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NO. COA01-360

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

STATE OF NORTH CAROLINA

v.

CEDRIC BOWENS

Durham County
No. 00-CRS-055488
00-CRS-010439

Appeal by defendant from judgments entered 2 November 2000 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 24 January 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General C. Norman Young, Jr., for the State.

Brian Michael Aus for defendant-appellant.

MARTIN, Judge.

Defendant was charged in proper bills of indictment with assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon. A jury found him guilty as charged. Defendant appeals from the judgments entered upon the verdicts.

The State's evidence tended to show that the victim in this case, Dante Snipes, was introduced to defendant by Randy Williams in early April 2000, when Williams took defendant to Snipes' home because defendant was interested in purchasing Snipes' motorcycle. According to Snipes, defendant offered to exchange a nine millimeter handgun for the motorcycle. Snipes declined this offer

but agreed to sell the motorcycle for cash and a necklace. Defendant purchased the motorcycle and took it with him.

On the afternoon of 19 April 2000, Snipes was at his home playing a video game in his mother's room with his cousin Tyrone and Rodney Bellamy. Randy Williams drove defendant to Snipes' house and blew the car horn. Bellamy went to the door and announced to Snipes that defendant and Williams were outside. Snipes then went to the door and Williams told Snipes that defendant "want [sic] to holler at you." Snipes invited defendant onto the porch where they talked. Defendant told Snipes that there was something wrong with the motorcycle and that he wanted his money back. Snipes responded that he did not have the money at that time, but that he would give defendant his number so that defendant could call him later that day at which time he would hopefully have the money to return to defendant. Defendant began mumbling with his head down. Snipes then went into the house and wrote down his phone number for defendant. Snipes testified that he had intended to call the prior owner of the motorcycle and ask for a refund and then, in turn, give the money back to defendant.

Snipes returned to the porch and gave defendant his phone number and told defendant to call him later that afternoon. Defendant continued to mumble with his head down. Snipes turned around to walk into his house when he heard a "click noise." Snipes testified that he knew the "click noise" came from a gun so he turned around holding his hands up over his face for protection. After turning around, Snipes saw the gun and he was shot in his

arm. According to Snipes, defendant was shooting from approximately ten or fifteen feet away. Snipes testified that he attempted to dodge bullets as defendant fired about eight shots at him. As Snipes was attempting to get back into the house, he was shot in the back of the leg. Snipes ran to the back of the house and defendant did not pursue him inside the house.

Snipes went next door and was taken by ambulance to the emergency room at Duke Hospital. He underwent surgery on his arm and leg and stayed in the hospital for about six hours. He was out of work for two months, and had to take prescription medication for pain for one month.

Randy Williams testified that he knew defendant and Snipes and that he had taken defendant to Snipes' home to purchase a motorcycle. However, Williams did not recall hearing defendant offer to purchase the motorcycle with a nine millimeter handgun. Williams testified that on 19 April 2000, defendant told him that he wanted to go to Snipes' house to talk to him about the motorcycle but did not tell Williams that he planned to do anything else.

Williams drove defendant to Snipes' home and upon arrival, defendant got out of the car and went up to the house while Williams remained in the car and turned the car around. Williams testified that he did not see any confrontation between defendant and Snipes but that he heard gun shots. Upon hearing the shots, Williams put the car in drive and got ready to pull off. Defendant jumped into the car within seconds of the last shot fired and

Williams drove away. Williams asked defendant what happened but defendant did not respond. Williams testified that he did not see a gun in defendant's possession when he drove defendant over to Snipes' home nor when he drove defendant away from Snipes' home. Additionally, Williams did not see who fired the shots.

Rodney Bellamy testified that on 19 April 2000, he was with Snipes and Tyrone at Snipes' mothers' home. Bellamy heard a horn blow and saw Williams and a passenger sitting outside in a red car. Bellamy testified that he and Snipes went onto the porch as defendant approached the house. Bellamy talked to Williams who was still sitting in his car while defendant and Snipes had a conversation. Bellamy and Snipes both went inside the house and Snipes was getting a pencil and a piece of paper. While in the house, Snipes told Bellamy that when he had gotten the motorcycle, it was messed up so he wanted to do the right thing and give defendant his phone number. After Snipes had gone back outside, Bellamy heard gunshots and discovered that Snipes had been shot and was in the back of the hallway bleeding from a gunshot wound.

Sherwood Barbee, a former ID technician in the Durham City Police Department, responded to the shooting. Barbee collected five shell casings--one was found in the middle of the street in front of Snipes' home and the other four were found spread out over the front lawn. Barbee opined that the blood trail that he observed was consistent with a person running from inside Snipes' home to the next door neighbor's house. Barbee also testified that the blood trail would be consistent with someone being shot on the

front lawn.

Eugene Bishop, a retired special agent with the State Bureau of Investigation, was qualified as an expert in firearm forensic examinations. Bishop testified that the shell casings collected from the crime scene had been fired from the same nine millimeter firearm and that no fingerprints were recovered from the casings.

Corporal Walter Tate of the Durham City Police Department responded to the shooting at the Snipes residence on 19 April 2000. Snipes told Corporal Tate that he knew the guy that had shot him but Corporal Tate did not get the shooter's name at that time. Snipes informed Corporal Tate that the person who had shot him was disgruntled over a dirt bike Snipes had sold to him and that was the reason that the shooter shot him. Detective Art Holland of the Durham City Police Department testified that Snipes identified defendant as the person who shot him through a photographic lineup. Detective Holland collected a projectile bullet from Snipes' brother that had been located in the house.

Officer James Carnevale of the Durham City Police Department testified that he was summoned to the Snipes residence on 19 April 2000. According to Officer Carnevale, when he asked Snipes who had shot him, Snipes stated, "[s]ome guys going north on Liberty Street in a red Chevy Cavalier shot me." Officer Carnevale testified that Snipes stated that he did not know who had shot him and that Snipes did not tell him why he was shot. However, Corporal Tate informed Officer Carnevale that Snipes had told him that the shooter was the person to whom he sold a motorcycle about a week before the

shooting.

I.

Defendant first assigns error to the trial court's denial of his request for a jury instruction as to the lesser included offense of assault with a deadly weapon inflicting serious injury. We find no merit in this argument and overrule this assignment of error.

Due process requires that a jury be instructed on a lesser included offense if the evidence would permit a rational juror to find a defendant guilty of the lesser offense and acquit him of the greater. *State v. Conaway*, 339 N.C. 487, 453 S.E.2d 824, cert. denied, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). It is not necessary, however, for the trial judge to instruct the jury on lesser included offenses "when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence related to any element of the crime charged." *State v. Washington*, 142 N.C. App. 657, 660, 544 S.E.2d 249, 251 (2001), disc. review denied, 353 N.C. 532, 550 S.E.2d 165 (2001).

Assault with a deadly weapon inflicting serious injury is a lesser included offense of assault with a deadly weapon with intent to kill inflicting serious injury. *State v. Grigsby*, 351 N.C. 454, 526 S.E.2d 460 (2000). Accordingly, if there was any evidence from which the jury could find defendant guilty of assault with a deadly weapon inflicting serious injury, it was error for the trial court to fail to submit that offense to the jury. See *Washington*, 142

N.C. App. 657, 544 S.E.2d 249. "Failure to give a necessary lesser included offense instruction is reversible error." *State v. Andrews*, 122 N.C. App. 274, 277, 468 S.E.2d 597, 599 (1996) (citation omitted).

Defendant claims that from the evidence, a rational juror could have found that defendant did not intend to kill Snipes and thus, the trial court erred in its failure to instruct on assault with a deadly weapon inflicting serious injury. Defendant suggests that a rational juror could have concluded that the nature of Snipes' wounds indicated that defendant did not intend to kill him. Defendant argues that while there were multiple gunshots, Snipes was only struck twice, both in non-vital areas of the body. Defendant contends the lack of more serious wounds supports the hypothesis that defendant did not intend to kill Snipes. We disagree.

"[D]efendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988) (citing *State v. Thacker*, 281 N.C. 447, 189 S.E.2d 145 (1972)). The evidence presented in the case *sub judice*, indicates that defendant intended to use lethal force. The evidence shows that defendant was upset when he learned that Snipes could not immediately refund his money for the motorcycle, mumbling to himself with his head down and continuing to mumble when defendant returned with a paper with his telephone number. He pulled the pistol as Snipes turned to go back into the

house and fired multiple shots at Snipes from the relatively close range of ten to fifteen feet. Snipes was shot in the arm that he was using to cover his face for protection, supporting the inference that defendant intended to shoot Snipes in the head or upper body. Defendant continued to shoot at Snipes as he was attempting to escape through the doorway into his house, striking him in the leg. The fact that defendant fired multiple shots but only shot Snipes twice in non-vital areas does not negate his intent to kill. Thus, we hold the State's evidence was positive as to defendant's intent to kill and there was no conflicting evidence from which a rational juror would acquit defendant of the greater charge and convict him of any lesser charge. This assignment of error is overruled.

II.

Defendant next argues that the trial court erred in denying his motions to dismiss the charges of assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon because of the insufficiency of the evidence.

In reviewing a motion to dismiss, this Court must determine “. . . whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense.” *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985). Substantial evidence has been defined as “that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377,

381 (1981). Further, the evidence should be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom. *Bates*, 313 N.C. at 581, 330 S.E.2d at 201. Any contradictions or discrepancies in the evidence are for resolution by the jury and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980).

The elements of the charge 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. N.C. Gen. Stat. § 14-32(a) (1999). A careful review of the record discloses there was substantial evidence as to each element of the charge of assault with a deadly weapon with intent to kill inflicting serious injury. First, the evidence shows that defendant was identified as the person who shot Snipes at close range with a handgun. A handgun is a deadly weapon *per se*. *Washington*, 142 N.C. App. at 661, 544 S.E.2d at 252. Therefore, there was an assault with a deadly weapon. There was also substantial evidence supporting the element of intent to kill for the reasons stated *supra*. Finally, defendant inflicted serious injury to Snipes since Snipes was shot through the arm and leg and had to undergo treatment at Duke Hospital. Thus, we hold there was substantial evidence of each element of the offense of assault with a deadly weapon with intent to kill inflicting serious injury, and the trial court properly denied the motion to dismiss this charge.

The offense of possession of a firearm by a felon requires:

(1) the purchase, owning, possession, custody, care, or control; (2) of a "handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c)"; and (3) by any person having a prior conviction of any crime defined in G.S. § 14-415.1(b). N.C. Gen. Stat. § 14-415.1 (1999).

Defendant stipulated that he had previously been convicted of a felony. His stipulation established that he had been convicted of a crime covered by G.S. § 14-415.1(b). Therefore, the State only had to show that defendant had a handgun in his possession or control. We conclude that the State presented substantial evidence that defendant possessed a handgun on 19 April 2000.

Defendant argues that Snipes was the only person who testified as to defendant's possession of a firearm and no firearm was ever recovered. He attacks Snipes' credibility by noting that he told Officer Carnevale at the crime scene that he did not know who shot him but only stated, "[s]ome guys going north on Liberty Street in a red Chevy Cavalier shot me," and pointing to other evidence contradicting Snipes' testimony. Snipes' credibility, however, was for the jury; his testimony that defendant was in possession of a firearm and identifying defendant as his assailant is substantial evidence sufficient to overcome defendant's motion to dismiss.

Because defendant offers no argument in support of his remaining assignment of error, it is deemed abandoned. N.C.R. App. P. 28(a), 28(b)(5).

No error.

Judges TIMMONS-GOODSON and BRYANT concur.

Report per Rule 30(e).