). After reviewing the entire record, we find no plain error.

Harry complains that the trial court "improperly removed from the jury the question whether or not the instruments described--a barstool, hands, feet, cue balls, and cue sticks--constituted Deadly Weapons, an essential element of the crime charged and one which Harry was entitled to have decided by the jury. "Harry specifically complains of the following jury instruction by the trial court:

> So I charge, Members of the Jury, that if you find from the evidence beyond a reasonable doubt that on or about November 24, 1998, the Defendant Mark Dwayne Harry, acting either by himself or acting together with one or more persons, intentionally assaulted [the victim],

> by striking him with a barstool, hands, feet, cue balls, and cue sticks, and that the Defendant Mark Dwayne Harry, or someone acting in concert with the Defendant Mark Dwayne Harry, intended to kill the victim . . . , and did seriously injure him, it would be your duty to return a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury.

Harry argues that the trial court's instruction precluded the jury from having to determine whether a deadly weapon was used, an element the State was required to prove. We disagree.

A person commits felonious assault with a deadly weapon with intent to kill and inflicting serious injury when he: 1) assaults another; 2) with a deadly weapon; 3) with intent to kill; and 4) inflicts serious injury. N.C.G.S. § 14-32(a) (2001); *see State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001). The State must prove every element of a criminal offense beyond a reasonable doubt. *In re Jones*, 135 N.C. App. 400, 405, 520 S.E.2d 787, 789 (1999) (citing *In re Winship*, 397 U.S. 358, 362, 25 L. Ed. 2d 368, 374 (1970)).

"A deadly weapon is 'any instrument which is likely to produce death or great bodily harm, under the circumstances of its use . . . . The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself . . . .'" *State v. Palmer*, 293 N.C. 633, 642-43, 239 S.E.2d 406, 412-13 (1977) (quoting *State v. Smith*, 187 N.C. 469, 121 S.E. 737 (1924)). Whether a weapon is deadly may be a question of law or fact.

> "Where the alleged deadly weapon and the manner of its use are of such character as to

> admit of but one conclusion, the question as to whether or not it is deadly . . . is one of law, and the Court must take the responsibility of so declaring . . . . But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury."

Id. at 643, 239 S.E.2d at 413.

The North Carolina Pattern Jury Instructions for assault with a deadly weapon with intent to kill inflicting serious injury states:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally *(describe assault)* the victim with a *(name object)* (and that *(name weapon)* was a deadly weapon) and that the defendant intended to kill the victim and did seriously injure him, (nothing else appearing) it would be your duty to return a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury . . . .

N.C.P.I.--Crim. 208.10 (1999). A footnote to this pattern jury instruction states that "and that (*name weapon*) was a deadly weapon" should be used where the weapon is not deadly per se. *Id.* In the instant case, the trial court failed to state this language. Assuming arguendo that this were error, we next determine whether the "error" in the instruction would have had a probable impact on the jury's finding of guilt.

Prior to giving the instruction complained of by Harry, the trial court instructed the jury on deadly weapons:

> Now members of the Jury, in determining whether or not a barstool, hands, feet, a cue ball and or cue sticks are--or excuse me, was or were deadly weapons, you should consider

> the nature of these objects, the manner in which it or they was [sic] used, and the size and strength of the Defendant Mark Dwayne Harry, as compared to the victim . . . .

Looking at the jury instructions as a whole, *see State v. Davis*, 321 N.C. 52, 59, 361 S.E.2d 724, 728 (1987), it is clear that the court properly instructed the jury that it was within their province to determine whether a barstool, hands, feet, a cue ball and cue sticks were deadly weapons. Accordingly, this assignment of error is overruled.

D.

Finally, Harry argues that the trial court erred by denying his motion for appropriate relief on the grounds that the jurors were improperly subjected to an outside influence by one juror's explanation of the law in relation to a relative who had been convicted and sentenced on a similar theory of acting in concert.

When reviewing the trial court's denial of a motion for appropriate relief, "the findings of fact are binding if they are supported by any competent evidence, and the trial court's ruling on the facts may be disturbed only when there has been a manifest abuse of discretion, or when it is based on an error of law." *State v. Harding*, 110 N.C. App. 155, 165, 429 S.E.2d 416, 423 (1993) (citing *State v. Pait*, 81 N.C. App. 286, 288-89, 343 S.E.2d 573, 575 (1986)). A review of the record reveals that the trial court's ruling on the motion for appropriate relief has not been included. We therefore cannot determine whether the trial court abused its discretion in ruling on the motion. The appellant has the burden of ensuring that the record on appeal is properly

settled and filed with this Court. *Groves v. Community Housing Corp. of Haywood County*, 144 N.C. App. 79, 548 S.E.2d 535 (2001); *see also State v. Kornegay*, 313 N.C. 1, 326 S.E.2d 881 (1985). Accordingly, this assignment of error is overruled.

II. Kendrick Duran Walden

Defendant Walden argues that the trial court erred by finding: 1) as an aggravating factor that the defendant joined with more than one person in committing the crime when the State proceeded on a theory of acting in concert; 2) the offense was especially heinous, atrocious or cruel, where there was insufficient evidence to support the finding; 3) as an aggravating factor that the offense was especially heinous, atrocious or cruel, where the same evidence of injury was used to establish the element of "serious injury"; and 4) as an aggravating factor that the victim suffered serious injury that is permanent and debilitating, where the same evidence of injury was used to establish the element of "serious injury." Upon a careful review of the record, we disagree and find no error.

Our standard of review for error in sentencing is "whether [defendant's] sentence is supported by evidence introduced at the trial and sentencing hearing." N.C.G.S. § 15A-1444(a1) (2001); *see State v. Choppy*, 141 N.C. App. 32, 42, 539 S.E.2d 44, 51 (2000), *appeal dismissed and review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001) ("When a defendant assigns error to the sentence imposed by the trial court, our standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing

hearing.'" (quoting *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997))). The State must prove by a preponderance of the evidence that aggravating factors exist. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988). The appellate court will not disturb the sentence if the trial court's determination is supported by the record. *State v. Ruffin*, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

A.

First, Walden argues that the trial court erred by finding as an aggravating factor that the defendant joined with more than one person in committing the crime when the State proceeded on a theory of acting in concert, therefore using the same evidence to establish both the elements of the underlying charge and the factor in aggravation. We disagree.

"Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation . . . ." N.C.G.S. § 15A-1340.16(d) (2001); *State v. Bruton*, 344 N.C. 381, 394, 474 S.E.2d 336, 345 (1996). Our Supreme Court has stated that the statutory factors in N.C.G.S. § 15A-1340.4(a)(1) "contemplate a duplication in proof without violating the proscription that 'evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation.'" *Bruton*, 344 N.C. at 394, 474 S.E.2d at 345 (citing *State v. Thompson*, 309 N.C. 421, 422 n.1, 307 S.E.2d 156, 158 n.1 (1983)). The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: 1) assault on another; 2) with a deadly weapon; 3) with intent to

kill; and 4) inflicting serious injury. N.C.G.S. 14-32(a) (2001); *see State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001). That Walden joined with more than one person in committing the offense is not an element of this crime. Rather, it was used to prove defendant's culpability under a theory of acting in concert. Accordingly, this assignment of error is overruled.

B.

Second, Walden argues that there was insufficient evidence to support the trial court's finding that the offense was especially heinous, atrocious or cruel. Specifically, Walden argues that, while the beating was unfortunate, "the facts of the case do not disclose excessive brutality, physical pain, psychological suffering or dehumanizing aspects not normally present in the offense of assault with a deadly weapon with intent to kill inflicting serious injury." We disagree.

On appeal, this Court presumes that there was competent evidence in support of the trial court's findings; therefore, absent evidence in the record to the contrary, this Court presumes that the trial court properly aggravated the sentence. *Evans*, 120 N.C. App. at 757, 463 S.E.2d at 833-34. "In determining whether an offense is especially heinous, atrocious or cruel, 'the focus should be on whether the facts of the case disclose *excessive* brutality or physical pain, psychological suffering or dehumanizing aspects *not normally present in that offense*.[']" *State v. Hager*, 320 N.C. 77, 88, 357 S.E.2d 615, 621 (1987) (quoting *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983)). The

court must consider all the circumstances surrounding the offense in making this decision. *Id.* "'Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to the question of sentencing, including whether the offense charged was especially heinous, atrocious, or cruel.'" *Evans*, 120 N.C. App. at 756, 463 S.E.2d at 833 (quoting *State v. Blackwelder*, 309 N.C. 410, 413 n.1, 306 S.E.2d 783, 786 n.1 (1983)). "[E]vidence that the defendant took pleasure in the assaults . . . is highly probative of whether the crimes were especially heinous, atrocious or cruel." *State v. Choppy*, 141 N.C. App. 32, 43, 539 S.E.2d 44, 52 (2000); *appeal dismissed and review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001).

In the instant case, the State's evidence tended to show the following: During the five-minute melee, Walden hit the victim very hard in the head and neck area with a barstool while the victim lay face down on the pool table. Harry struck the victim in the upper back with a barstool while the victim lay face down on the pool table. An unidentified assailant struck the victim very hard above the right temple four or five times with a cue ball. Harry and Walden continued to beat the victim after Tran called the police and the other assailants had fled. Harry and Walden repeatedly kicked the victim as he lay on the floor. Walden left the restaurant momentarily, then returned and convinced Tran that he wanted to see if the victim was okay. Walden then kicked the victim in the head and chin. On his way out of the restaurant,

Walden kicked down the door, dropped his pants and "mooned" the patrons inside.

The evidence that Walden continued to beat and kick the victim after everyone but Harry had fled, and that Walden left but returned and delivered a powerful kick to the victim's jaw, shows excessive brutality in the assault. The evidence that Walden mooned the remaining patrons of the restaurant suggests a perverse pleasure gained from commission of the assault. We find there was competent evidence to support the trial court's finding that the offense was especially heinous, atrocious or cruel. Accordingly, this assignment of error is overruled.

C.

Third, Walden argues that the trial court erred in finding as an aggravating factor that the offense was especially heinous, atrocious or cruel, where the same evidence of injury was used to establish both the serious injury element of the underlying charge and the factor in aggravation. We disagree.

Walden cites to *State v. Hammonds*, 61 N.C. App. 615, 615, 301 S.E.2d 457, 458 (1983), in support of his argument. In *Hammonds*, the defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury after he approached the victim and shot him in the face without provocation. The trial court found as an aggravating factor that the crime was especially heinous, atrocious and cruel. On appeal, this Court found error and remanded for resentencing after concluding that there was no evidence of heinous, atrocious or cruel behavior apart from the

evidence used to prove the serious injury element of the crime. *Id.* at 616, 301 S.E.2d at 458. In reaching this conclusion, the *Hammonds* Court stated, "The use of a deadly weapon and the seriousness of injury involved here may be evidence of an especially heinous, atrocious and cruel crime. However, the same evidence proved the deadly weapon and serious injury elements of the crime." *Id.* We do not find *Hammonds* to be on point. As we stated above, a duplication in proof does not necessarily violate the rule that "evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." *Bruton*, 344 N.C. at 394, 474 S.E.2d at 345.

The State's evidence tended to show that the victim's jaw was fractured on both sides, and that the skin was torn open. One of the victim's wisdom teeth had been fractured and had gone down his windpipe. The neurosurgeon testified that the facial injuries were consistent with a kick to the chin. The State's evidence further showed that Walden had returned to the restaurant to "check on" the victim, then kicked him in the jaw. Furthermore, the neurosurgeon testified that pool balls and items struck to the head could cause the brain to shake back and forth and result in brain damage such as that suffered by the victim. After reviewing the record, we conclude that the State proved by a preponderance of the evidence that the injuries to the victim's jaw and brain were both serious injuries that more likely than not occurred at separate times. Therefore, the evidence was sufficient to establish as an aggravating factor that the offense was especially heinous,

atrocious or cruel. Accordingly, this assignment of error is overruled.

D.

Finally, Walden argues that the trial court erred by finding as an aggravating factor that the victim suffered serious injury that is permanent and debilitating, where the same evidence of injury was used to establish the element of "serious injury," therefore using the same evidence to establish both the elements of the underlying charge and the factor in aggravation. We disagree.

In *State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994), defendant appealed from a conviction of assault with a deadly weapon inflicting serious injury. The victim suffered a broken neck when another inmate slammed his head against the cell bars and the floor. The defendant argued that the same evidence used to convict him of the crime could not also be used to aggravate his sentence. Our Supreme Court disagreed, stating that "[t]he evidence relating to the victim's broken neck, aside from evidence relating to the resulting paralysis, was sufficient to establish the element of the crime that the defendant inflicted a 'serious injury' upon the victim." *Id.* at 770, 448 S.E.2d 826.

In the instant case, the victim suffered multiple blows to the head that rendered him comatose. When the victim arrived at the hospital, he was unresponsive to stimulation, was unable to speak because he was on a ventilator, and he had no motor response. At trial, the victim's neurosurgeon testified that the victim had suffered bruising on the left side of his brain, which controls

speech, and had blood at the base of his brain. The victim later suffered an aneurism of the carotid artery, which required further surgery. Another surgery was required to put a shunt put into the victim's brain to drain an accumulation of blood and spinal fluid.

It is apparent from the record that the victim suffered severe injuries as a result of the assault. Because of his injuries, the victim's speech is impaired, such that anyone unaccustomed to his speech cannot understand his words. The victim needs help with basic care such as bathing and brushing his teeth. Evidence that the victim suffered brain injuries that rendered him comatose as a result of being struck in the head with a stool and cue ball is sufficient to establish the "serious injury" element of the crime. Evidence that the victim suffered permanent damage that left him with impaired speech and diminished physical abilities to the extent that he could not care for himself is sufficient to establish the aggravating factor that the victim suffered a serious injury that is permanent and debilitating. Accordingly, this assignment of error is overruled.

Conclusion

For the reasons stated above, we find no error as to either Harry or Walden.

NO ERROR.

Judges MARTIN and TIMMONS-GOODSON concur.

Report per Rule 30(e).