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NO. COA10-1491
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v. Dare County
No. 09 CRS 001258, 050824

DON FREDERICK SAUER

Appeal by defendant from judgments entered 14 May 2010 by Judge Wayland J. Sermons, Jr., in Dare County Superior Court. Heard in the Court of Appeals 25 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Parish & Cooke, by James R. Parish, for defendant.

ELMORE, Judge.

On 8 June 2009, Don Frederick Sauer (defendant) was indicted for attempted first-degree murder of his wife, Amanda Dancks, assault with a deadly weapon with intent to kill inflicting serious injury, and felony breaking and entering. On 14 May 2010, defendant was convicted of all three charges. Following his conviction, the jury determined that defendant

committed the offenses in violation of a domestic protection order, and thus was eligible for a sentencing enhancement. Defendant was sentenced to a term of 176 to 221 months for attempted first-degree murder, 176 to 221 months for assault with a deadly weapon with intent to kill inflicting serious injury, and sixteen to twenty months for felony breaking and entering. The sentences were ordered to run consecutively. Defendant now appeals.

Defendant contends that the trial court erred by: (1) failing to instruct the jury that, at the time defendant committed the breaking and entering, he intended to commit a specific identifiable felony; (2) failing to dismiss the charge of felonious breaking and entering for insufficient evidence; (3) violating defendant's right to be free from double jeopardy; and (4) instructing the jury that a buck knife was a deadly weapon as a matter of law.

Defendant and Dancks married in 2004 and have two children. In 2009, Dancks obtained a restraining order against defendant after defendant began verbally abusing Dancks and threatening her with bodily harm. On 15 April 2009, Dancks received an ex parte domestic violence protection order lasting one week. Dancks returned to court the following week where she and

defendant entered into a consent order for domestic protection. In the order, defendant agreed to give Dancks custody of the children and possession of the family home. The order also provided that defendant not assault, threaten, abuse, or follow Dancks. On 11 May 2009, defendant went to the family home uninvited, kicked in the front door, and entered the house carrying a buck knife. When defendant approached Dancks, Dancks attempted to escape out the back door of the home but was unable to because the lock on the door was stuck. As Dancks struggled with the lock, she felt what she thought were punches in her back, fell to the ground, and saw her blood on the floor. Dancks managed to push defendant away, fled outside the house, and called for help.

Police responded and Dancks was taken to the Outer Banks Hospital by EMS. From there, she was taken by helicopter to Norfolk General Hospital where she was treated for a punctured lung. Dancks later learned that the hospital treated her for sixteen puncture wounds in her back.

Dancks testified that she was familiar with the knife she observed in defendant's hand when he came through the door on 11 May 2009, and that it was the knife defendant carried with him every day, particularly when he was fishing. She further

testified that the blade was "three and a half, four inches" long. During trial, Investigator Tammy Willis of the Dare Country Sheriff's Department identified the knife as a Gerber buck knife and measured the blade for the jury "right at three inches." Investigator Willis further described the knife as having a sharp edge toward the tip while the rest of the blade was serrated.

Defendant first argues that the trial court committed plain error by failing to instruct the jury that, at the time defendant committed the breaking and entering, he intended to commit a specific identifiable felony. Defendant contends that this failure lowered the State's burden of proof and allowed the jury to convict the defendant upon speculation. We disagree.

Because defendant failed to object to the jury instruction at trial and he argues plain error on appeal, we review the jury instruction for plain error. Under plain error review, defendant must prove "not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (quotations and citations omitted). Plain error must be so fundamental, basic, and prejudicial that "justice cannot have been done." *State v. Odom*, 307 N.C. 655,

660, 300 S.E.2d 375, 378 (1983) (quotations and citation omitted). "[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction where no objection has been made in the trial court." *Id.* at 661, 300 S.E.2d at 378. To be reversible, the error in the instructions must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d, 188, 193 (1993).

The trial court gave the following instruction to the jury on the fourth element of felonious breaking or entering: "And fourth, that at the time of the breaking or entering or breaking and entering the defendant intended to commit a felony." Defendant contends that the trial court's failure to name the specific felony that defendant intended to commit constitutes reversible error because it reduced the State's burden of proof and left the jury to speculate without any guidance.

"In giving instructions the court is not required to follow any particular form, as long as the instruction adequately explains each essential element of an offense." *State v. Bunch*, 363 N.C. 841, 846, 689 S.E.2d 866, 870 (2010) (quotations and citation omitted). "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any

building (3) with the intent to commit any felony or larceny therein." *State v. White*, 84 N.C. App. 299, 301, 352 S.E.2d 261, 262 (1987) (citation omitted). Our Supreme Court has repeatedly held that "an indictment for felonious breaking and entering does not have to specify the underlying felony." *State v. Farrar*, 361 N.C. 675, 678, 651 S.E.2d 865, 867 (2007) (citing *State v. Silas*, 360 N.C. 377, 383, 627 S.E.2d 604, 608 (2006)). "It is sufficient for the indictment to allege, along with the other required elements of breaking or entering, that the defendant intended to commit a felony or larceny inside the building. . . . [O]nly a general averment that defendant intended to commit a felony upon breaking or entering is required." *Silas*, 360 N.C. at 381, 383, 627 S.E.2d at 607, 608 (2006). The stated rationale for this holding is N.C. Gen. Stat. § 15A-924(a)(5), which states that an indictment must "assert[] facts supporting e*very element of a criminal offense* and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2009) (emphasis added). The Court concluded that the statute was satisfied by a general averment that the defendant intended to commit "a felony," and thus the specific felony is

not an element of the criminal offense of felony breaking or entering. And, because jury instructions only need to explain the essential elements of each crime, it was not error for the trial court to charge the jury only with determining whether defendant had "intended to commit a felony" without specifying the type of felony.

Defendant next argues that the trial court erred by denying his motion to dismiss for insufficient evidence. He contends that the State failed to present substantial evidence that defendant intended to commit a particular felony at the time of the breaking or entering. Defendant relies on *Silas* for the proposition that, "[h]aving failed to allege any specified felony in the indictment[,] the State must allege or prove some specified felony at the time the court evaluates the motion to dismiss or suffer dismissal." This rule is not supported by *Silas*. That case does not address motions to dismiss or whether the State must specify a particular felony when the defendant moves to dismiss for insufficient evidence.

> Our review of the trial court's denial of a motion to dismiss is well understood. [W]here the sufficiency of the evidence . . . is challenged, we consider the evidence in the light most favorable to the State, with all favorable inferences. We disregard defendant's evidence except to the extent it favors or clarifies the State's case. 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. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion.

State v. Hinkle, 189 N.C. App. 762, 766, 659 S.E.2d 34, 36-37 (2008) (quotations and citation omitted; alteration in original).

As recited above, "The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein." *White*, 84 N.C. App. at 301, 352 S.E.2d at 262 (citation omitted). Only the third element is at issue here, so our review is limited to whether the State presented sufficient evidence that defendant broke or entered the building "with the intent to commit any felony or larceny therein."

A jury could reasonably infer that when defendant kicked in the victim's locked door while holding a knife in his hand, just a few weeks after she took out a domestic violence protection order against him, he intended to commit a felony therein. This inference is further supported by the victim's testimony that, during her marriage to defendant, he told her, "I'd like to kill you, I'm going to rip your head off." She testified, "He said

he was going to take me fishing and not bring me home. Told me one day he was going to cut me up for the crabs." She also testified that he had hit her in the face in front of their children. At the least, the State's evidence supports an inference that defendant intended to commit assault with a dangerous weapon inflicting serious injury, a Class E felony. *See* N.C. Gen. Stat. § 14-32 (2009). Accordingly, the trial court did not err by denying defendant's motion to dismiss for insufficient evidence.

In his third argument, defendant contends that being sentenced for two crimes based on the same conduct -- attempted first-degree murder and assault with a deadly weapon with the intent to kill inflicting serious injury -- violates his right to be free from double jeopardy. Our Supreme Court has already addressed this precise issue and determined that, "[b]ecause each offense contains at least one element not included in the other," a defendant convicted of both attempted first-degree murder and assault with a deadly weapon with the intent to kill inflicting serious injury has not been subjected to double jeopardy. *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004). Accordingly, we overrule this assignment of error.

Defendant's fourth and final contention is that the trial court erred by instructing the jury that a buck knife was a deadly weapon as a matter of law for the charges of assault with a deadly weapon with intent to kill inflicting serious injury and attempted first-degree murder.

As in the first issue, because defendant failed to object to the trial court's instruction at trial, the instruction can only be reviewed for plain error. *Odom*, 307 N.C. at 660, 300 S.E.2d. at 378.

A knife may or may not be considered a deadly weapon, depending upon the manner in which it is used. *State v. Carson*, 296 N.C. 31, 46, 249 S.E.2d 417, 426 (1978). "The actual effects produced by the weapon may also be considered in determining whether it is deadly." *State v. Roper*, 39 N.C. App. 256, 258, 249 S.E.2d 870, 871 (1978). "Where the circumstances of the use of an alleged deadly weapon admit of but one conclusion, the question of the weapon's character is one of law for the court to declare." *State v. McKinnon*, 54 N.C. App. 475, 477, 283 S.E.2d 555, 557 (1981). In *McKinnon*, this Court held that, when the evidence showed that the defendant purposefully stabbed the victim in the chest with a pocket knife, "the trial court should have held that the pocketknife as used by defendant

was a deadly weapon as a matter of law." *Id.* at 478, 283 S.E.2d at 557. Similarly, in *State v. Parker*, the trial court properly found a steak knife with "a sharp, sawtooth blade approximately four and one-half inches long with a keen point" to be a deadly weapon per se. *State v. Parker*, 7 N.C. App. 191, 195, 171 S.E.2d 665, 667 (1970).

Here, Tammy Willis of the Dare County Sheriff's Department identified the knife as a Gerber buck knife and measured the blade for the jury "right at three inches," and described it as having a sharp edge toward the tip while the rest of the blade was serrated. Both the first officer who responded to the scene and the paramedic with the EMS unit testified that they were able to see her lung through the cuts she had received. The paramedic testified that it took four sets of hands to control the victim's bleeding during the forty-five-minute ambulance ride from Cape Hatteras to the hospital in Nags Head. The victim was treated at the hospital in Norfolk for a punctured lung and a total of sixteen stab wounds.

Based on the measurement and description of the knife used, along with its effect on the victim, the trial court properly found that it was a deadly weapon per se. As such, it was proper for the trial court to instruct the jury that the knife

used was a deadly weapon per se and we find no error, plain or otherwise.

For the reasons set forth above, we hold that defendant received a trial free from error.

No error.

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).