NO. COA11-5
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v. Lenoir County
No. 10 CRS 50220

DAVID TOLER

Appeal by Defendant from judgment entered 29 June 2010 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 17 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

David Toler ("Defendant") appeals from judgment for assault with a deadly weapon and the common law offense of going armed to the terror of the people. Defendant raises four issues on appeal. First, Defendant contends the trial court did not have jurisdiction to try him on the charge of assault with a deadly weapon, as Defendant had previously been acquitted of that

charge in district court. Defendant also argues the trial court erred when it ordered Defendant's guns be destroyed without providing him notice and the opportunity to be heard. We agree with both of these contentions. Defendant also argues the trial court erred when it commented on evidence in the presence of the jury. We disagree. Finally, Defendant contends the trial court erred by denying his Motion to Dismiss the charges against him. We find no error on that issue.

I. Factual & Procedural History

On 22 January 2010, Adam Montiel appeared before a Lenoir County Magistrate and furnished information leading to a warrant for arrest against Defendant on three misdemeanor charges: 1) assault with a deadly weapon, 2) communicating threats to physically injure, and 3) going armed to the terror of the people. The three offenses took place on 21 January 2010.

On 5 February 2010, a bench trial was held in Lenoir County District Court before Judge Lonnie Carraway. Defendant pleaded not guilty to all charges. At trial, Defendant was found guilty of communicating threats and going armed to the terror of the people. Defendant was found not guilty of assault with a deadly weapon. At the close of trial, Defendant gave oral notice of appeal from district court to superior court.

Prior to the jury trial in Lenoir County Superior Court, the Clerk of the Court "add[ed] back in" the charge of assault with a deadly weapon, even though Defendant had been acquitted of this charge in district court. At the superior court proceeding on 29 June 2010, Defendant pleaded not guilty to all charges. The State's evidence at trial tended to show the following:

In 2007, Mr. Montiel and his wife, Kelly Montiel, purchased land from Defendant that included an access easement. The access easement crossed the land where Defendant resided. Mr. Montiel testified he and Defendant have "had controversy" since Mr. Montiel purchased the land from Defendant and they became neighbors.

Mr. Montiel testified that, around 7:00 p.m. on 21 January 2010, Mr. Montiel, his wife, and their children were driving along the easement and

> as soon as we started passing [Defendant], he come around the other way. There's two ways to come in and out. Well, soon as we started coming around the curve, he pulled his gun out and started shooting. He shot two or three times. Well then we kept going up and he followed us and went around and cut us off. And when we went to the highway and we turned on the highway, he got behind us, throwed his bright lights on and shot again once or twice like that and just got right on my rear-end. My kids was in the back crying and my wife and I just -- I didn't know what to do. I temporarily like lost control and run off the side of the road. I stopped and I didn't know what to do. He

> went to the edge of the road and stopped and turned around. So we went back and went back to my house.

Mr. Montiel testified that he was able to see that Defendant was the person driving the vehicle and that Defendant was yelling at the time of the incident. Though Mr. Montiel was unable to understand what Defendant was saying, Mr. Montiel testified he was scared at the time.

After returning home, the Montiels discussed what action they should take against Defendant and eventually resumed their original plan for the evening, which was to visit Mr. Montiel's sister.

Both of Mr. Montiel's sons testified that they were present during the incident, Defendant shot guns in the air, the car ran off the road, and they were scared. Ms. Montiel testified the reason they did not call the police that night was because

> [w]e have called the Sheriff several times on [Defendant] out there shooting around us and shooting when my children were in the yard, and they always say go down and make a report. . . . [T]hey'll tell me: well, it's [Defendant] and [Mr.] Montiel, we're familiar with the case, come in the next morning and make a report.

Charles Harrell ("Mr. Harrell"), another neighbor, testified he was aware that there had been controversy between Defendant and Mr. Montiel regarding the easement. At the close of the State's evidence, Defendant moved for dismissal of all charges. The trial

court granted Defendant's Motion to Dismiss the charge of communicating threats and denied the motion as to the other charges.

Defendant testified that at 7:00 p.m. on 21 January 2010, he was taking care of his animals and "watching out for the place" because the Montiels had "started acting up, spinning wheels in the yard." Defendant was driving his wife's Nissan Frontier back and forth between his residence and the Montiels' property. Later that evening, Defendant saw Mr. Montiel and his family driving down the easement. Defendant testified to the following exchange with Mr. Montiel:

> We were coming in and out several times, both of us. And he come by and I came out coming right behind him. And he stopped in front of me and I turn and go around him. He beats me to this intersection he's talking about that I go in front of him at, and stops in front of me again. And I turn and go around him. Nothing happened, it was just: turn and go around him.

Defendant testified that the encounter then ended. Defendant further testified that he did not have a gun with him at the time and stated, "I have never pulled a gun on anyone in my life."

Leslie Hines, Defendant's wife, testified Defendant was going back and forth between their home and Mr. Montiel's property near the easement on 21 January 2010. Ms. Hines further testified that her husband's guns were in their usual storage place in their home

that night, and that Defendant appeared normal and easy-going when he returned home that evening. Ms. Hines did not give an exact time that Defendant returned home.

A jury found Defendant guilty of assault with a deadly weapon and going armed to the terror of the people. On the charge of assault with a deadly weapon, Defendant was sentenced to 75 days in the North Carolina Department of Correction ("NCDOC"), which was suspended and Defendant was placed on supervised probation for 24 months. On the charge of going armed to the terror of the people, the trial court sentenced Defendant to 45 days in the custody of the NCDOC, to run consecutively with his other sentence. This sentence was also suspended and Defendant was placed on supervised probation for 24 months.

As a condition of probation, Defendant was ordered to "surrender all handguns to the Lenoir County Sheriff's office within 24 hours." As an intermediate sanction, Defendant was ordered to serve an active term of 10 days in the Lenoir County jail. **T**he trial court then entered a separate order requiring the Lenoir County Sheriff's Department to destroy Defendant's handguns as a part of his judgment for assault with a deadly weapon. While the transcript contains a discussion of the surrender of Defendant's handguns, there is no discussion in the

transcript of the guns being destroyed, and Defendant asserts the order requiring the Sheriff's Department to destroy his handguns was entered outside his presence.

II. Jurisdiction & Standard of Review

As Defendant appeals from the final judgment of a superior court, this Court has jurisdiction to hear the appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009).

Defendant's objections to subject matter jurisdiction can be raised at any time, even for the first time on appeal. *State v. Petty*, ___ N.C. App. ___, ___, 711 S.E.2d 509, 512 (2011); *Brown v. Brown*, 171 N.C. App. 358, 362, 615 S.E.2d 39, 41 (2005). Jurisdiction is a question of law and is reviewable *de novo*. *State v. Black*, 197 N.C. App. 373, 377, 677 S.E.2d 199, 202 (2009); *State v. Frady*, 195 N.C. App. 766, 767, 673 S.E.2d 751, 752 (2009). We also review *de novo* whether the trial court erred in sentencing Defendant outside his presence. *State v. Arrington*, No. COA 10-1134, 2011 WL 3569412, at *4 (N.C. App. Aug. 16, 2011).

Our Court "uses a totality of the circumstances test to evaluate whether a judge's comments 'cross into the realm of impermissible opinion.'" *In re D.M.B.*, 196 N.C. App. 775, 777, 676 S.E.2d 66, 68 (2009) (quoting *State v. Larrimore,* 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (citations omitted)). "'In

applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made.'" *D.M.B.*, 196 N.C. App. at 777, 676 S.E.2d at 68 (quoting *State v. Carter,* 233 N.C. 581, 583, 65 S.E.2d 9, 10–11 (1951)).

We review the trial court's denial of Defendant's motion to dismiss for insufficient evidence *de novo*. *State v. Robledo,* 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008). Our Court must 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. The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Davis, 197 N.C. App. 738, 742, 678 S.E.2d 385, 388, *aff'd in part, rev'd on other grounds,* 364 N.C. 297, 698 S.E.2d 65 (2010) (internal citations and quotation marks omitted).

III. Analysis

Defendant first argues he was acquitted by Judge Carraway in district court on the charge of assault with a deadly weapon and therefore could not be tried for the offense in superior court, as the superior court lacked jurisdiction. The State and

Defendant stipulate in the appellate record that Defendant was acquitted of this offense in Lenoir County District Court on 5 February 2010. The State concedes Defendant could not be retried on this charge.

"A defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law." N.C. Gen. Stat. § 15A-1431 (2009). However, the State does not have the same right to appeal where a defendant is found not guilty, and instead has a very limited right to appeal decisions of a district court judge. *See* N.C. Gen. Stat. § 15A-1432 (2009). The superior court does not have jurisdiction unless there is "a trial *and conviction* in the district court." *State v. Petty*, ___ N.C. App. ___, ___, 711 S.E.2d 509, 512 (2011).

It is fundamental that "when a party charged with any offence before a tribunal of competent jurisdiction has been tried and acquitted, the result is final and conclusive." *State v. Powell*, 86 N.C. 640, 643 (1882). Because Defendant was acquitted of the charge of assault with a deadly weapon in district court, he could not be tried for that offense in superior court. We therefore vacate the superior court's judgment as to the charge of assault with a deadly weapon for lack of jurisdiction.

We note in addition that the trial court erred in ordering, outside Defendant's presence, that Defendant's guns be destroyed as a part of his judgment for assault with a deadly weapon. "It is well-established that a criminal defendant has a right to be present when his sentence is imposed." *State v. Dubose*, ___ N.C. App. ___, ___, 702 S.E.2d 330, 335 (2010). If there is a substantive change, it must be made in the presence of the defendant so he has the opportunity to be heard. *Id.*; *see also State v. Crumbley*, 135 N.C. App. 59, 67, 519 S.E.2d 94, 99 (1999). The destruction of Defendant's guns, as compared with the surrender of his guns, was a substantive change which should not have been made outside Defendant's presence, and the order is therefore vacated.

Defendant next argues the trial court erred when it commented on evidence before the jury. The following exchange took place on cross-examination of Mr. Harrell by Defense Counsel:

> [DEFENSE COUNSEL]: And you say you have no knowledge of the incident on January 21; correct?
>
> [Mr. Harrell]: What exactly happened on the 21st? What are you referring to?
>
> [PROSECUTOR]: The issue is whether Mr. Toler assaulted Mr. Montiel with a deadly weapon, communicated a threat or went armed to the terror of the public?

> [Mr. Harrell]: No, I have no knowledge of that. However, what I do have knowledge of is: Mr. Toler has made it so uneasy for my wife, not me, but my wife, that she refused to live on that land so therefore that land is useless to me because she was so afraid of Mr. Toler.
>
> The Court: Okay. Ladies and gentlemen, you have to disregard that remark. That's not what Mr. Toler is charged with. I understand your concern, but he's not charged with doing anything to your wife.
>
> [Mr. Harrell]: No.
>
> The Court: Okay.

Defendant argues the trial court improperly expressed an opinion in the presence of the jury when it said, "That's not what Mr. Toler is charged with. I understand your concern, but he's not charged with doing anything to your wife." Specifically, Defendant argues the phrase "I understand your concern" shows the trial judge stepped outside of his impartial role and lent credibility to the claims made against Defendant.

"'Whether the accused was deprived of a fair trial by the challenged remarks [of the court] must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant." *State v. Brinkley*, 159 N.C. App. 446, 447-48, 583 S.E.2d 335, 337 (2003) (quoting *State v. Faircloth*, 297 N.C. 388, 392, 255 S.E.2d 366, 369 (1979)) (alteration in original); *see also State v. Greene*, 285 N.C. 482, 489, 206

S.E.2d 229, 234 (1974) ("An accused is not entitled to a new trial because of remarks of the trial judge unless they tend to prejudice defendant in light of the circumstances in which they were made, and the burden of showing that he had been deprived of a fair trial by such remarks is upon the defendant.").

Mr. Harrell was testifying as to his wife's fear and uneasiness resulting from a history with Defendant. The trial judge found this testimony irrelevant, instructed the jury to disregard the testimony, spoke directly to Mr. Harrell, and advised him that those facts were not relevant to the case at hand. Although the trial judge expressed that he understood the concerns of Mr. Harrell, this was directed at Mr. Harrell and did not relate to the charges against Defendant. The trial judge's innocuous comments were not error.

Finally, Defendant argues the trial court erred in denying Defendant's Motion to Dismiss the charges against him. As explained above, we find the trial court did not have jurisdiction to try Defendant on the charge of assault with a deadly weapon, so we address only the issue of whether the trial court erred in denying Defendant's Motion to Dismiss the charge of going armed to the terror of the people.[1]

[1] The trial court dismissed the charge of communicating threats at the close of the State's evidence.

To be convicted of going armed to the terror of the people, Defendant must have 1) armed himself with an unusual and dangerous weapon 2) for the unlawful purpose of terrorizing the people and 3) gone about the public highways 4) in a manner to cause terror to the people. *State v. Dawson*, 272 N.C. 535, 549, 159 S.E.2d 1, 11-12 (1968). Our Court must determine if there is substantial evidence of each element of the offense charged and of Defendant's identity as the perpetrator of such offense. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

The State provided substantial evidence that Defendant armed himself with an unusual and dangerous weapon when Mr. Montiel testified Defendant "pulled out his gun and started shooting." *See Dawson*, 272 N.C. at 543, 159 S.E.2d at 8 (finding a gun to be an "unusual weapon"). The State also provided substantial evidence that Defendant was driving on a highway at the time of the incident, as Mr. Montiel testified that Defendant began following him as they drove off of their property and "turned on the highway."

Defendant argues there was no evidence that he caused "terror to the people," as the only evidence presented by the State showed a threat to the Montiel family, not to the general

public. The State presented evidence that Defendant was shooting his gun on a public highway while driving closely behind the Montiels with his high beams on. We find this to be substantial evidence that this behavior was intended to be to the terror of the people and was in fact to the terror of the people. The fact that a limited number of witnesses testified regarding Defendant's actions does not change the character of those actions.

In addition, we find unpersuasive Defendant's argument that if he was otherwise lawfully shooting his weapon, he cannot be convicted of going armed to the terror of the people. This argument would require commission of another crime in order to be convicted of going armed to the terror of the people. This has never been a requirement of going armed to the terror of the people, and we will not create such a requirement.

Considering the evidence in the light most favorable to the State, there was substantial evidence of each essential element of going armed to the terror of the people. We find the trial court did not err when it denied Defendant's Motion to Dismiss the charge of going armed to the terror of the people.

Defendant additionally argues the State should have been collaterally estopped from proving the charge of going armed to the terror of the people because the same conduct used to

support that charge was used to support the charge of assault with a deadly weapon, which Defendant had been acquitted of in district court for lack of substantial evidence. We disagree. The common law elements of going armed to the terror of the people are distinct from the elements of assault with a deadly weapon. *See* N.C. Gen. Stat. § 14-33(c)(1) (2009). Because the two charges have different elements, lack of substantial evidence for one charge does not necessarily mean there will be lack of substantial evidence for the other. *See State v. Rich*, 130 N.C. App. 113, 118, 502 S.E.2d 49, 53 (1998).

IV. Conclusion

We conclude the trial court did not have jurisdiction to try Defendant for assault with a deadly weapon, a charge he had been acquitted of in district court, and erred in ordering, outside Defendant's presence, that Defendant's guns be destroyed. We find no error in the trial court's comments regarding testimony. Finally, we find the trial court did not err when it denied Defendant's Motion to Dismiss the charges against him.

No error in part. Vacated in part.

Judges HUNTER, Robert C. and STROUD concur.

Report per rule 30(e).