An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-560

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v. New Hanover County
No. 03 CRS 13007-8

THEAUSSAR E. DEREEF,
Defendant.

Defendant appeals from judgment entered 30 April 2004 by Judge Jay D. Hockenbury in the Superior Court in New Hanover County. Heard in the Court of Appeals 12 January 2006.

Attorney General Roy Cooper, by Special Counsel Caroline Farmer, for the State.

Geoffrey W. Hosford, for defendant-appellant.

HUDSON, Judge.

In April 2004, a jury convicted defendant of first-degree burglary, violation of a domestic violence protective order, and possession with intent to sell and deliver ("PWISD") cocaine. The court sentenced defendant to an active term of 96 to 125 months. Defendant appeals. As discussed below, we conclude that there was no error.

The evidence tends to show the following facts. Defendant and Janetta Wells have known each other since 1998, have been romantically involved, and have two children together. Wells ended the relationship in November 2002. Wells testified about three incidents of domestic violence between 2000 and 2003. Wells reported that on 11 October 2000, defendant called and woke her,

stating that he needed to talk to her. Shortly thereafter, defendant removed the window air-conditioning unit from her second-floor bedroom window and entered her bedroom. She testified that defendant then grabbed, pushed, choked, and eventually beat her unconscious. She eventually escaped to her mother's house and later dropped the charges at defendant's urging.

According to Wells, the second incident of domestic violence occurred on 8 February 2003, after she and defendant had broken up. Defendant approached Wells at a night club, the two began arguing, and defendant "jumped on" Wells; several security guards then escorted defendant from the premises. Before Wells returned home, defendant entered her home, disconnected all of the phones, and destroyed the television and stereo with a metal baseball bat. When Wells arrived home, defendant physically assaulted her by kicking her, punching her in the face, beating her, choking her, and hitting her in the ribs with the baseball bat. He told her several times, "I'm going to kill you, bitch." When Wells tried to get away, defendant grabbed her by her hair and dragged her. She eventually escaped and ran to the parking lot, where a neighbor helped her. Neighbors saw defendant throw a brick through Wells' window before he left. Wells' face was bloody, she had a swollen eye, her nose and lip were bleeding, and she had pain in her ribs. Defendant pled guilty to breaking and entering and assault on a female.

Wells obtained a domestic violence protective order which prohibited defendant from assaulting, threatening, following, or

harassing Wells by telephone or by visiting her home or workplace. He was not permitted to have contact with Wells, except to contact her to arrange visitation with the children. However, defendant made a threatening phone call to Wells on 19 March 2003 and was arrested for violating the protective order.

The incident which led to the charges and convictions defendant now appeals occurred on 9 July 2003. At 1:45 a.m., defendant called Wells at her newly unlisted number. Wells reported that this call was similar to the one defendant made before the October 2000 break-in, so she immediately called the police. Defendant arrived and walked around her house, screaming, cussing, and calling Wells names. He threatened her, "I'm going to kill you, bitch." He was also yelling that he wanted to see his children. She told him to leave, but he broke out a window. Defendant admits that his hands entered the window, but other witnesses testified that his body was all the way in the window, up to his rib cage and that Wells prevented his complete entry by beating him with a broom. Defendant was able to disturb items on Well's dresser and he tore down the blinds and curtains. Police Officer Robert Odom, the first to arrive in response to an assault call, testified that he "heard a female screaming, a male yelling, and glass breaking," and that he saw defendant with his body in Wells' window, with Wells trying to push him out with a broom. Defendant fell out of the window, saw Odom, and took off running, in spite of Odom's order to halt. Odom chased defendant and saw him pull something from his pocket and throw it underneath a parked

van. Officer Matt Fox assisted Odom during the chase and testified that he also witnessed defendant pull something from his pocket and make a throwing gesture towards the van. Two to three seconds later, Fox tackled defendant and handcuffed him. The officers escorted defendant back to the police car, went back to the area where the object had been thrown, and found a bag of crack cocaine on the ground. Odom testified that the bag contained 10.55 grams of cocaine, an amount more consistent with a sale and delivery than for personal consumption.

At trial, defendant testified on his own behalf. He denied committing a breaking and entering or an assault on Wells in October 2000, stating that he was in jail at the time. Regarding the events of 9 February 2003, he testified that he entered Wells' apartment to claim some of his possessions after Wells had said he could not have them back. He denied hitting her with a bat, but admitted fighting with her. Defendant further testified that on the night of 9 July 2003, he called Wells because he wanted to see his children before leaving town to avoid arrest on unrelated warrants. He denied planning to assault Wells and denied throwing crack cocaine during the police chase.

Defendant argues that the trial court should have granted his motions to dismiss because the State did not present sufficient evidence of first-degree burglary or of possession with intent to sell and deliver cocaine. We disagree. The Court should grant a motion to dismiss if the State fails to present substantial evidence of every element of the crime charged. *State v. McDowell*,

329 N.C. 363, 389 (1991). Substantial evidence constitutes evidence that is "existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99 (1980). In reviewing the trial court's ruling on a motion to dismiss, we must evaluate the evidence in the light most favorable to the State. *State v. Molloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). All contradictions must be resolved in favor of the State. *Id.* Ultimately, we must determine "whether a reasonable inference of the defendant's guilt may be drawn from the circumstances." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). If the evidence supports a reasonable inference of defendant's guilt, it is up to the jury to decide whether there is proof beyond a reasonable doubt. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). This is true whether the evidence is direct or circumstantial. *Id.*

The elements of first-degree burglary are breaking and entering of an occupied dwelling, at night, with the intent to commit a felony therein. *State v. Mangum*, 158 N.C. App. 187, 191 (2003). Defendant challenges the sufficiency of the evidence only as to the intent to commit a felony element. The State argued that defendant intended to commit felonious assault. A felonious assault either involves serious injury and the use of a deadly weapon or serious bodily injury. *State v. Owens*, 65 N.C. App. 107, 110-11 (1983). Serious bodily injury is that which carries a substantial risk of death or permanent disfigurement, coma, permanent impairment of an organ, or a permanent or protracted

condition causing extreme pain. *State v. Williams*, 154 N.C. App. 176, 180 (2002). In contrast, serious injury may cause hospitalization, pain, blood loss, and time lost at work. *State v. Uvalle*, 151 N.C. App. 446, 454 (2002). In order to sustain a conviction for first-degree burglary, the intent to commit a felony must exist at the time of entry. Id. "[A]ctual commission of the felony . . . is not required in order to sustain a conviction of burglary." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974).

Thus, the issue here is whether there was substantial evidence to support a reasonable inference that defendant intended to commit felonious assault at the time he entered Wells' home. The State presented evidence of a history of escalating violence by defendant against Wells, including him hitting her with a baseball bat. Wells also testified that on the night in question, defendant stated, "I'm going to kill you, bitch." Taken in the light most favorable to the State, we conclude that there was sufficient evidence for jurors to reasonably infer that defendant intended to commit felonious assault after breaking and entering Wells' home.

We now turn to defendant's contention that there was insufficient evidence to support his conviction of PWISD cocaine. We disagree. To survive a motion to dismiss on PWISD, the State must present substantial evidence that the defendant possessed a controlled substance and that he intended to sell or deliver that substance. N.C. Gen. Stat. § 90-95(a)(1) (2004); *State v. Carr*, 122 N.C. App. 369 (1996). If the defendant does not have actual

possession of the substance, the State must prove that the defendant had constructive possession. *State v. Morgan*, 111 N.C. App. 662, 665 (1993). A person has constructive possession when he has the intent and capability to maintain control and dominion over a controlled substance. *State v. Williams*, 307 N.C. 452, 298 S.E2d 372 (1983). "Also, the State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'" *State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972) (internal citation omitted). Moreover, this Court has previously held that where narcotics were found in a location where an officer observed defendant throw an object, "a reasonable mind could rationally conclude that the defendant possessed the cocaine." *State v. Wilder*, 124 N.C. App. 136, 140, 476 S.E.2d 394, 396 (1996).

Here, Officer Fox testified that from five feet away, he saw defendant take something from his pants and throw it underneath a parked van. Officer Odom also testified that he saw defendant take something from his pants and make a throwing motion towards the van. Dereef was apprehended a few yards away, with $359 cash on his person. There was no testimony that anyone else was nearby. We conclude that the evidence, considered in the light most favorable to the State, supports the inference that defendant possessed the cocaine.

Finally, defendant contends that the court committed plain

error in allowing testimony that defendant previously assaulted the victim and that he violated a protective order. To prevail under a plain error analysis, a defendant must show an error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988) (citing *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)). Generally, "[e]vidence of other crimes, wrongs, or acts is not admissible 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) (2004). However, such evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* Evidence of a defendant's past violence against the victim is admissible when it "explain[s] the context, motive, and set-up of the crime," and "form[s] the integral and natural part of an account of the crime . . . necessary to complete the story of the crime for the jury." *State v. Agee*, 326 N.C. 542, 548, 391 S.E.2d 171, 173-74 (1990) (internal citations omitted). In domestic violence situations, prior malicious acts by defendant may be used to show the state of the defendant's feelings. *State v. Scott*, 343 N.C. 313, 471 S.E.2d 605 (1996).

Here, the prior events reveal a pattern of escalating

violence. They show that defendant repeatedly broke into Wells' home without her permission by climbing in her bedroom window, and each time he did so, he assaulted her. They also show that defendant repeatedly threatened Wells. Further, in October 2000, prior to breaking in and assaulting her, defendant telephoned Wells and stated that he needed to speak with her, just as he did during the burglary of July 2003. We conclude that the prior events were relevant to show defendant's motive and plan, that they were "necessary to complete the story of the crime for the jury." *Agee*, 326 N.C. at 548, 391 S.E.2d at 174. We overrule this assignment of error.

No error.

Judges TYSON and GEER concur.

Report per Rule 30(e).