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NO. COA05-1474

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

STATE OF NORTH CAROLINA

v.

Greene County
No. 04 CRS 50173

JARRY A. LAND

Appeal by defendant from judgment entered 13 April 2005 by Judge W. Allen Cobb in Greene County Superior Court. Heard in the Court of Appeals 7 June 2006.

Attorney General Roy Cooper, by Assistant Attorney General Neil Dalton, for the State.

Glen W. Gerding for defendant-appellant.

CALABRIA, Judge.

Jarry A. Land ("defendant") appeals from jury verdicts finding him guilty of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, aggravated assault on a handicapped person, unauthorized possession of a weapon capable of inflicting serious injury or death by a prisoner, and committing an assault with such a weapon. We find no error.

On 16 February 2004, Elmer Castillo Reyes ("the victim") was serving time as an inmate of the Eastern Correctional Institution, a prison under the authority of the North Carolina Department of

Correction. At the time of the incident giving rise to this case, one of the victim's legs had previously been amputated, and his other leg was broken. The victim used a prosthetic leg to perform his duties in the prison's laundry; however, when he removed the prosthetic leg, he traveled in a wheelchair. Because of these medical conditions, the Eastern Correctional Institution housed the victim in a co-op unit with other inmates with handicaps and medical conditions.

On the day of the incident, the victim was working in the laundry, and at approximately 10 a.m., he exited the laundry, traveled to his cell, and removed his prosthetic leg. Then, at the co-op unit's lunchtime, the victim exited his cell and entered the hallway, using his wheelchair. After the victim entered the hallway, two inmates, later identified as defendant and Inmate Sosa ("Sosa"), approached the victim. State witnesses testified that Sosa then grabbed the wheelchair from the front and stated, "I got something for you." State witnesses also testified that both Sosa and defendant subsequently stabbed the victim in the back, chest, and side with objects that were later identified as "shanks," weapons made by inmates in prison by sharpening pieces of metal. Defense witnesses testified to the contrary that it was the victim who obtained the shank from his wheelchair, and Sosa then obtained the shank from the victim prior to stabbing him. After the incident, the victim was transported to Pitt Memorial Hospital where he underwent surgery. Personnel then transported the victim

to Central Prison Hospital, where he received 50 days of medical treatment.

Based on these and related facts, the State indicted defendant on three counts of possession of a dangerous weapon in prison, one count of assault with a deadly weapon with intent to kill inflicting serious bodily injury, one count of attempted first-degree murder, and one count of assault on a handicapped person. The trial court subsequently dismissed one count of possession of a dangerous weapon in prison, and the jury convicted defendant of all remaining charges. The trial court then consolidated for judgment the convictions for possession of a dangerous weapon in prison and sentenced defendant to a minimum of 34 months and a maximum of 41 months in the North Carolina Department of Correction. The trial court also sentenced defendant on the attempted first-degree murder conviction to a minimum of 250 months to a maximum of 309 months to run at the expiration of defendant's other sentences. The trial court also consolidated the convictions for assault with a deadly weapon with intent to kill inflicting serious bodily injury and assault on a handicapped person, and it sentenced defendant to a minimum of 146 months to a maximum of 185 months. Defendant appeals.

Defendant initially argues, "the trial court erred in denying [his] renewed motion to dismiss because the state offered insufficient evidence to support the convictions of attempted murder, assault with a deadly weapon with intent to kill inflicting serious injury, and aggravated assault on a handicapped person."

When reviewing a denial of a motion to dismiss, we examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). We then consider *de novo*

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. If so, the motion is properly denied. If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

State v. Scott, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citations omitted).

Defendant's first sub-argument is that "[t]he State failed to prove the elements of malice, premeditation[,] and deliberation required for a conviction of attempted murder." When the State charges a defendant with attempt to commit a crime, the State must show beyond a reasonable doubt: "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996).

"Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. McCollum*, 157 N.C. App. 408, 412, 579 S.E.2d 467, 470 (2003). Malice that can support a conviction of first-degree murder includes: (1) actual malice, i.e., "express hatred, ill will or

spite," (2) an "act which is inherently dangerous to human life . . . done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief," or (3) a "condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). Additionally, "[t]he intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice." *State v. Russell Council Judge*, 308 N.C. 658, 661, 303 S.E.2d 817, 820 (1983). Accordingly, both because the State presented evidence that defendant repeatedly stabbed the handicapped victim with a metal shank, twice near vital organs, without just cause, excuse, or justification and because a shank can be considered a deadly weapon, the State presented substantial evidence of malice, and defendant's argument is without merit.

Defendant also challenges the elements of premeditation and deliberation. Premeditation requires that a defendant thought about the criminal act prior to committing it, no matter how long. *State v. Bullock*, 326 N.C. 253, 257, 388 S.E.2d 81, 83 (1990). Deliberation is a defendant's intent to kill occurring while in a "cool state of blood." *Id.* Because the mental processes of premeditation and deliberation are not normally susceptible to proof by direct evidence, they are most commonly proven by circumstantial evidence. *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994). This Court has recognized that the lack of

provocation by the victim and the manner of the attempted killing can be circumstantial evidence of the elements of premeditation and deliberation. *State v. Peoples*, 141 N.C. App. 115, 118, 539 S.E.2d 25, 28 (2000). In the case *sub judice*, the State presented the testimony of both Officer McKeel and the victim that while the victim was in his wheelchair on his way to lunch, he was approached by defendant and Sosa. On the State's theory of the case, defendant and Sosa then took out shanks and began stabbing the victim 15-20 times, twice near the victim's heart and lungs, without apparent provocation. We hold that these facts amount to substantial evidence of premeditation and deliberation such that the trial court did not err in failing to dismiss the charge of attempted murder.

In his second sub-argument, defendant argues, "the State failed to prove the element of intent to kill required for a conviction of attempted murder, assault with a deadly weapon with intent to kill inflicting serious injury, and aggravated assault on a handicapped person." Intent to kill is a required element of first-degree murder. *State v. Jones*, 353 N.C. 159, 166, 538 S.E.2d 917, 923-24 (2000). "To show the 'specific intent to kill' required to prove first-degree murder, the State must show more than an intentional act by the defendant resulting in the death of the victim; the State also must show that the defendant intended for his action to result in the victim's death." *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992). Likewise, showing intent to kill is a necessary element of assault with a deadly

weapon with intent to kill inflicting serious injury, N.C. Gen. Stat. § 14-32(a), and is one way of establishing aggravated assault on a handicapped person. N.C. Gen. Stat. § 14-32.1.

In the absence of direct evidence of intent to kill, it "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. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972). We hold that the same facts that constituted substantial evidence of premeditation and deliberation also constitute substantial evidence on the issue of intent to kill, particularly that defendant and Sosa stabbed the handicapped victim 15-20 times with a metal shank, twice near vital organs including the area of the heart and lungs. Accordingly, this argument is without merit.

Defendant's third sub-argument states, "[t]he State failed to prove the elements of serious injury required for a conviction of assault with a deadly weapon with intent to kill inflicting serious injury and aggravated assault on a handicapped person." See N.C. Gen. Stat. §§ 14-32(a); 14-32.1(e)(2). Our Supreme Court has held, "as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious." *State v. Alexander*, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994). The State presented evidence that the victim had puncture wounds resulting from the attack by defendant and Sosa that required surgery at Pitt Memorial Hospital and 50 days of medical

treatment at the Central Prison Hospital. We hold this evidence amounts to substantial evidence of an injury such that the trial court properly denied defendant's motion to dismiss. See *id.*

Defendant's fourth sub-argument states, "[t]he State failed to prove beyond a reasonable doubt that Defendant did not act in self-defense." Upon a defendant's motion to dismiss, the trial court reviews evidence in the light most favorable to the State and determines whether the State has presented substantial evidence of each element of the crimes with which it has charged a defendant. *Benson, supra.* In this case, viewing the evidence in the light most favorable to the State, the evidence showed that defendant and Sosa attacked the victim without provocation. Although defendant presented some evidence that the victim was the first aggressor, courts of this State have repeatedly held that "contradictions and discrepancies do not warrant dismissal of the case--they are for the jury to resolve." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). Thus, the trial court did not err in denying defendant's motion to dismiss.

Defendant also argues that the State failed to present substantial evidence that defendant possessed a dangerous weapon in prison because the State failed to produce sufficient evidence that defendant was in custody of the Division of Prisons. See N.C. Gen. Stat. § 14-258.2. Defendant has failed to preserve this argument for appellate review because in his motions to dismiss he never urged dismissal on the basis that the State failed to produce substantial evidence that defendant was in the custody of the

Division of Prisons. See N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely . . . motion, stating the specific grounds for the ruling the party desired"). Thus, we do not address this assignment of error.

Additionally, defendant argues that the State failed to provide substantial evidence of the greater offense that he possessed a dangerous weapon in prison that he used to commit an assault inflicting bodily injury. See N.C. Gen. Stat. § 14-258.2. As stated *supra*, we hold that the State presented substantial evidence that defendant inflicted bodily injury on the victim including puncture wounds near the victim's heart and lungs that required surgery at Pitt Memorial Hospital and 50 days of medical treatment at the Central Prison Hospital. Thus, we reject this argument.

Defendant's final argument on appeal states, "[t]he trial court committed plain error when it instructed the jury that it could convict defendant of aggravated assault on a handicapped person if it found defendant inflicted 'serious injury or serious damage' when the indictment alleged that defendant inflicted only 'serious injury.'" "It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). When determining whether an instructional error amounts to plain error, this Court

"determine[s] if the instructional error had a probable impact on the jury's finding of guilt." *State v. Tucker*, 317 N.C. 532, 539, 346 S.E.2d 417, 421 (1986).

The State argues that plain error "is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" See *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation omitted).. Moreover, the State argues that defendant cannot meet the burden of showing plain error because defendant was also convicted of assault with a deadly weapon with intent to kill inflicting serious injury. Because the jury found that the element of serious injury was met in that offense, the State argues it would be inconsistent for the jury to determine that the serious injury element of aggravated assault on a handicapped person was not met. We agree with the State and hold that defendant has failed to show plain error on the facts of this case.

Defendant has failed to argue his remaining assignments of error on appeal, and we deem them abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006).

No error.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).