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NO. COA11-351
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v.

Johnston County
Nos. 10 CRS 52828, 52829

EDDIE L. HENDERSON

Appeal by defendant from judgments entered 22 September 2010 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 28 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Barry H. Bloch, for the State.

Sue Genrich Berry for defendant appellant.

McCULLOUGH, Judge.

Eddie L. Henderson ("defendant") appeals from his convictions for discharging a firearm into occupied property and communicating threats. Defendant received a sentence of a minimum term of 32 months and a maximum term of 48 months in a judgment consolidating the two convictions for sentencing. Defendant gave written notice of appeal which was filed on 4 October 2010.

I. Background

On 8 May 2010, defendant and his girlfriend visited the convenience store of Thabete and Ali Algory (collectively, the "Algory brothers") in Smithfield, North Carolina, at approximately 11:30 p.m. Defendant's girlfriend ("Boylan") entered the store to speak with Ali while defendant remained outside. Defendant observed Boylan from outside and became angry. Defendant then entered the store and began to threaten Ali. Defendant told Thabete and Ali that he would return in five minutes.

When defendant returned, he resumed threatening Ali while shaking his hand inside his pocket. Defendant told Ali that if he talked to Boylan again he would kill him. Ali responded, "What are you waiting for? Just do it." Defendant then left the store again.

A few minutes later the Algory brothers were both inside the store when they heard something strike the window. Then, there was a second impact which broke one of the windows. Thabete looked outside and saw broken glass. Concluding someone had shot the window, Thabete called the police. When the police

arrived, the Algory brothers told them about the confrontation between Ali and defendant. Defendant was a regular customer of the store, and the brothers were able to give the police a description of defendant and the location of his home. The police also found a spent bullet that had hit a pack of cigarettes and landed on the store counter.

The police officers then went to defendant's home, but no one was present; however, they met defendant coming down the street towards his home. Before they could speak with him, defendant stated that he did not have a gun and had not shot the place. Based on this statement, the officers concluded defendant may have knowledge of the incident and decided to detain him and check for weapons. The officers found no weapons, called for a warrant check, and learned that defendant had an outstanding warrant for failure to appear. Officer Jason Beyer ("Officer Beyer") then placed defendant under arrest. After arresting defendant, Officer Beyer asked defendant how he knew the officers were there investigating the shooting at the convenience store. Defendant replied that he had heard the officers talking about it while he was pumping gas at the store. Officer Beyer testified at trial that no one was pumping gas when he and his fellow officer arrived at the store, and that no

one pumped after they arrived, because they immediately secured the area as a crime scene.

After being transported to the Smithfield Police Department, defendant was questioned by Detective Blinson. After signing a waiver of his *Miranda* rights, the detective proceeded to administer a test for gunshot residue on the hands of defendant. When the test was explained to defendant, defendant stated that he had fired a gun that evening at some dogs in his trash to scare them away. Defendant later changed his story and told the detective that he had fired the gun into the air to scare the dog away. The detective then inquired as to the type and location of the gun. Defendant responded that it was a .22 caliber rifle and that his cousin had it, but he refused to identify his cousin or state where he was. Defendant also told the detective, "I didn't shoot at him, if I was pissed, I would just whoop his ass."

Across the street from the Algory brothers' convenience store is the Wilco-Hess. Andrea Smith-Betts ("Smith-Betts") was working at the Wilco-Hess on the night of the incident, 8 May 2010. She knew defendant as someone who occasionally came into the store. Defendant had been in her store earlier that day, arguing with his girlfriend, and purchased a drink. That night

Smith-Betts heard a popping sound, and stepped outside to check it out. When she stepped outside, she saw a black man standing at the edge of her store's parking lot. She saw him fire a shot and then heard glass break. She then saw the man stick something in his pocket and walk toward the mobile home park where defendant lives. Detective Blinson testified at trial that Smith-Betts told him she recognized the shooter as a man who had been at her store earlier that day with his girlfriend.

In his defense, defendant made offers of proof of testimony from Smith-Betts and Boylan that Ali had upset other residents in the neighborhood by talking to and flirting with the women who come into his store. Defendant argued that this testimony was relevant and admissible to demonstrate that other people had a motive to fire bullets into the windows of the Algor brothers' store. The trial court ruled on both offers of proof that the evidence was speculative and of marginal relevance, stating further that, even if the evidence was relevant, its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury by considerations of undue delay or waste of time.

II. Analysis

A. Exclusion of Witness Testimony

Defendant's first issue on appeal is whether the trial court erred in excluding defendant's offer of proof of testimony from Smith-Betts and Boylan. Defendant argues that, when the trial court excluded the evidence, his constitutional right to present a defense was violated to his prejudice. For the following reasons we disagree.

The right to present evidence in one's own defense is protected under both the United States and North Carolina Constitutions. *State v. Fair*, 354 N.C. 131, 149, 557 S.E.2d 500, 513 (2001). As noted by the U.S. Supreme Court in *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297 (1973), "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* at 294, 35 L. Ed. 2d at 308.

However, "[l]ike all evidence offered at trial, . . . evidence offered to support a defense must be relevant to be admissible." *Fair*, 354 N.C. at 150, 557 S.E.2d at 515. Evidence is relevant if it has 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. Gen. Stat. § 8C-1, Rule 401 (2009). The evidence is admissible if it is more probative than prejudicial, and a decision to exclude it will not be overturned unless manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. N.C. Gen. Stat. § 8C-1, Rule 403 (2009); *State v. Hyde*, 352 N.C. 37, 55, 530 S.E.2d 281, 293 (2000).

Further, our Supreme Court explained in *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987), that “[e]vidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of another and be inconsistent with the guilt of the defendant.” *Id.* at 667, 351 S.E.2d at 279-80.

Defendant contends that the excluded evidence went to the heart of his defense in this case, and claims that the offered evidence should be admitted on grounds that it shows other people in the community had motives to commit a crime towards Ali on account of his flirtatious reputation. Under *Cotton*, however, admission of the evidence in question would be inappropriate, as it attempts to establish another could have

committed the crime but does so without creating more than a mere inference or conjecture. Nothing in the excluded evidence points to the guilt of another party.

In *Cotton*, the defense offered evidence

that within a few hours during the same night, three homes in close proximity were broken into and the female occupants sexually assaulted. The *modus operandi* in each case was very similar. From this evidence, the jury reasonably could have concluded that the three attacks were committed by the same person. The excluded evidence also tended to show that a specific person other than the defendant committed one of the very similar break-ins and assaults. . . . The excluded evidence therefore tended to show that the same person committed all of the similar crimes in the neighborhood in question on that night and that the person was someone other than the defendant.

Id. Here, the excluded evidence merely attempted to show that others in the community potentially also harbored ill will towards Ali stemming from his interactions with others' wives and girlfriends. At the very most, such evidence creates only an inference that another person might have fired upon the convenience store on the night in question and is too speculative to warrant admission.

Nor is this Court prepared to say that the trial court's decision to exclude the evidence was manifestly unsupported by

reason or so arbitrary that it could not have been the result of a reasoned decision. The evidence was of the very type the balancing test in Rule 403 is in place to exclude. Admission of the offered testimony in this case would have done little more than confuse the issues and create an undue delay and waste of time, as the testimony of Boylan and Smith-Betts, implicating no one else, would have resulted only in the creation of an opportunity for the jury to make improper and irrelevant inferences based on speculative testimony.

The speculative nature of the offered evidence indicates that the trial court indeed relied on sound reasoning in its decision to exclude the evidence.

B. Motion to dismiss

Defendant's second issue on appeal is whether the trial court erred in denying his motion to dismiss the charge of communicating threats. Defendant argues that the State failed to present substantial evidence of each essential element of the charged offense by failing to present substantial evidence that Ali actually believed defendant would carry out his threats. For the following reasons we disagree.

On a defendant's motion for dismissal on the ground of insufficiency of the evidence, 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). What constitutes substantial evidence is a question of law for the trial court. *Id.* Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* "If there is substantial evidence - whether direct, circumstantial, or both - to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988).

N.C. Gen. Stat. § 14-277.1(a) (2009) provides the requisite elements for a conviction of communicating threats without lawful authority. Defendant concedes that substantial evidence with respect to the first three requisite elements was provided by the State, but argues the State failed to present substantial evidence with respect to the fourth element. N.C. Gen. Stat. § 14-277.1(a)(4) reads: "The person threatened believes that the threat will be carried out." Defendant argues that the nature of the confrontation, and the conditional nature of one of his many threats, somehow negates the substantial nature of the

evidence offered by the State that Ali might actually have believed the threat would be carried out.

This Court has previously ruled that a defendant may be found guilty for communicating threats where the threat is conditional and the condition is one which he has no right to impose. *State v. Roberson*, 37 N.C. App. 714, 716-17, 247 S.E.2d 8, 10 (1978). Ali was free to speak with any customer who came into his store, including Boylan. Defendant's threats that if Ali spoke to Boylan again, he would "kill him," indicated an intention to carry out the threat. The State provided substantial evidence that defendant threatened Ali, left the store, soon thereafter returned, and began threatening Ali again. The evidence tends to show that defendant made such a scene within the convenience store that a reasonable mind could accept it as adequate to support a conclusion that Ali believed defendant would actually carry out his threats.

III. Conclusion

Admission of defendant's offered testimony regarding Ali's reputation in the community was properly excluded as speculative. Its admission would have only allowed the jury to make an inappropriate inference and would have confused the issues, resulting in an undue delay of the trial.

Nor did the trial court err in denying defendant's motion to dismiss the charge of communicating threats for failure to provide substantial evidence with respect to each requisite element of the offense. In light of the substantial evidence provided by the State, the case was properly for the jury and the motion correctly denied.

No error.

Judges HUNTER (Robert C.) and STEELMAN concur.

Report per Rule 30(e).