NO. COA11-219
NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

STATE OF NORTH CAROLINA

v. Edgecombe County
Nos. 09 CRS 51699
09 CRS 51700

WILLIE ROBERT McNAIR, JR.
ORLANDO QUANTREL McNAIR

Appeal by defendants from judgments entered 5 May 2010 by Judge Walter H. Godwin, Jr., in Edgecombe County Superior Court. Heard in the Court of Appeals 1 September 2011.

Roy Cooper, Attorney General, by Kimberley A. D'Arruda, Assistant Attorney General, for the State.

William D. Spence, for defendant Willie McNair, Jr.

Roy Cooper, Attorney General, by M. Lynne Weaver, Assistant Attorney General, for the State.

Harrington, Gilliland, Winstead, Feindel & Lucas, LLP, by Anna S. Lucas, for defendant Orlando McNair.

THIGPEN, Judge.

Co-defendants Willie McNair, Jr., and Orlando McNair (collectively "Defendants") each appeal from two convictions of assault with a deadly weapon and a conviction of assault with a

deadly weapon with intent to kill inflicting serious injury arising out of a drive-by shooting at a basketball court. We must decide whether the trial court erred by (I) denying Defendants' motions to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury and (II) denying Defendants' motions to set aside the verdict. After a review of the record on appeal, we find no error.

The State's evidence tended to show that on 15 May 2009, a fist fight occurred during a basketball game at the Pinetops Community Center. Defendants' brothers, Chris Hopkins and Tytrel Hopkins, fought with Quandre Pittman and Jvon Brown. After the fight ended, Chris and Tytrel left the basketball court, and witnesses heard Tytrel say, "I'm about to call my brother. We'll be back."

Shortly after the basketball game resumed, a black Crown Victoria pulled up next to the basketball court with a shotgun sticking out of the front passenger window. When Pittman saw the gun, he turned and ran away from the court. Pittman was hit with 12 or 13 pellets on the back of his arms, the back of his head, and his back. Pittman went to two hospitals for treatment, but doctors were not able to remove the pellets. At

trial, Pittman testified that he now has "bumps" where the pellets are still in his body.

Danny Dupree was also on the basketball court and also started running when he saw a gun on the passenger side of the Crown Victoria. Dupree was hit in his back with two pellets. Dupree was taken by ambulance to the hospital where one of the pellets was removed. Teyon Belcher, another basketball player, was hit in his shoulders by two pellets from the shotgun and was also taken to a hospital for treatment.

At trial, Emmanuel Davis and Kyndell Eason testified they were at the basketball court, saw the fist fight, and saw the black Crown Victoria with Orlando McNair driving and Willie McNair on the passenger side of the vehicle "hanging out of the window" with a shotgun in his hands. Both witnesses also testified they saw Willie McNair fire the shotgun multiple times.

Defendants were each charged with three counts of assault with a deadly weapon with intent to kill inflicting serious injury. Defendants were tried together. The jury found both Defendants guilty of: (1) assault with a deadly weapon of Dupree; (2) assault with a deadly weapon with intent to kill inflicting serious injury of Pittman; and (3) assault with a

deadly weapon of Belcher. The trial court consolidated the two assault with a deadly weapon charges and sentenced Defendants to 60 days imprisonment for the consolidated charges and 73 to 97 months imprisonment for assault with a deadly weapon with intent to kill inflicting serious injury. Defendants appeal from these judgments.

Defendants raise similar issues on appeal. Willie McNair argues the trial court erred by (I) denying his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury of Pittman and (II) failing to acknowledge the jury's original verdict with regard to Pittman, or, in the alternative, by denying his motion to set aside the verdict. Orlando McNair argues the trial court erred by (I) denying his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury of Pittman and (II) denying his motion to set aside the verdict.

I. Motions to Dismiss

In their first argument on appeal, Defendants contend the trial court erred by denying their motions to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury of Pittman because the State presented

insufficient evidence of the elements of intent to kill and serious injury. We disagree.

"This Court reviews a trial court's denial of a motion to dismiss criminal charges *de novo*, to determine whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Davis*, 197 N.C. App. 738, 742, 678 S.E.2d 385, 388 (2009) (citation and quotation marks omitted), *rev'd in part on other grounds*, 364 N.C. 297, 698 S.E.2d 65 (2010). "If the evidence will permit a reasonable inference that the defendant is guilty of the crime charged, the trial judge should allow the case to go to the jury. This is true whether the evidence is direct, circumstantial or both." *State v. Faison*, 330 N.C. 347, 358, 411 S.E.2d 143, 149 (1991) (citation omitted). "The evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom." *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (quotation and quotation marks omitted).

The elements of assault with a deadly weapon with intent to kill inflicting serious injury are "(1) an assault, (2) with a deadly weapon, (3) an intent to kill, and (4) infliction of a

serious injury not resulting in death." *Id.* at 456, 526 S.E.2d at 462 (citation omitted).

A. Intent to Kill

Defendants first argue the trial court erred by denying their motions to dismiss because the State presented insufficient evidence of intent to kill. Specifically, Defendants argue that there was "only an intent to scare rather than an intent to kill" because the shotgun shells contained "fairly small birdshot" rather than "buckshot" and that there was no evidence that the gun was aimed at anyone in particular. We disagree.

"An intent to kill is a matter for the State to prove, and is ordinarily shown by proof of facts from which an intent to kill may be reasonably inferred." *State v. Nicholson*, 169 N.C. App. 390, 393, 610 S.E.2d 433, 435 (2005) (citation omitted), "This inference may be made from the nature of the assault, the manner in which the assault was made, the conduct of the parties, or from any other relevant circumstance." *Id.* at 393-94, 610 S.E.2d at 435 (citation omitted). "The requisite intent may be inferred from the deadly character of the weapon used and the viciousness of the assault." *State v. Robbins*, 99 N.C. App.

75, 81, 392 S.E.2d 449, 453 (citation omitted), *aff'd*, 327 N.C. 628, 398 S.E.2d 331 (1990).

Here, the evidence shows that Pittman was involved in a fight at the basketball court with Tytrel and Chris Hopkins. As Tytrel and Chris Hopkins left the court, witnesses heard them say they were going to call their brothers and would be back. Shortly thereafter, Orlando and Willie McNair arrived at the basketball court in a black Crown Victoria. Orlando McNair was driving while Willie McNair shot a shotgun from the passenger window, striking Pittman with 12 or 13 pellets as he ran from the basketball court. Although the shotgun shells contained "fairly small birdshot" rather than "buckshot," the fact that Defendants used a shotgun and that Pittman was struck 12 or 13 times on his back and the back of his arms and head is evidence from which intent to kill may be inferred. *See id.* Considering the evidence in the light most favorable to the State, we find the evidence sufficient to infer that Defendants had the intent to kill. Thus, we conclude the trial court did not err by denying Defendants' motions to dismiss on this basis.

B. Serious Injury

Defendants next contend the trial court erred by denying their motions to dismiss because the State presented

insufficient evidence that Pittman sustained a serious injury. We disagree.

"The North Carolina Supreme Court has not defined 'serious injury' for purposes of assault prosecutions, other than stating that the injury must be serious but it must fall short of causing death and that further definition seems neither wise nor desirable." *State v. Brunson*, 180 N.C. App. 188, 193, 636 S.E.2d 202, 205 (2006) (quotations and quotation marks omitted), *aff'd*, 362 N.C. 81, 653 S.E.2d 144 (2007). "Whether such serious injury has been inflicted must be determined according to the particular facts of each case." *Id.* at 193, 636 S.E.2d at 206 (citation omitted). "A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury." *Id.* at 194, 636 S.E.2d at 206 (citation omitted).

In this case, Pittman was hit with 12 or 13 shotgun pellets in his arms, back, and the back of his head. After the shooting, Pittman went by ambulance to Heritage Hospital in Tarboro, North Carolina, and later went to a hospital in Greenville, North Carolina. However, the pellets were not

removed from his body at either hospital. Pittman testified that one pellet later came out of his leg on its own and looked "like a small size BB." Pittman also stated he has "bumps" on his arm, back, and on the back of his head where pellets still remain in his body. Furthermore, Deputy Carlos Williams of the Edgecombe County Sheriff's Office interviewed Pittman at Heritage Hospital and testified that he saw "multiple . . . pellet wounds in [Pittman's] back" and that Pittman told him that "he was fine . . . [but [i]t just kept stinging in his back."

We find this case analogous to *State v. Jones*, 258 N.C. 89, 128 S.E.2d 1 (1962). In *Jones*, the victim was shot "in the back and arm with a .410 shotgun, loaded with bird shot" and had 17 shots removed at the hospital. *Id.* at 92, 128 S.E.2d at 3. Even though the record did not disclose how deep the shots penetrated the victim's skin or how long the victim remained in the hospital, the court concluded that "[t]he evidence is sufficient to go to the jury on the question of serious injury[.]" *Id.* Like the victim in *Jones*, Pittman was shot with a shotgun loaded with birdshot, was struck with 12 or 13 pellets, and went to the hospital for treatment. Following *Jones*, we find there was sufficient evidence to submit the

charges of assault with a deadly weapon with intent to kill inflicting serious injury to the jury. Therefore, the trial court did not err in denying Defendants' motions to dismiss.

II. Motions to Set Aside Verdict

Defendants next argue the trial court erred by denying their motions to set aside the verdict for Count II, the offenses against Pittman. Additionally, Willie McNair argues the trial court erred by failing to accept the jury's verdict with regard to Pittman. We disagree.

A. Willie McNair: Failure to Accept the Jury's Verdict

Willie McNair contends the trial court erred in failing to accept the jury's "original" verdict finding him guilty of assault with a deadly weapon with intent to kill of Pittman. Willie McNair further argues that judgment on the verdict related to Pittman should be arrested because he was not charged with, nor was the jury instructed on, assault with a deadly weapon with intent to kill. We disagree and conclude that the jury did not render a verdict finding Willie McNair guilty of assault with a deadly weapon with intent to kill of Pittman.

The jury was instructed on four possible verdicts for each count, in addition to a verdict of not guilty: (1) assault with a deadly weapon with intent to kill inflicting serious injury;

(2) assault with a deadly weapon inflicting serious injury; (3) assault with a deadly weapon; and (4) assault inflicting serious injury. After the jury voted, the trial court initially summarized the verdict from the verdict sheet as follows:

> In the case of Willie McNair, Jr., your foreperson has reported to me that he is guilty in the first count, of assault with a deadly weapon, *in the second count, guilty of assault with a deadly weapon with intent to kill*. And in the third case -- count, guilty of assault with a deadly weapon. Is this your verdict, so say you all.
>
> (JURORS RESPOND WITH YES.)

(Emphasis added). Subsequently, the trial court recognized that it failed to read the second line on the verdict sheet for Count II; thus, the trial court did not read "inflicting serious injury" after reading "guilty of assault with a deadly weapon with intent to kill[.]" Thereafter, the trial court asked the jury to clarify its verdict, stating, "It's the same thing on Quandre, Count number II, assault with a deadly weapon with intent to kill inflicting serious injury. Is that your verdict in Mr. Pittman's case, ladies and gentlemen?" The jurors responded, "Yes, Sir."

The law of this State provides:

> A verdict is a substantial right and is not complete until accepted by the court. The trial judge's power to accept or reject a

> verdict is restricted to the exercise of a limited legal discretion. In a criminal case, it is only when a verdict is not responsive to the indictment or the verdict is incomplete, insensible or repugnant that the judge may decline to accept the verdict and direct the jury to retire and bring in a proper verdict. Such action should not be taken except by reason of necessity. If the verdict as returned substantially finds the question so as to permit the court to pass judgment according to the manifest intention of the jury, it should be received and recorded.

State v. Hampton, 294 N.C. 242, 247-48, 239 S.E.2d 835, 839 (1978) (internal citations omitted).

Willie McNair cites *State v. Perry*, 225 N.C. 174, 33 S.E.2d 869 (1945), in support of his argument that the trial court "should have acknowledged the verdict first tendered by the jury," finding him guilty of assault with a deadly weapon with intent to kill of Pittman, because the verdict was complete and unambiguous. A review of the record, however, shows that the jury did not render a verdict finding Willie McNair guilty of assault with a deadly weapon with intent to kill of Pittman. Rather, the trial court initially read the verdict incorrectly due to a clerical error on the verdict sheet discussed in further detail below.

Because the jury did not render a verdict finding Willie McNair guilty of assault with a deadly weapon with intent to

kill of Pittman, the trial court did not err by failing to accept that verdict. We conclude that this argument is without merit.

B. Motions to Set Aside the Verdict

Defendants next argue the trial court erred by denying their motions to set aside the verdict because the verdict sheets were confusing due to a clerical error. We disagree.

We review a trial court's decision to grant or deny a motion to set aside the verdict for an abuse of discretion. *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985) (citation omitted). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted).

A review of the record shows that Defendants' verdict sheets contained a list of the possible verdicts with a blank line before each offense for the jury to indicate its verdict. Each offense was listed on a separate line, and the offenses were separated by semi-colons. However, the first offense listed under Count II, the offenses regarding Pittman, contained two blank lines before the offense instead of one, so that "Guilty of Assault With a Deadly Weapon With Intent to Kill,"

appeared on one line preceded by a blank line which had been checked by the jury, and "Inflicting Serious Injury;" appeared on the next line, also preceded by a blank line.[1]

In reading the jury's verdicts on Count II, the trial court initially misread the verdict sheets by failing to continue reading after the first line, so that the trial court did not read "inflicting serious injury" after reading "guilty of assault with a deadly weapon with intent to kill[.]" However, the trial court subsequently recognized its error, as demonstrated by the following discussion:

> MR. MUSE: What was the verdict on the second count for Orlando McNair?
>
> THE COURT: On count II, which involves Mr. Pittman, guilty of assault with a deadly weapon with intent to kill.
>
> MR. MUSE: Just with intent to kill.
>
> THE COURT: Sir.
>
> MR. MUSE: Just with intent to kill.

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[1]The verdict sheets stated as follows:

Count II (Quandre Pittman)
___ Guilty of Assault With a Deadly Weapon With Intent to Kill,
___ Inflicting Serious Injury;
___ Guilty of Assault With a Deadly Weapon, Inflicting Serious Injury;
___ Guilty of Assault with a Deadly Weapon;
___ Guilty of Assault, Inflicting Serious Injury;
OR
___ Not Guilty.

> THE COURT: Inflicting serious –
>
> MR. HARRELL: There's an error on the paper. That shouldn't be the same inflicting serious injury.
>
> THE COURT: Okay. Guilty of assault with a deadly weapon with intent to kill inflicting serious injury, is that correct?
>
> MR. HARRELL: Yes, sir.
>
> THE COURT: ***Okay. It's on the second line and I didn't keep reading after the comma.***
>
> THE STATE: What about as to –
>
> THE COURT: It's the same thing on Quandre, Count number II, assault with a deadly weapon with intent to kill inflicting serious injury. Is that your verdict in Mr. Pittman's case, ladies and gentlemen?
>
> (JURORS RESPOND WITH YES, SIR.)

(Emphasis added).

"A verdict is not bad for informality or clerical errors in the language of it if it is such that it can be clearly seen what is intended." *Perry*, 225 N.C. at 176, 33 S.E.2d at 870. "Although defective in form, if it substantially finds the question in such a way as will enable the court intelligently to pronounce judgment thereon according to the manifest intention of the jury, [a verdict] is sufficiently certain to be received and recorded." *Id.* (citations omitted).

Here, although the verdict sheets contained a clerical error which caused the trial court to initially misread the verdict sheets, the trial court subsequently recognized its error and re-read the verdict. Moreover, the trial court asked the jury if "assault with a deadly weapon with intent to kill inflicting serious injury" was the correct verdict regarding Pittman, and the jury responded in the affirmative. Accordingly, we hold that any uncertainty in the jury's verdicts because of the clerical error on the verdict sheets was cured when the trial court asked the jury to clarify its verdict. *See State v. Ware*, 31 N.C. App. 292, 296, 229 S.E.2d 249, 252 (1976) (holding that any uncertainty in the jury's verdict was cured when the clerk polled the jury as to its verdict). Thus, the trial court did not abuse its discretion by denying Defendants' motions to set aside the verdict.

NO ERROR.

Judges GEER and STROUD concur.

Report per Rule 30(e).