NO. COA03-1201

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

STATE OF NORTH CAROLINA

v.

CARL LEE ROBINSON, JR.

Sampson County
Nos. 03-CRS-01393
03-CRS-03972
03-CRS-51716

Appeal by defendant from judgments entered 11 July 2003 by Judge Kenneth F. Crow in Sampson County Superior Court. Heard in the Court of Appeals 27 May 2004.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

Haral E. Carlin for defendant-appellant.

THORNBURG, Judge.

Background

Carl Lee Robinson, Jr. ("defendant") appeals convictions of assault with a deadly weapon inflicting serious injury and felonious assault inflicting serious bodily injury. At trial, the State presented the testimony of Latasha Beebe ("Ms. Beebe") which, in pertinent part, was as follows: Ms. Beebe and defendant met in October of 2001 and started a relationship in November of 2001, which ended approximately 10 months later. On 14 March 2003, Ms. Beebe went to visit two of her friends, Monesha Moore ("Ms. Moore") and Belinda Garner ("Ms. Garner") at the residence of Ms. Garner.

Five minutes after Ms. Beebe arrived, defendant knocked on the door and asked Ms. Moore for a cigarette. Ms. Beebe became fearful of defendant and arranged to go to the store with Ms. Moore. As Ms. Beebe left the house, defendant followed her. Defendant then asked Ms. Beebe for a kiss. Ms. Beebe asked defendant to leave her alone, but defendant repeated his request, using stronger language. As Ms. Beebe started to turn around in order to tell defendant to leave her alone, defendant cut her face. When Ms. Beebe raised her arm to block defendant from striking her again, defendant cut her hand. Ms. Beebe testified that she could not see what defendant had in his hand, but that she felt a sharp object and saw blood dripping from her hand. After defendant struck Ms. Beebe the second time, he walked away. Ms. Beebe then went to the hospital, accompanied by Ms. Moore. At the hospital emergency room, Ms. Beebe was treated by Michael Lewis, a physician's assistant ("PA Lewis"). At trial, PA Lewis testified that Ms. Beebe had two deep cuts, one to her face and one to her hand.

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury (N.C. Gen. Stat. § 14-32(b)(2003), case no. 03-CRS-51716), felonious assault inflicting serious bodily injury (N.C. Gen. Stat. § 14-32.4 (2003), case no. 03-CRS-3972) and misdemeanor assault inflicting serious injury. The trial court arrested judgment on the offense of misdemeanor assault inflicting serious injury and entered judgment on the other two offenses. Defendant was sentenced to a minimum of 46 months to a maximum of 65 months for assault with a deadly weapon inflicting serious

injury and 25 to 30 months for felonious assault inflicting serious bodily injury. Defendant appeals.

Issues

On appeal, defendant argues that the trial court erred by 1) failing to arrest judgment on the conviction of felonious assault inflicting serious bodily injury; 2) failing to dismiss the charges against defendant due to insufficiency of the evidence; 3) giving a peremptory jury instruction that the injury suffered by Ms. Beebe was a serious injury and 4) allowing certain evidence to be considered by the jury pursuant to Rule 404(b) of the North Carolina Rules of Evidence.

I

Defendant argues that the trial court erred by not arresting judgment on the charge of assault inflicting serious bodily injury, N.C. Gen. Stat. § 14-32.4, and requests a new trial on this ground. In *State v. Ezell*, 159 N.C. App. 103, 582 S.E.2d 679 (2003), this Court held that North Carolina courts "cannot convict and sentence [a defendant] for both §§ 14-32 and 14-32.4 for the same conduct without violating the double jeopardy provisions of the United States and North Carolina constitutions." *Id.* at 111, 582 S.E.2d at 685. The State concedes, and we agree, that *Ezell* controls the disposition of the instant case. Defendant's consecutive sentences for N.C. Gen. Stat. §§ 14-32 and 14-32.4 amount to multiple punishments for the same offense. However, the State argues that under *Ezell* the proper remedy is not a new trial, but rather, remand for entry of judgment on the more serious offense, assault

with a deadly weapon inflicting serious injury. We agree and arrest judgment in case no. 03-CRS-3972 and remand for entry of judgment in case no. 03-CRS-51716.

II

Defendant next argues that the trial court erred by not dismissing the charge of assault with a deadly weapon inflicting serious injury for insufficiency of the evidence. Specifically, defendant contends that the State did not present substantial evidence that Ms. Beebe suffered a serious injury.

In order to survive a defendant's motion to dismiss, the State must present substantial evidence of each essential element of the crime charged. *State v. Alexander*, 152 N.C. App. 701, 705, 568 S.E.2d 317, 319 (2002). Substantial evidence is such "relevant evidence that a reasonable mind might accept as sufficient to support a conclusion." *State v. Allen*, 346 N.C. 731, 739, 488 S.E.2d 188, 192 (1997). Further, all evidence must be viewed in the light most favorable to the State, and the State is entitled to all reasonable inferences to be drawn therefrom. *Id.* "The courts of this state have declined to define serious injury for purposes of assault prosecutions other than stating that the term means physical or bodily injury resulting from an assault, and that '[f]urther definition seems neither wise nor desirable[.]'" *Ezell*, 159 N.C. App. at 110, 582 S.E.2d at 684 (internal citations omitted). Relevant factors in determining whether serious injury has been inflicted include, but are not limited to, pain, loss of blood, hospitalization, and time lost from work. *State v.*

Alexander, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994). Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury. *State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 374 (1978).

In the instant case, the State presented the testimony of the police officer who took Ms. Beebe's statement. The officer testified about Ms. Beebe's condition as follows:

> To me she looked bad. She was in a lot of pain. She was crying. Her side of her face was cut. It was a large gap and you could see all inside. Her hand was split and you could see all down in it. She appeared to be in a lot of pain.

PA Lewis testified that Ms. Beebe's pain assessment shortly after the incident was 10 on a scale of 1 to 10, with 10 being the most severe. PA Lewis indicated that Ms. Beebe's wounds were the result of cuts by a sharp blade and would typically cause pain and suffering. He further testified that the scar on Ms. Beebe's face that resulted from the laceration is permanent. *Cf.* N.C. Gen. Stat. § 14-32.4 (2003)(defining "serious bodily injury" for the purposes of that statute, assault inflicting serious bodily injury, as including "serious permanent disfigurement"). Thus, we conclude that the State presented substantial evidence indicating that Ms. Beebe sustained serious injury as a result of defendant's assault. Accordingly, this assignment of error is overruled.

III

By further assignment of error, defendant contends the trial court erred by instructing the jury that the injuries suffered by the victim were serious injuries. Whether a serious injury has

been inflicted is a factual determination usually within the province of the jury. *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991), *cert. denied*, 529 U.S. 1006, 146 L. Ed. 2d 223 (2000). However, if there is no conflicting evidence and the evidence is such that reasonable minds could not differ as to the serious nature of the injuries inflicted, a trial judge may instruct the jury that the injuries to the victim are serious as a matter of law. *Id.* at 54, 409 S.E.2d at 318-19. Based on the evidence discussed above, we hold that the trial judge did not err in determining that reasonable minds could not differ as to the seriousness of Ms. Beebe's injuries and instructing the jury that Ms. Beebe had suffered serious injuries for the purposes of N.C. Gen. Stat. § 14-32(b)(2003). *See State v. Crisp*, 126 N.C. App. 30, 37, 483 S.E.2d 462, 467 (1997)(holding that reasonable minds could not differ as to the seriousness of the victim's physical injuries where the victim required emergency treatment for a gunshot wound to his calf muscle). This assignment of error is overruled.

IV

Defendant next contends that the trial court erred by admitting into evidence the testimony of several witnesses describing defendant's past assaults and threats directed at Ms. Beebe. Defendant raises three arguments in reference to this issue, all grounded in Rule 404(b) of the North Carolina Rules of Evidence. Defendant first asserts that the trial court improperly admitted this evidence to show defendant's malice towards Ms. Beebe. Rule 404(b) explicitly excludes evidence admitted to "prove

the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b)(2003). However, "[r]ule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Berry,* 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002)(citation omitted). Further, North Carolina courts have specifically allowed evidence of other crimes or wrongful acts by defendant to demonstrate malice. *See State v. Byers,* 105 N.C. App. 377, 383, 413 S.E.2d 586, 589 (1992). This argument is without merit.

Defendant also asserts that this evidence was more prejudicial than probative in that defendant's past acts, as testified to by Ms. Beebe, were dissimilar and remote in time to the acts underlying the instant charges. After a careful review of the transcript, record and briefs, we conclude that the trial court correctly determined that the acts in question were sufficiently similar and not too remote to be probative of motive, intent, common plan and malice. Further, we conclude that the trial court did not abuse its discretion in weighing the probative value of this testimony against its prejudice to defendant and ruling the evidence admissible. *See State v. Howell*, 343 N.C. 229, 236-37, 470 S.E.2d 38, 42 (1996)(explaining the relationship between evidence rules 403 and 404(b) in the context of trial court rulings

on admissibility of evidence when arguments of dissimilarity and remoteness are raised).

Defendant next asserts that the trial court erred by allowing an employee of the clerk's office to testify about one of defendant's prior convictions. During the State's case in chief, the prosecutor called the clerk of court as a witness. The clerk read the judgment finding defendant guilty of assault on a female. The defense attorney objected to the details of the judgment such as the probation period and the length of the suspended sentence. Specifically, the defense attorney said, "[o]bjection, Your Honor, to the details of that. I mean, the guilty verdict, I think, is enough." The trial judge sustained the objection. The State then authenticated the judgment and offered it into evidence. The trial judge asked if defense counsel objected. Defense counsel said, "[n]o objection, Your Honor."

As no timely objection was made to the admission into evidence of either the testimony concerning the guilty verdict or the judgment, we conclude that this alleged error was not preserved for our review. N.C. R. App. P. 10(b)(1); *see State v. McCray*, 342 N.C. 123, 127, 463 S.E.2d 176, 179 (1995). Nor did defendant "specifically and distinctly" contend that the admission of this evidence constituted plain error. *State v. Truesdale*, 340 N.C. 229, 232-33, 456 S.E.2d 299, 301 (1995). Accordingly, defendant waived his right to appellate review of this issue. *Id.* This assignment of error fails.

No error in part.

Arrest judgment as to felonious assault inflicting serious bodily injury, case no. 03-CRS-3972.

Judges HUDSON and GEER concur.

Report per Rule 30(e).