NO. COA05-257

NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2006

STATE OF NORTH CAROLINA

v. Stanly County
Nos. 02 CRS 54051-52

JOHN ALAN MORTON

Appeal by defendant from judgments entered 30 July 2004 by Judge Susan C. Taylor in Stanly County Superior Court. Heard in the Court of Appeals 2 November 2005.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

JACKSON, Judge.

On the evening of 2 December 2002, Keith Stallings ("Stallings") went to the home of Dena Burris ("Burris") and her two sons. Stallings reported to police officers that while he was at Burris' home, he was sitting on her couch drinking beer when John Morton ("defendant") suddenly came through the front door, sprayed Stallings with pepper spray, and then stabbed him. Stallings stated that after being stabbed, he ran from Burris' home to his truck, where defendant and Rodney Britt, a friend of defendant's, continued to threaten him. Stallings stated that he then left Burris' home in his truck, and went to a friend's home so

that he could be taken to the hospital. When he arrived at the hospital, he told a nurse that defendant had stabbed him. Stallings had a stab wound in his chest, which punctured his heart and required emergency open heart surgery.

Detective John Broadway ("Detective Broadway") investigated the stabbing. He went to Burris' home, where he met Burris and one of her sons. Burris allowed the detective to come into her home and look around. Detective Broadway did not find any evidence in the living room or in the home indicating that a stabbing or attack had occurred, and he did not find any evidence that blood had been cleaned up using cleaners or chemicals. The detective spoke briefly with Burris and her son. Both Burris and her son denied seeing defendant attack Stallings, and stated that he did not stab Stallings in their living room. Detective Broadway testified that there were some blood droplets leading down the sidewalk in front of Burris' home towards the street, but that this was the only evidence of blood he saw at the scene.

On 14 July 2003, defendant was indicted for the attempted-first degree murder of Stallings, and for the assault with a deadly weapon with intent to kill inflicting serious injury on Stallings, using a knife or other sharp stabbing instrument. A jury found defendant guilty of both charges. During the sentencing hearing, defendant made a motion to the trial court asking that his sentences run concurrently. The trial court denied defendant's motion, and defendant was sentenced consecutively to terms of 170 to 213 months imprisonment for attempted first-degree murder, and

100 to 129 months imprisonment for assault with a deadly weapon with intent to kill inflicting serious injury. Defendant now appeals his convictions.

We begin by noting that defendant lists thirteen assignments of error in the record on appeal. In his brief to this Court, defendant presents arguments as to only seven of the listed assignments of error. Therefore, the remaining assignments of error are deemed abandoned. N.C. R. App. P. 28(b)(6) (2005).

Defendant first contends the trial court failed to instruct the jury on the requirement of jury unanimity in order to return a verdict, thereby violating North Carolina General Statutes, section 15A-1235(a) and defendant's state and federal constitutional rights.

North Carolina General Statutes, section 15A-1235(a) (2004) requires that "[b]efore the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty." In addition, our State's constitution provides that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. North Carolina pattern criminal jury instruction 101.35 states, *inter alia*, that "members of the jury . . . you may not return a verdict until all [twelve] jurors agree unanimously. You may not render a verdict by majority vote." In the instant case, the trial court failed to give the instruction precisely as provided in pattern jury instruction 101.35.

Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides that in order to preserve for appeal a challenge to the jury instructions given at trial, a party must object to the jury instructions before the jury retires. N.C. R. App. P. 10(b)(2) (2005). However, a defendant's "failure to object to alleged errors by the trial court that violate [his] right to a unanimous verdict does not waive his right to raise the question on appeal." *State v. Lawrence*, 165 N.C. App. 548, 556, 599 S.E.2d 87, 94 (2004) (citing *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)), *disc. review denied*, 359 N.C. 413, 612 S.E.2d 634 (2005); *see also*, *State v. Lawrence*, __ N.C. App. __, __ n.3, 612 S.E.2d 678, 684 (2005). Thus, "[w]hen a question of unanimity is raised, 'we must examine the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed.'" *State v. Bates*, __ N.C. App. __, __, 616 S.E.2d 280, 286-87 (2005) (quoting *State v. Petty*, 132 N.C. App. 453, 461-62, 512 S.E.2d 428, 434, *disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999)).

At the charge conference during defendant's trial, the trial court stated that it would give the pattern criminal jury instruction 101.35 summary instructions, which includes, *inter alia*, an instruction on the requirement for a unanimous decision of the jury in order to render a verdict. Defendant did not object to the proposed instruction, and simply requested the "boilerplate" instructions. Defendant now contends that this amounted to a request for specific instructions, and an agreement by the trial

court to give the instructions, such that the subsequent failure by the trial court to give the agreed upon instructions preserves the issue for appellate review. *See State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) ("[A] request for an instruction at the charge conference is sufficient compliance with . . . Rule [10(b)(2)] to warrant . . . full review on appeal where the requested instruction is . . . promised but not given."); *see also*, *State v. Jaynes*, 353 N.C. 534, 556, 549 S.E.2d 179, 196 (2001) ("when the instruction actually given by the trial court varied from the pattern language, defendant was not required to object in order to preserve this question for appellate review"); *State v. Keel*, 333 N.C. 52, 56, 423 S.E.2d 458, 461 (1992) (once trial court agreed to give pattern instruction, defendant not required to request it be given; requirements of N.C. R. App. P. 10(b)(2) satisfied to preserve review). We do not agree, and hold that defendant's request for the "boilerplate" instructions did not amount to a specific request, such that the trial court's failure to give the precise pattern instruction constitutes a failure to give any instruction as defendant argues. We further hold that the trial court gave the proper instructions as it agreed to do during the charge conference.

During the charge to the jury, the trial court's sole instruction on jury unanimity consisted of the following statement:

> COURT: When you have unanimously agreed upon a verdict as to each charge and are ready to announce them, your foreperson should record your verdicts . . . .

Defendant failed to object to the jury charge as given by the trial court. When the jury retired to deliberations, the jury was given verdict sheets which specifically stated: "We, the jury, unanimously return as our verdict that the defendant is: guilty of attempted first degree murder[] OR not guilty"; and "We, the jury, unanimously return as our verdict that the defendant is: guilty of assault with a deadly weapon with intent to kill inflicting serious injury[] OR guilty of assault with a deadly weapon inflicting serious injury[] OR not guilty." Upon returning to open court, the trial court asked the foreman of the jury if the jury had reached a unanimous verdict as to each charge, to which the foreman replied "Yes, they have." After the verdicts were announced, the jury was individually polled, and each juror was asked "Is this still your verdict?" and "And do you still assent thereto?" Each juror responded "yes" to each question.

Although the trial court did not instruct the jury using the precise language in 101.35, it did instruct the jury that their verdict must be unanimous as to each charge. In addition, the jurors were polled individually and asked if the verdicts that were announced were indeed their own personal verdicts, to which they each responded in the affirmative. "The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered." *State v. Black*, 328 N.C. 191, 198, 400 S.E.2d 398, 402 (1991); *see also State v. Tirado*, 358 N.C. 551, 584, 599 S.E.2d 515, 537 (2004) (jury poll "'enable[s] the court and the parties to ascertain *with*

certainty that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented'" (citation omitted) (emphasis in original)), *cert. denied*, __ U.S. __, 161 L. Ed. 2d 285 (2005). The polling of the jury thus served as an additional assurance of the unanimity of the jury's verdicts.

Based on the fact that the jury was instructed to reach unanimous verdicts, the verdict sheets stated that the jury's verdicts were to be unanimous, and each juror individually assented to the verdicts, we hold the trial court did not err in failing to instruct the jury using the precise language of pattern jury instruction 101.35. There is sufficient evidence in the transcript and record indicating that the jury was aware of the requirement of a unanimous verdict, in that the trial court did instruct the jury on the issue of unanimity, the trial court asked the foreman if the jury had reached a unanimous decision, and each juror assented to the jury's verdict for each charge. Further, defendant has not presented any evidence indicating that the verdicts were not the result of a unanimous decision of the jury.

Therefore, we hold the trial court did not commit error in its instruction to the jury regarding the need for a unanimous verdict, and defendant's constitutional rights to a unanimous verdict were not violated.

Defendant next assigns error to the trial court's instruction to the jury that the knife used by defendant to stab the victim was a deadly weapon as a matter of law. As previously noted, defendant

failed to object to the jury instructions prior to the jury's retiring. When a party has failed to make a timely objection to the jury instructions, this Court must determine whether the instructions as given amounted to "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Before this Court conducts a "plain error" analysis of the challenged instructions, we must first determine that the instructions constituted "error" at all. *State v. Bethea*, __ N.C. App. __, __, 617 S.E.2d 687, 693 (2005) (citations omitted). "Then 'before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict.'" *Id.*, __ N.C. App. at __, 617 S.E.2d at 693 (citations omitted). Therefore, as defendant failed to object, we review defendant's objection to the trial court's instruction to determine whether the instruction constituted "plain error." N.C. R. App. P. 10(b)(2) (2005).

In the present case, when instructing the jury regarding the charges of assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury, the trial court instructed the jury that "[a] knife is a deadly weapon." Previously in the instructions, when instructing the jury regarding the charge of attempted first-degree murder, the trial court instructed the jury on what a deadly weapon was, and what factors could be considered in determining if an item was indeed a deadly weapon. Defendant contends that the instruction regarding a knife as a deadly weapon constituted

prejudicial plain error in that the State did not produce the actual knife used or any detailed evidence about the knife defendant allegedly used to stab Stallings.

Our courts repeatedly have held that "'any article, instrument or substance which is likely to produce death or great bodily harm'" may be considered to be a deadly weapon. *State v. Lawson*, __ N.C. App. __, __, 619 S.E.2d 410, 416 (2005) (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)). A knife may be considered a deadly weapon, but the evidence presented in each case will determine whether a knife will be considered a deadly weapon as a matter of law. *Sturdivant*, 304 N.C. at 301, 283 S.E.2d at 726; *see also*, *State v. Carson*, 296 N.C. 31, 46, 249 S.E.2d 417, 426 (1978); *State v. Cooke*, 87 N.C. App. 613, 615, 361 S.E.2d 764, 765 (1987). This Court has held that "where the victim has actually suffered serious injury or death the courts have consistently held that a knife is a dangerous or deadly weapon as a matter of law even if it was not produced or described in detail at trial." *State v. Sanders*, 81 N.C. App. 438, 440, 344 S.E.2d 592, 593 (1986).

In the instant case, defendant stipulated that Stallings was stabbed with a knife, and that his wound was indeed a serious injury. In addition, there was testimony at trial that defendant had a pocketknife with him on the night of the attack. Although the State did not produce the actual knife at trial, and there was no testimony specifically describing defendant's knife, defendant's

stipulations are sufficient to support the instruction to the jury that a knife is a deadly weapon as a matter of law.

Therefore, we conclude that the trial court's instruction in this case regarding a knife as a deadly weapon was proper, and that a "plain error" analysis is unnecessary. Defendant's assignment of error is overruled.

Defendant next contends the trial court erred by allowing Detective Broadway to testify on rebuttal about prior inconsistent statements made by Burris. When testifying at trial, Burris denied making certain statements to Detective Broadway. Specifically, Burris testified that the detective never asked her if she had seen defendant, and she denied making the statement that it had been several weeks since she last had seen him. She also testified that she told the detective that "nothing" had gone on that night at her home, and that Stallings was not stabbed on her couch and she did not see defendant stab Stallings. Burris also was questioned about giving her consent to the detective to allow him to enter her home. Burris stated that she allowed him to come into her home and look around, but she denied saying that she "wasn't signing shit" when the detective presented her with a consent to search form. Defense counsel objected to the State's question regarding Burris' statement that she would not sign the consent to search form, and the objection was overruled.

After Burris testified, the State called Detective Broadway back to the stand as a rebuttal witness. On rebuttal, both the State and defense counsel elicited testimony from the detective

concerning specific statements Burris made to him. Detective Broadway testified that Burris specifically told him that she had not seen defendant in several weeks, that she stated that she "hadn't seen anything," and that when he asked her to sign a consent to search form, she replied that "she wasn't signing shit."

A witness' character or truthfulness may be impeached "through cross-examination about prior inconsistent statements; however, the answers of the witness are conclusive and may not be contradicted by extrinsic evidence." *State v. Mitchell*, 169 N.C. App. 417, 420, 610 S.E.2d 260, 263 (2005) (citing *State v. Shane*, 304 N.C. 643, 652-53, 285 S.E.2d 813, 819 (1982), *cert. denied*, 465 U.S. 1104, 80 L. Ed. 2d 134 (1984)). "When a cross-examiner seeks to discredit a witness by showing prior inconsistent statements . . ., the answers of the witness to questions concerning [the] collateral matter are generally conclusive and may not be contradicted by extrinsic testimony." *State v. Cutshall*, 278 N.C. 334, 349, 180 S.E.2d 745, 754 (1971) (citation omitted). "'[C]ollateral matters' are those which are irrelevant to the issues in the case; they involve immaterial matters and irrelevant facts inquired about to test observation and memory." *Mitchell*, 169 N.C. App. at 421, 610 S.E.2d at 263 (quoting *State v. Najewicz*, 112 N.C. App. 280, 289, 436 S.E.2d 132, 138 (1993)). Subsequent testimony which contradicts "'a witness's denial that he made a prior statement when that testimony purports to reiterate the substance of the statement' is collateral." *Id.* (quoting *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989)). Once a witness has denied

making a prior inconsistent statement, "the State may not introduce the prior statement in an attempt to discredit the witness; the prior statement concerns only a collateral matter, *i.e.*, whether the statement was ever made." *Najewicz*, 112 N.C. App. at 289, 436 S.E.2d at 138; *Mitchell*, 169 N.C. App. at 421, 610 S.E.2d at 263.

With regards to Burris' statement that she refused to sign a consent to search form, and that she "wasn't signing shit," defendant's argument that this amounted to improper evidence of a collateral matter does not prevail. On rebuttal, defense counsel specifically elicited the following testimony from the detective:

> COUNSEL: You asked Ms. Burris if you could come inside, and she immediately advised you yes, did she not?
>
> WITNESS: She said yes.
>
> COUNSEL: Okay. And that's when you say Officer Swink had come then?
>
> WITNESS: Yes, sir.
>
> COUNSEL: And you asked her about some consent form?
>
> WITNESS: I asked [Officer Swink] if she had a consent form in her vehicle.
>
> COUNSEL: Okay. And that's when Ms. Burris said that she wasn't signing it?
>
> WITNESS: Yes, sir.
>
> COUNSEL: But to come in anyway?
>
> WITNESS: She said, you can come in, but I ain't signing shit. Yes, sir.

When defendant first objected to the admission of this statement of Burris', and then later elicited the same evidence, defendant waived his right to appeal regarding the admission of this

testimony. "'[W]hen "evidence is admitted over objection, and the same evidence . . . is later admitted without objection, the benefit of the objection is lost."'" *State v. Dawkins*, 162 N.C. App. 231, 234, 590 S.E.2d 324, 328 (2004) (quoting *State v. Reed*, 153 N.C. App. 462, 466, 570 S.E.2d 116, 119, *disc. review denied*, 356 N.C. 622, 575 S.E.2d 521 (2002)). Therefore, Detective Broadway's testimony concerning Burris' statement that she would not sign the consent to search form is not appealable, and we need not determine whether the admission of this testimony constituted error.

With respect to the detective's rebuttal testimony that Burris told him that she "did not see anything" and that she had not seen defendant in several weeks, defendant failed to object to the detective's rebuttal testimony on these matters, and thus failed to preserve his right to appeal on this line of questioning. *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983); N.C. R. App. P. 10(b)(1) (2005). Therefore, as defendant properly argues, we must review the admission of these statements under a plain error analysis. "'Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result.'" *Mitchell*, 169 N.C. App. at 422, 610 S.E.2d at 264 (quoting *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002)). We apply the plain error rule very cautiously, and only in exceptional cases. *Black*, 308 N.C. at 740, 303 S.E.2d at 806.

The evidence at defendant's trial consisted of testimony not only from Burris and Detective Broadway, but also the victim Stallings, defendant's girlfriend, and defendant himself. The jury heard testimony from Stallings that on the night of the attack, he was at Burris' home when defendant came through the door, sprayed him with pepper spray and stabbed him. Burris herself testified that defendant and Stallings had an argument outside her home that evening, and that Stallings threatened to kill defendant during the argument. In addition, Eddie Kimrey testified that on the night of the attack, he gave defendant a ride, and while they were driving, defendant showed Kimrey a pocket knife and stated that he was going to stab Stallings with it. Kimrey then testified that defendant told Kimrey that he was "going to use the whole thing" on Stallings. Based on the evidence presented at trial, we hold the admission of Detective Broadway's rebuttal testimony does not rise to the level of plain error. Therefore, defendant's assignment of error is overruled.

Defendant next contends that his convictions for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury violate his state and federal constitutional rights to be free from double jeopardy.

Pursuant to the Double Jeopardy Clause of the Fifth Amendment, no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V; *see also*, N.C. Const. art. I, § 19. This clause is made applicable to North Carolina through the Fourteenth Amendment. *State v. Battle*, 279

N.C. 484, 486, 183 S.E.2d 641, 643 (1971). When a defendant is faced with charges on two or more offenses, double jeopardy will apply when the two convictions are identical. *Bethea*, __ N.C. App. at __, 617 S.E.2d at 696.

> Even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

Id. at __, 617 S.E.2d at 696-97 (quoting *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534).

Defendant's case is similar to that in *State v. Bethea*, and *State v. Tirado*, in which our courts held that a defendant who is convicted of both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury is not subjected to double jeopardy based on the fact that "'each offense contains at least one element not included in the other.'" *Bethea*, __ N.C. App. at __, 617 S.E.2d at 697 (quoting *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534).

In order to be convicted of attempted first-degree murder, the State must prove that the defendant "(1) had a specific intent to kill another; (2) made a calculated overt act to carry out that intent; (3) possessed malice, premeditation, and deliberation accompanying the act; and (4) failed to complete the intended killing." *Id.*; *see* N.C. Gen. Stat. § 14-17 (2004); *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534. In order to support a conviction

for assault with a deadly weapon with intent to kill inflicting serious injury, the State must prove the there was "'(1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death.'" *Id.* (quoting *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534)); *see* N.C. Gen. Stat. § 14-32(a) (2003). As recognized in both *Bethea* and *Tirado*,

> [w]hen the defendant is charged with assault with a deadly weapon with intent to kill inflicting serious injury, the State must prove "the use of a deadly weapon" and "proof of serious injury;" however, the charge of attempted murder does not contain the assault with a deadly weapon or serious injury requirement.

Bethea, __ N.C. App. at __, 617 S.E.2d at 697 (citing *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534 (citations omitted)). In addition, when a "defendant is charged with attempted first-degree murder, the State must show proof of premeditation and deliberation; however, these elements are not required for the charge of assault with a deadly weapon with intent to kill inflicting serious injury." *Id.* at __, 617 S.E.2d at 697 (citing *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534). As each of defendant's convictions contain an element that is not included in the other, we hold defendant was not subjected to double jeopardy.

Defendant has asked this Court to reexamine our Supreme Court's holding in *Tirado*, and find that it was erroneously decided. As the issues presented by defendant previously have been decided upon by this Court in *Bethea* and our Supreme Court in *Tirado*, we therefore are "bound by that precedent, unless it has

been overturned by a higher court." *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133 (2004) (quoting *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). Defendant's assignment of error is overruled.

In his next assignment of error, defendant contends the trial court abused its discretion in denying his motion to have his sentences run concurrently, and in ordering that his sentences run consecutively.

Pursuant to North Carolina General Statutes, section 15A-1354(a) (2004),

> When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

As neither North Carolina General Statutes, section 14-87, setting forth the crime of attempted first-degree murder, nor section 14-32(a), setting forth the crime of assault with a deadly weapon with intent to kill inflicting serious injury, require that sentences run consecutively, the decision was one left to the discretion of the trial court. In the instant case, the defendant's judgments state specifically that his sentence for assault with a deadly weapon with intent to kill inflicting serious injury is to run consecutively to his sentence for attempted first-degree murder. The decision to run defendant's sentences concurrently or

consecutively was left to the discretion of the trial court, and will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Taylor*, 332 N.C. 372, 392, 420 S.E.2d 414, 426 (1992); *State v. Wiggins*, 161 N.C. App. 583, 594, 589 S.E.2d 402, 410 (2003); *State v. Thompson*, 139 N.C. App. 299, 310, 533 S.E.2d 834, 842 (2000).

Defendant contends the trial court abused its discretion in ordering his sentences to run consecutively. During the sentencing hearing, defendant presented evidence of mitigating factors, including that he was steadily employed in the community, has a twelve year old child, and has family support in his community. Defendant then asked the court to take into consideration his non-violent criminal record, which he contended consisted of only "minor offenses." On appeal, defendant now argues that these factors, when taken into consideration with the length of his sentences and the circumstances of the crime, constitute an abuse of discretion by the trial court. We disagree.

The trial court heard arguments from both defendant and the State before sentencing defendant. In support of longer sentences for defendant, the State noted that in committing this crime, defendant had induced Rodney Britt to participate and aid him, and that he asserted a position of leadership or dominance over Britt. The State also noted that the crime was committed through the use of a deadly weapon, which inflicted permanent and debilitating injuries to Stallings.

Based on the evidence presented during the trial, and the arguments made by both sides during the sentencing hearing, defendant has failed to show the trial court abused its discretion in ordering defendant's sentences to run consecutively. The trial court was presented with substantial evidence in favor of longer sentences. We find no evidence that the trial court abused its discretion.

In his final argument on appeal, defendant contends that his conviction for attempted first-degree murder must be vacated because the indictment for that charge is fatally defective, in that it is insufficient to charge him with this offense. The attempted murder indictment alleges that defendant "unlawfully, willfully and feloniously did of malice aforethought attempt to kill and murder Keith Lindsey Stallings." Recently our Supreme Court held that the use of practically identical language was sufficient to charge a defendant with attempted murder. *State v. Jones*, 359 N.C. 832, 838, 616 S.E.2d 496, 499 (2005) ("[W]e hold that [N.C. Gen. Stat.] § 15-144 . . . implicitly authorizes the state to utilize a short-form indictment to charge attempted first-degree murder. . . . [W]hen drafting such an indictment, it is sufficient for . . . the state to allege 'that the accused person feloniously, willfully, and of his malice aforethought, did [attempt to] kill and murder' the named victim."). Therefore, this assignment of error is overruled.

Affirmed.

Judges TYSON and SMITH concur.

Report per Rule 30 (e).