NO. COA02-561

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Granville County
Nos. 01 CRS 002343, 050847

ROY LEE TERRY

Appeal by defendant from judgment dated 7 December 2001 by Judge Ronald L. Stephens in Granville County Superior Court. Heard in the Court of Appeals 30 December 2002.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn L. Strange, for the State.

Howard A. Kurtz for defendant appellant.

GREENE, Judge.

Roy Lee Terry (Defendant) appeals from a judgment dated 7 December 2001 entered consistent with a jury verdict finding him guilty of felonious assault inflicting serious injury and assault with a deadly weapon with intent to kill inflicting serious injury. At trial, the State introduced evidence tending to show on 1 May 2001, Thelma Henderson (the victim) and Defendant were at his mother's house. They both began drinking alcoholic beverages at or before noon that day. In the evening, they were sitting in the backyard with Defendant's sister and nephew. His sister's dog

barked when the victim got up to go to the bathroom. After the victim called the dog's name, Defendant "threw a fit." The victim called the nephew's name, and Defendant followed the victim toward the house.

Defendant struck the victim in the head with his fist and knocked her to the ground. The victim then entered the house, and Defendant followed her and continued hitting her in the face. Defendant next got a bar stool from another room and hit the victim in the head with it until the bar stool broke. Afterwards, he went back outside and began arguing with his sister and nephew. When Defendant's sister saw the victim waving from the doorway, she went inside to telephone for an ambulance. Corporal Jason Tingen (Corporal Tingen) responded to the call at approximately 7:15 p.m. and discovered the victim sitting in a bathtub covered in blood. The victim appeared to be incoherent, prompting Corporal Tingen to telephone EMS. Officers subsequently found Defendant hiding under clothes in a closet.

The victim was admitted to a hospital emergency room at 7:40 p.m. with what Dr. Jesse Randall Byrd (Dr. Byrd) stated was a very significant head injury. He described two lacerations on her head as being four inches in length and a third laceration as being two inches in length and noted approximately fifty stitches were placed in the victim's head. Dr. Byrd testified the lacerations did not appear to have been caused by a sharp edge, but rather by blunt force trauma. He indicated the lacerations on the victim's head were consistent with being struck by a blunt object such as a bar

stool with a very high degree of force. He opined the lacerations were not consistent with a glass bowl light fixture falling down and hitting the victim.

Dr. Byrd observed the victim's left eye was swollen shut and she had fractures on both sides of her nose. He stated those injuries were consistent with the victim having been punched and would have required a high degree of force. The victim also had a laceration on her left foot. Dr. Byrd opined it would have taken at least three and probably four blows to cause all of the lacerations. Hospital tests indicated the victim had a blood alcohol concentration of 0.187%.

Both Detective Warren Hicks (Detective Hicks) and Corporal Tingen stated Defendant had no bruises, bleeding, cuts, or marks on the date in question. Corporal Tingen also stated he had overheard Defendant earlier in the courtroom telling the victim to change her story and "[t]ell them that she had fell [sic] and hit her head." The victim testified Defendant tried to get her to tell the jury a fan had fallen on her head even though there was not a fan in the room. Detective Hicks stated there was not a fan or chandelier in the room, and he observed red marks on the broken bar stool found in the room.

Defendant testified, on his own behalf, the victim had first assaulted him sixteen years before, and she had been drinking since 10:00 a.m. on the date in question. He said the victim started fighting with him on the date in question. Although Defendant tried to get away from the victim and hit her five or six times

with his hand to get her off of him, the victim would not stop. The victim grabbed the bar stool, and a light fixture was broken as Defendant struggled to get the bar stool away from her. He stated the victim was cut by the falling glass from the light fixture. Defendant admitted there was not a fan in the room. When asked about the blood on the bar stool, Defendant suggested the blood came either from the floor or from the victim's feet. Defendant stated he told his sister to call the ambulance for the victim.

During the charge conference, Defendant requested the trial court instruct the jury on self-defense and accident. The trial court agreed to give an instruction on self-defense but denied the request for an instruction on accident because there was not substantial evidence, stating there was "at least no credible evidence to support that." Following closing arguments and the trial court's charge to the jury, Defendant sought an additional instruction from the trial court. He noted the trial court had sustained his objection to the State's comment during closing arguments "as defense counsel [he] did not take an oath . . ." and asked the trial court to instruct the jury "that numerous people take an oath, including each of the attorneys." The trial court denied the request, and the jury subsequently returned its guilty verdict.

The issues are whether: (I) there was substantial evidence of an accident to support an instruction on the defense of accident and (II) the record shows the trial court erred in failing to give

Defendant's requested instruction about the State's allegedly improper comment during closing argument.

I

Defendant first contends the trial court erred in denying his request to instruct the jury as to the defense of accident. He argues substantial evidence supported the requested instruction, as his own testimony indicated the injuries were caused by an accident. We disagree.

"It is well established that when a defendant requests a special instruction which is correct in law and supported by the evidence, the trial court must give the requested instruction, at least in substance." *State v. Tidwell*, 112 N.C. App. 770, 773, 436 S.E.2d 922, 924 (1993). If a trial court refuses to give a requested instruction, a defendant on appeal must show "the requested instruction was not given in substance, and that substantial evidence supported the omitted instruction." *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792 (1985). "'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Gray*, 337 N.C. 772, 777-78, 448 S.E.2d 794, 798 (1994) (citation omitted). "The trial court need only give the jury instructions supported by a reasonable view of the evidence." *White,* 77 N.C. App. at 52, 334 S.E.2d at 792. An instruction on the defense of accident should be given when there is substantial evidence, *see In re Wilson*, --- N.C. App. ---, ---, 568 S.E.2d 862, 863 (2002), the "alleged assault was unintentional and the

defendant acted without wrongful purpose in the course of lawful conduct and without culpable negligence," *State v. Thompson*, 118 N.C. App. 33, 36, 454 S.E.2d 271, 273 (1995).

In this case, Defendant relies exclusively on his testimony of the events on the night in question to support his requested instruction. His testimony, however, is inconsistent with the physical evidence. The room where the victim was injured did not contain a fan or chandelier, and the evidence further indicated the victims' lacerations were not caused by falling glass but blunt force trauma requiring three to four blows. The facial fractures and swollen eye were consistent with punches and would have required a high degree of force. Defendant did not present substantial evidence for a reasonable juror to find the victim's injuries were caused by accident. Thus, Defendant was not entitled to an instruction on the defense of accident.

II

Defendant next contends the trial court committed reversible error by denying his request to instruct the jury as to allegedly improper remarks about his defense counsel during the State's closing argument. Although the closing arguments were not recorded, Defendant claims the State commented defense counsel had not taken an oath. He argues the comment "presumably impl[ied] that Defense Counsel was not obligated to tell the truth and directly impugn[ed] his credibility." Defendant asserts the trial court had an obligation to instruct the jury to disregard the disparaging remarks and he was prejudiced by the trial court's

denial of his requested instruction.

Defendant, as the appellant, has the duty and responsibility of seeing that the record before this Court is complete, *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983), for "review is solely upon the record on appeal and the verbatim transcript of proceedings." N.C.R. App. P. 9(a). "This Court is bound by the record before it, and in the absence of anything in the record to indicate otherwise, must assume that the trial judge ruled properly on matters before him, correctly applying the applicable law." *State v. Williams*, 304 N.C. 394, 415, 284 S.E.2d 437, 451 (1981). Because the closing arguments were not recorded, Defendant's argument is not properly before this Court. He has failed to set out "so much of the evidence . . . as is necessary for an understanding of all errors assigned." N.C.R. App. P. 9(a)(1)(e).[1] Thus, we are unable to address this assignment of error.

Accordingly, Defendant's convictions are upheld.

No Error.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).

[1]The trial court did apparently sustain Defendant's objection to the State's comment.