NO. COA08-1598

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v. Edgecombe County
No. 06 CRS 50562

JOHNNIE BURNETTE THORNE

Appeal by defendant from judgment entered 10 June 2008 by Judge Clifton W. Everett, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 19 August 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathleen N. Bolton, for the State.

Linda B. Weisel, for defendant-appellant.

JACKSON, Judge.

Johnnie Burnette Thorne ("defendant") appeals his 10 June 2008 conviction for assault with a deadly weapon with intent to kill inflicting serious injury. For the reasons stated below, we hold no prejudicial error in part, dismiss in part, and no error in part.

On 18 February 2006, defendant repeatedly asked his friend, Joseph Dickens ("Dickens") if Dickens knew where defendant's keys were. The night before, Dickens and defendant had ridden in a van belonging to Alicia Davis ("Davis"), Dickens's girlfriend, and

defendant thought his keys were in the van. Dickens denied knowing where the keys were, stating that Davis had not found any keys after searching the van.

At approximately 9:25 that night, defendant saw Dickens's brother, Tracy Robinson ("Robinson"), at 3'Os, a local convenience store. Defendant was wearing a white T-shirt, a brown Carhartt jacket, and blue jeans. Defendant recognized Robinson and said to him, "Tell your brother to give me my mother-fucking keys or else." Robinson responded, "So what[,] are you threatening my brother[?]" Defendant started moving toward Robinson, saying, "I'll get you right now."

Robinson quickly left the store, leaving the cigarettes he had purchased sitting on the counter. Robinson saw defendant follow him out of the store and quickly crossed the street into a neighborhood, ultimately arriving at Davis's home, where Dickens lived. Robinson called Dickens and told him what had happened at 3'Os. Dickens met Robinson at Davis's home, and they went together to 3'Os to retrieve Robinson's cigarettes. They then returned to Davis's house. On the way to the house, Dickens saw defendant down a street with a rifle equipped with a scope. Dickens did not mention this to his brother. Upon returning to Davis's house, they sat outside on the porch.

Robinson heard a walkie-talkie "chirp" and a gun cock. Robinson testified that defendant carried a walkie-talkie that sounds like the chirp he heard that night. Robinson saw a person with a gun who was wearing a white T-shirt, a brown Carhartt

jacket, and blue jeans. Dickens recognized this person as defendant and identified the gun as a .22 rifle. Robinson and Dickens got up and began to walk away from defendant.

As Robinson and Dickens walked away from defendant, Robinson felt a "sharp pain," fell to the ground, and could not feel his legs. Davis called the police, and an ambulance arrived. Robinson was taken to a hospital. Robinson sustained a gunshot wound to the back, between the shoulder blades. The bullet severed his spinal cord, resulting in his being a paraplegic for the rest of his life. The doctor determined that it was safer to leave the bullet than to remove it from Robinson's body; therefore, no bullet identification was possible.

Defendant was arrested and charged with assault with a deadly weapon with intent to kill inflicting serious injury. On 10 June 2008, a jury convicted him of this crime. Defendant appeals.

Defendant makes three evidentiary arguments in support of his appeal. Defendant first argues that the trial court erred by admitting evidence of "other crimes," with this evidence consisting of testimony that the witness and defendant would "always smoke joints together." We disagree.

In order to be preserved for appeal, an issue must have been raised by a "request, objection or motion." N.C. R. App. P. 10(b)(1) (2007). Absent such an objection at trial, a criminal defendant may appeal a purported mistake pursuant to the plain error rule. *See, e.g.*, *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641

(2001); *State v. Garcell*, 363 N.C. 10, 678 S.E.2d 618 (2009). In order for an error to reach the level of a plain error,

> the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant.

State v. Walker, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986) (citations omitted). Furthermore, "the plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . ." *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983) (internal quotations omitted). A defendant, therefore, bears a heavy burden of showing "that a different result probably would have been reached but for the error or [] that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *Cummings*, 352 N.C. at 636, 536 S.E.2d at 61 (citation omitted).

In the instant case, defendant admits that at trial he did not object to the statement concerning drug use. Because no objection was made at trial, the issue was not preserved for appeal. In the absence of having preserved the issue, defendant relies on plain error review. Defendant has not carried his heavy burden of showing that but for the witness's testimony that he and defendant "always smoked joints together[,]" the jury would not have returned a guilty verdict. Defendant's bare assertions that this statement "probably caused the jury to find [d]efendant guilty" and that the jury convicted defendant "because of the kind of person he is,

rather than because the evidence [showed] . . . that he committed the offense charged" are not sufficient to support a finding of plain error. Therefore, we hold that the trial court's admission of a witness's statement concerning defendant's drug use did not constitute prejudicial error.

Defendant next argues that the trial court erred by admitting "non-corroborative inadmissable hearsay evidence" and that defendant is therefore entitled to a new trial. We disagree.

Roy Wooten ("Wooten"), defendant's nephew, was present in 3'Os on the night in question and saw the interaction between defendant and Robinson at that store. Subsequent to the shooting, Wooten gave a statement to Officer James Staten ("Officer Staten") that he saw defendant and another person identified as "Peanut" harassing Robinson at 3'Os and talking into a walkie-talkie. According to the statement, after leaving 3'Os, Wooten, from the vantage point of his home, saw defendant exit the woods with "a long stick or something" and "skip[]" across the street in the direction of Davis's home.

In court, Wooten gave testimony that he did not see a fight at 3'Os, that defendant was alone at 3'Os, and that he did not see defendant later that night. Wooten claimed that he did not say, or did not remember saying, what was in the police statement and claimed that he only signed it to stop Officer Staten from "cussing out" his children. The trial court allowed the State to enter into evidence Wooten's signed statement to the police for the purpose of impeaching Wooten's testimony. Defendant's attorney objected

multiple times to the State's being allowed to impeach its own witness. The trial court overruled these objections and later instructed the jury to consider the evidence for corroborative purposes only.

Defendant argues on appeal that this "corroborative" evidence did not match the testimony it was intended to corroborate. This argument is raised for the first time on appeal and does not appear in the record on appeal or the transcript of the proceeding below. The only objection on the record concerns using the statement as an inconsistent statement to impeach the witness.

"[W]here a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].'" *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). When a defendant relies on one theory for an objection at trial and asserts a different theory on appeal, the "no horse swapping" rule applies and the issue has not been properly preserved. *See id.*; *see also State v. Benson*, 323 N.C. 318, 321–22, 372 S.E.2d 517, 518–19 (1988). Consequently, defendant's second argument is not preserved for appeal and is dismissed.

Defendant's final argument on appeal is that the trial court erred by denying his motion at the close of the State's evidence to dismiss for lack of evidence. We disagree.

We review a motion to dismiss *de novo*. *State v. Robledo*, __ N.C. App. __, __, 668 S.E.2d 91, 94 (2008). All evidence is viewed

in the light most favorable to the State, and the State is given the benefit of every reasonable inference that can be drawn from the evidence. *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91, *disc. rev. denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). The State must have presented substantial evidence of each element of the offense charged and of the defendant's identity as the perpetrator of the offense. *See State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993); *see also State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (citations and quotations omitted). "Any contradictions or discrepancies in the evidence are for the jury to resolve, and these inconsistencies, by themselves, do not serve as grounds for dismissal." *State v. Thomas*, 134 N.C. App. 560, 567, 518 S.E.2d 222, 227 (1999) (citing *State v. Hamlet*, 312 N.C. 162, 169, 321 S.E.2d 837, 842 (1984)). It is not required that the "evidence exclude[] every reasonable hypothesis of innocence[.]" *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983).

Defendant claims that the State failed to present substantial evidence that he was the perpetrator of the crime. Defendant points to multiple pieces of evidence which work to undermine the State's case. However, defendant never addresses the evidence weighed against his innocence, such as the eyewitness testimony relating to the attack or recent threats by defendant against the victim. The jury's duty is to weigh each piece of evidence for

credibility and to weigh the totality of the evidence to determine guilt. We will not re-weigh the evidence and will not undermine the authority vested in the jury by our law. We hold that there was substantial evidence of defendant's identity as the perpetrator of the shooting.

Defendant further argues that the State did not present substantial evidence that he acted with intent to kill.

> An intent to kill is a mental attitude, and ordinarily it must be proved . . . by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred. The nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred.

State v. Grigsby, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (quoting *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956)). While "[p]roof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill," *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972), "[w]here the defendant points a gun at the victim and pulls the trigger, this constitutes evidence from which intent to kill may be inferred." *State v. Cromartie*, 177 N.C. App. 73, 77, 627 S.E.2d 677, 680, *disc. rev. denied*, 360 N.C. 539, 634 S.E.2d 538 (2006). In this case, the State offered substantial evidence of threats by defendant against the victim and his brother and of defendant's shooting the victim in the middle of his back, barely missing his aorta. From this evidence, a jury reasonably could infer that

defendant's intent was to kill the victim. We hold that the trial court did not err in denying defendant's motion to dismiss.

For the forgoing reasons, we hold that defendant's first argument fails plain error review, that his second argument is dismissed as improperly before this Court, and that the trial court did not err in failing to dismiss the charge against defendant for evidentiary insufficiency.

No prejudicial error in part; Dismissed in part; No error in part.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).