An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-651

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 99 CRS 37337, 37338, 37340, 49952, and 49955

ROBERT WAYNE STANLEY

Appeal by defendant from judgments entered 19 January 2001 by Judge Howard R. Greeson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Melissa L. Trippe, for the State.

Daniel Shatz, for defendant-appellant.

TYSON, Judge.

I. Facts

On 18 November 1997, Robert Wayne Stanley ("defendant") approached Cynthia Parker ("Parker") as she sat in an automobile with Alfredo Arrendondo ("Arrendondo"), Fidel Mosqueda ("Mosqueda"), and Mosqueda's girlfriend. Defendant asked Arrendondo why he was with Parker. Arrendondo responded that Parker was his girlfriend. An argument ensued during which defendant told Arrendondo that Parker was "his girlfriend" and to "watch his back."

Jeffrey Nelson ("Nelson") testified for the State that he was

present with defendant on 18 November 1997. After the argument, he and defendant drove into Bass Trailer Park where they saw the car that Parker had been sitting in earlier that day. Nelson also testified that defendant became very angry and said "I'm going to get that b--ch," and "I'm going to blow her trailer up with her and that wetback in it."

On 19 November 1997, defendant drove back to the trailer park with Benjamin McClary ("McClary") and Dwight Evans. McClary testified that he and Mr. Evans knocked on the door of the trailer but that no one came to the door. McClary further testified that defendant was angry and said he was going to "get their a--es," "blow their a--es up," and "make a bomb." McClary testified that on the Friday after the fire defendant told him "that b--ch and that wetback got what they deserved."

David Smart ("Smart") testified for the State pursuant to a plea agreement that he accompanied defendant and Mr. Evans on 19 November 1997. Smart testified that he purchased $3.00 worth of gasoline for defendant and that defendant and Mr. Evans assembled a Molotov cocktail with the gasoline, an Old English bottle, rocks, and a rag. Smart also testified that: (1) defendant drove to a trailer park and pointed out a trailer, (2) he and defendant exited the car and walked up to the trailer, (3) defendant told him to throw the Molotov cocktail into the trailer, and (4) when he refused the defendant lit the Molotov cocktail and threw it through the window into the trailer. Mosqueda received third-degree burns over seventy percent of his body and Francisco Lara received

second-degree burns over three percent of his body.

Parker testified that defendant had been interested in a romantic relationship with her, and became obsessed with where she was and who she was with. Parker also testified that on 19 November 1997 she heard a loud noise come through the window of the trailer, heard people screaming and running, and saw flames. Parker testified that she observed Mosqueda on fire and his burns after they were able to douse the flames with water.

Defendant testified at trial that he and Nelson went to eat on 19 November 1997, and that he never left his house after returning home. Defendant denied making and throwing a Molotov cocktail through the window of the trailer where Parker was staying. Defendant also testified that he cared about Parker, had feelings for her at one time, and that he did not deliberately follow her around or interfere with her relationships.

Defendant was tried on the charges of attempted first-degree murder of Cynthia Lee Parker, first-degree arson, one count of malicious injury by the use of an explosive or incendiary device of Francisco Lara, one count of malicious injury by the use of an explosive or incendiary device of Fidel Mosqueda, and manufacturing a weapon of mass destruction. The trial court denied defendant’s motion to dismiss the attempted murder and malicious injury charges. The jury found defendant guilty of all charges. Defendant was sentenced to a minimum of 276 months and a maximum of 341 months for attempted first-degree murder to run consecutively with a minimum of 129 months and a maximum of 164 months for first-

degree arson. Defendant was also sentenced to a minimum of twenty-six months and a maximum of thirty-two months for manufacturing a weapon of mass destruction to run concurrently with the sentences for attempted murder and arson. Defendant was sentenced to a minimum of 129 months and a maximum of 164 months on each count of malicious injury by use of an explosive or incendiary device, to run consecutively with each other and the sentence received for manufacturing a weapon of mass destruction, but to run concurrently with the sentences received for attempted murder and arson. Defendant appeals. We find no error.

II. Issues

The issues presented are whether: (1) the trial court erred in denying defendant's motion to dismiss, (2) the trial court's jury instructions on attempted murder were erroneous, (3) there was plain error in the jury instructions on malicious injury by the use of an explosive or incendiary device, (4) the trial court erroneously expressed an opinion on the evidence, and (5) the trial court erred in imposing aggravated sentences.

III. Motion to Dismiss

Defendant argues that the trial court erred in denying his motion to dismiss all charges at the close of the State's evidence and again at the close of all the evidence. Defendant argues that there was insufficient evidence to establish: (1) an intent to kill Parker to support his conviction for attempted first-degree murder, and (2) that Francisco Lara was maliciously injured by the use of an explosive or incendiary device.

When a defendant moves for dismissal, "the trial court [must] determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). In determining whether the State's evidence is substantial, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom. *See State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Substantial evidence consists of "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Hargett*, ___ N.C. App. ___, ___, 559 S.E.2d 282, 285 (quoting *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980)), *disc. review allowed*, 355 N.C. 351, 562 S.E.2d 426 (2002). The trial court looks to the sufficiency of the evidence to carry the case to the jury and not to the weight of the evidence. *Id*. "The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct." *Id.* (citing *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982)).

A. Attempted First-degree Murder

The elements of attempted first-degree murder are: (1) a specific intent to kill another person unlawfully, (2) an overt act calculated to carry out that intent, going beyond mere preparation, (3) the existence of malice, premeditation, and deliberation

accompanying the act; and (4) a failure to complete the intended killing. *State v. Gartlan*, 132 N.C. App. 272, 275, 512 S.E.2d 74, 77 (1999) (citing *State v. Cozart*, 131 N.C. App. 199, 505 S.E.2d 906 (1998)).

Examining the evidence in the light most favorable to the State, the record reveals substantial evidence of defendant's intent to unlawfully kill Parker from the statements he made both before and after the fire. This assignment of error is overruled.

B. Malicious Injury

The elements of malicious injury by the use of an explosive or incendiary device are that defendant: (1) willfully, (2) maliciously, (2) injure another person, (4) by the use of any explosive or incendiary device or material. N.C. Gen. Stat. § 14-49(a) (2001).

While Francisco Lara did not testify, Arrendondo testified that he saw Mr. Lara's arm and leg on fire after the Molotov cocktail came through the window into the trailer. Additionally, Dr. Wayne Meredith testified that he treated Francisco Lara in the emergency room on 19 November 1997 and that Mr. Lara had second-degree burns over three percent of his body, arm and left hand.

We conclude that there was substantial evidence of every element of malicious injury by use of an explosive or incendiary device. This assignment of error is overruled.

V. Jury Instructions

Defendant contends that the trial court committed plain error in instructing the jury on attempted first-degree murder and

malicious injury by the use of an explosive or incendiary device. Defendant concedes that counsel did not object to the trial court's instructions at trial. *See* N.C.R. App. P. 10(b)(2) (2001) ("A party may not assign as error any portion of a jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict.") Therefore, appellate review on this issue is limited to plain error. *See* N.C.R. App. P. 10(c)(4) (2001).

Plain error occurs where the court's instructional error is so fundamental that it has "a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). "[E]ven when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)), *quoted in State v. Anderson*, 350 N.C. 152, 177, 513 S.E.2d 296, 311, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). In order to prevail on his claims, defendant must show that absent the error the jury probably would have reached a different result. *Id.*

A. Attempted First-degree Murder

Defendant argues that it was plain error for the trial court to instruct the jury on the doctrine of transferred intent and in failing to instruct the jury that it must find Parker, the victim named in the indictment, to be the victim of attempted murder. We disagree.

The trial court in this case instructed the jury:

> Now, if you find from the evidence and beyond a reasonable doubt that on or about the date in question the defendant intentionally attempted to kill the *victim* with a deadly weapon and performed an act designed to bring this about, but which fell short of the completed crime of first degree murder and which in the ordinary and likely course of things would have proximately resulted in the death of the *victim or victims* had he not been stopped or prevented from completing his apparent course of action and that in performing this act the defendant acted with malice and premeditation and deliberation, it would be your duty to return a verdict of guilty of attempted first degree murder. If you do not so find or if you have a reasonable doubt as to one or more of these things, you will return a verdict of not guilty.

(Emphasis supplied). Defendant contends that the use of "victim or victims" amounts to an instruction by the trial court on the doctrine of transferred intent and that the doctrine of transferred intent does not apply to attempted murder. We disagree.

In reviewing jury instructions, we must read the trial court's charge as a whole. *State v. Hardy*, 353 N.C. 122, 131-32, 540 S.E.2d 334, 342 (2000). We construe the jury charge contextually and will not hold a portion of the charge prejudicial if the charge as a whole is correct. *Id.* at 132, 540 S.E.2d at 342. "'If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.'" *State v. Rich*, 351 N.C. 386, 394, 527 S.E.2d 299, 303 (2000) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970)). After reviewing the trial court's jury instructions as a whole, we

conclude that the trial court correctly instructed the jury that the defendant must have had the specific intent to kill the victim and performed a substantial act towards completing the crime of first-degree murder. *See* N.C.P.I. - Crim. 206.17A (2000).

Defendant also argues that it was plain error for the trial court to use "victim" and not instruct that defendant had to have the specific intent to kill Parker, the victim named in the indictment. Defendant bases this argument on the fact that three other individuals were present in the trailer when the Molotov cocktail came through the window and that the jury could have believed that Arrendondo, Mosqueda, or Lara was the "victim." We disagree.

The trial court properly instructed the jury that defendant must have intended to commit first-degree murder and that first-degree murder is "the unlawful killing of a human being with malice and with premeditation and with deliberation." Because a specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, proof of premeditation and deliberation is also proof of intent to kill. *State v. Lowery*, 309 N.C. 763, 768, 309 S.E.2d 232, 237 (1983). In discussing premeditation and deliberation, our Supreme Court has stated that:

> [p]remeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980). Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent

> passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982).

State v. Brown, 315 N.C. 40, 58, 337 S.E.2d 808, 822 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Assuming *arguendo* that the trial court erred in its charge, we are not persuaded that absent the error the jury probably would have reached a different verdict. Here, the evidence indicates a specific intent to kill Parker by defendant's statements that "I'm going to get that b--ch," and "I'm going to blow her trailer up with her and that wetback in it." The errors cited by defendant did not alter the essential meaning or intent of the pattern jury instructions. In light of the evidence, we conclude that it is not likely that the instructions confused the jury and that defendant is not entitled to relief under the plain error standard.

B. Malicious Injury

Defendant also argues that it was plain error for the trial court not to instruct the jury separately with respect to each count of malicious injury and stating to the jury that it should find defendant guilty if defendant injured "Francisco Lara and/or Fidel Mosqueda." We disagree.

The trial court specifically explained to the jury that it was instructing only once on the charge of malicious injury by the use of an explosive or incendiary device because the same law applies to the two charges, one maliciously injuring Francisco Lara, the other maliciously injuring Fidel Mosqueda. The trial court made it

clear to the jury that the instructions were the same for each charge but that they were to "independently consider" the facts for each charge. The jury returned separate verdicts of guilty as to each charge individually naming Francisco Lara and Fidel Mosqueda.

Defendant has failed to demonstrate how the inclusion of separate instructions as to each victim of malicious injury by the use of any explosive or incendiary device would have resulted in a different verdict. These assignments of error are overruled.

VI. Opinion

Defendant next argues that the trial court impermissibly expressed an opinion regarding the weight of the evidence. We disagree.

During deliberations, the jury requested to see State's Exhibit Number 37 which was a letter written to Smart while he was in jail by another inmate in the defendant's presence. The trial court responded to the jury:

> [A]ll right. Now, ladies and gentlemen of the jury, Mr. Robinson, you've asked for State's Exhibit 37, which was the letter that came in and was not passed to you. Sometimes this happens during the course of a trial. It was introduced by the State. It's a copy of a letter. It came in unobjected to. I didn't examine it. In order to save y'all time, we didn't send it to you. I've examined the letter and I'm not going to circulate it to you for this reason, it's unintelligible and I can't make it -- anything out of it. With the parties and because of that, I'm not going to -- I'm just not going to send it back to you and confuse the jury on this letter.

The trial court ultimately allowed the jury to see the letter and stated to the jury that "I'll -- I will consider any specific

question that y'all have that you -- that you feel like is necessary to -- to reach a fair and impartial verdict . . . ."

A trial judge must not, during any stage of a trial, express "any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2001). This statute has been construed to mean that a trial judge must not express any opinion as to the weight or credibility of any competent evidence presented before the jury. *State v. Harris*, 308 N.C. 159, 167, 301 S.E.2d 91, 97 (1983). A new trial is not required if, considering the circumstances under which a remark was made, it could not have prejudiced the defendant's case. *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984). Upon review, all facts and attendant circumstances must be considered and remarks must be considered in context. *State v. Brady*, 299 N.C. 547, 560, 264 S.E.2d 66, 74 (1980).

A review of the comments about which defendant complains reveals that the trial court did not express impermissible opinions as to the weight or credibility of the exhibit to the prejudice of defendant's case. This assignment of error is overruled.

V. Sentencing

Defendant contends that the evidence did not support the sole aggravating factor found: that defendant joined with more than one other person in committing the offense and was not charged with conspiracy. Defendant, however, did not object to these findings during the sentencing hearing. This issue, therefore, is not properly before this Court. N.C.R. App. P. 10(b)(1) (2001); *State*

v. Degree, 110 N.C. App. 638, 643, 430 S.E.2d 491, 494 (1993). Defendant asserts plain error. Since this was the only aggravating factor found we review for plain error. *See* N.C.R. App. P. 10(c)(4) (2001).

The State bears the burden of persuasion on aggravating factors by a preponderance of the evidence. *State v. Parker*, 315 N.C. 249, 255, 337 S.E.2d 497, 500 (1985). The evidence presented at trial showed that: (1) Mr. Evans and Smart went with defendant on the night of 19 November 1997, (2) Smart purchased gasoline at the request of defendant, (3) Mr. Evans and defendant constructed a Molotov cocktail, (4) the three men drove to the trailer, (5) defendant and Smart went up to the trailer, and (6) defendant instructed Smart to throw the Molotov cocktail through the window and when he refused, defendant lit and threw it through the window into the trailer. We hold that the State met its burden of supporting the aggravating factor. This assignment of error is overruled.

No error.

Chief Judge EAGLES and Judge HUDSON concur.

Report per Rule 30(e).