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NO. COA06-119

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

STATE OF NORTH CAROLINA

v.

Wayne County
No. 04 CRS 53746

JONATHAN DEVON LOFTON
Defendant.

Appeal by defendant from judgments dated 18 May 2005 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 11 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

M. Alexander Charns for defendant-appellant.

BRYANT, Judge.

Jonathan Devon Lofton (defendant) appeals from judgments dated 18 May 2005, entered consistent with a jury verdict finding defendant guilty of discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury. For the reasons below, we find no error occurred at defendant's trial and dismiss his assignment of error alleging ineffective assistance of counsel.

Facts

On 3 May 2003, at approximately 5:00 a.m., officers of the Goldsboro Police Department responded to a shooting at 715 Bain

Street in Goldsboro, North Carolina. Upon their arrival they discovered that Rosemary McClain, the owner of the residence at 715 Bain Street, had been shot several times, suffering injuries to her left arm, wounds to her chest and upper left leg. Ms. McClain was taken by emergency medical technicians to Wayne County Memorial Hospital where she was stabilized and subsequently transported by helicopter to Pitt County Memorial Hospital, due to the "catastrophic" nature of her injuries.

Shortly into their investigation, the investigating officers received information from an anonymous caller indicating a gold, four-door sedan with two African-American males wearing white tee-shirts may have been involved in the shooting. A description of the vehicle and suspects was transmitted to all police officers on duty and, shortly thereafter, Officer Karen Powers was passed by a gold, four-door Nissan sedan. Officer Powers testified that the Nissan was driven by defendant, that he was wearing a white tee-shirt, and that there was a passenger in the front seat. Officer Powers turned around to follow the vehicle and observed it park in a driveway off the street. By the time Officer Powers reached the driveway, the two occupants of the gold Nissan had disappeared.

Investigating officers recovered an SKS automatic rifle from the back seat of the gold Nissan. Defendant admitted the gold Nissan was his and that he had been driving it all night. Defendant further admitted the automatic rifle was his, that he kept it for protection, that he had not loaned it to anyone and it

was in his sole custody the entire evening. In a later statement to the police, defendant denied being involved in the shooting.

Twenty-eight shell casings were found scattered from the back of the north side to the front of the east side of the McClain home. The shell casings were recovered at the corner of the house, in front of the house, and at the back of the house. An analysis of the shell casings recovered from the crime scene revealed that there were two separate brands of ammunition used in the shooting; eighteen were Klimovsk and ten were Ulyanovsk. All but one of the submitted Klimovsk shell casings were sufficiently marked to have been positively identified as fired from the rifle recovered from defendant's vehicle. None of the Ulyanovsk shell casings had sufficient microscopic indication to conclude they were fired from the recovered rifle, though all had been fired from the same weapon. The Ulyanovsk shell casings could not be completely eliminated as having been fired from the recovered rifle, and it was possible they were fired from another gun.

Procedural History

On 6 December 2004, defendant was indicted by the Wayne County Grand Jury for the offenses of discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was tried before a jury in Wayne County Superior Court on 16 through 18 May 2005, the Honorable Paul L. Jones presiding. Defendant was found guilty of both offenses on 18 May 2005. The trial court subsequently entered judgments consistent with the jury verdict on 18 May 2005,

sentencing defendant to a term of twenty-five to thirty-nine months imprisonment for discharging a firearm into occupied property and seventy to ninety-three months imprisonment for assault with a deadly weapon with intent to kill inflicting serious injury. The trial court ordered that the sentences were to run consecutively and further ordered defendant to pay restitution to Ms. McClain in the amount of \$834.92. Defendant appeals.

Defendant raises the issues of: (I) whether the trial court erred in failing to grant defendant's motion to dismiss due to the insufficiency of the evidence; (II) whether the trial court erred in giving an instruction to the jury on the theory of acting in concert; (III) whether the trial court erred by allowing into evidence repeated references to gangs and defendant's connection to gangs; and (IV) whether it was ineffective assistance of counsel to not request complete recordation of the entire trial.

I

Defendant first argues the trial court erred in failing to grant defendant's motion to dismiss due to the insufficiency of the evidence. To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)).

In reviewing the sufficiency of the evidence, the question for the trial court is whether there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction. Once the court decides a reasonable inference of defendant's guilt may be drawn from the evidence, it is for the jurors to decide whether the facts satisfy them beyond a reasonable doubt that the defendant is actually guilty.

Id. at 717, 483 S.E.2d at 435 (internal citations and quotations omitted).

Defendant was charged with the offenses of discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury. In the instant case, the State has presented substantial evidence of each essential element of these two offenses.

A person is guilty of discharging a firearm into occupied property if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.

State v. Fletcher, 125 N.C. App. 505, 512, 481 S.E.2d 418, 423 (1997) (citation and quotations omitted); see also N.C. Gen. Stat. § 14-34.1 (2005) (defining the crime of Discharging a Firearm into Occupied Property). The State presented evidence that at least seventeen of the twenty-eight rounds fired into the home of Rosemary McClain were fired from defendant's automatic rifle. The shooting took place while Ms. McClain and approximately fifteen other friends and family members were inside the home. Although no

one witnessed the shooting, defendant admitted that the automatic rifle was in his sole possession that night. This evidence is sufficient to establish the elements of the offense of discharging a firearm into occupied property.

"The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (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." *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) (citing N.C. Gen. Stat. § 14-32(a) (2003)), *cert. denied sub nom. Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Our Supreme Court has held that an assault is "an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995) (citation omitted). Further, "[i]ntent to kill must normally be proved by circumstantial evidence, and 'an intent to kill 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. Barlowe*, 337 N.C. 371, 379, 446 S.E.2d 352, 357 (1994) (quoting *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972)).

Here, the nature of the shooting itself was sufficient to infer defendant's intent to kill. The State presented further evidence that Ms. McClain was struck by several of the twenty-eight

rounds fired into her home, and suffered "catastrophic" injuries that left her permanently disabled. Thus, the State has presented sufficient evidence to establish the elements of the offense of assault with a deadly weapon with intent to kill inflicting serious injury. This assignment of error is overruled.

II

Defendant next argues the trial court erred in giving an instruction to the jury on the theory of acting in concert. We disagree.

"A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001) (citation omitted).

Before the court can instruct the jury on the doctrine of acting in concert, the State must present evidence tending to show two factors: (1) that defendant was present at the scene of the crime, and (2) that he acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Robinson, 83 N.C. App. 146, 148, 349 S.E.2d 317, 319 (1986) (citation omitted). In reviewing whether the evidence presented at trial is sufficient to support a jury instruction of acting in concert, the evidence is viewed in the light most favorable to the State. *State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994).

The evidence presented at trial tends to show that shortly after the shooting a law enforcement officer saw defendant driving a car with a passenger in the front seat. The car and its

occupants matched the description given of a car and two people who might have been involved in the shooting. Both occupants had disappeared from the vehicle by the time the officer reached it. Defendant admitted he was in sole possession of the automatic rifle recovered from the gold Nissan on the night of the shooting. Defendant's automatic rifle was positively identified as having fired seventeen of the twenty-eight rounds shot into the house. Ten of the rounds shot into the house could not be directly shown to have been fired from defendant's automatic rifle, and could have been fired from a second rifle. No evidence was presented as to exactly who fired the rounds into the victim's house; however the evidence does indicate that defendant may have acted with another person to commit the offense. This evidence, when viewed in the light most favorable to the State, is sufficient to justify an instruction to the jury on the theory of acting in concert. This assignment of error is overruled.

III

Defendant also argues the trial court erred by allowing into evidence repeated references to gangs and defendant's connection to gangs in that the references were irrelevant and prejudicial, inadmissible hearsay, and violated defendant's constitutional rights. We first note that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal. Statutory violations, however, are reviewable regardless of objections at the trial court." *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004) (citations omitted). At

trial defendant objected several times to testimony from the State's witnesses, each time objecting to the testimony on the grounds of relevancy. However, defendant never raised an objection to the testimony regarding gangs based on a constitutional question and his constitutional arguments on this issue are thus not properly before this Court. Further, while defendant states that the objectionable testimony is also hearsay, he presents no argument and cites to no authority in support of his contention, and his argument as to hearsay is deemed abandoned. See N.C. R. App. P. 28(b)(6) ("Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned.")

We thus only address defendant's arguments as to the relevancy of the testimony referencing gangs and defendant's connection to gangs. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). Generally, "all relevant evidence is admissible[.]" N.C. Gen. Stat. § 8C-1, Rule 402 (2005). Our Supreme Court has further held that

[e]vidence is relevant if it has any logical tendency to prove a fact at issue in a case, and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. It is not required that evidence bear directly on the question in issue[.]

State v. Arnold, 284 N.C. 41, 47-48, 199 S.E.2d 423, 427 (1973) (internal citations omitted).

Rule 401 sets a standard to which trial judges must adhere in determining whether proffered evidence is relevant; at the same time, this standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has any logical tendency to prove any fact that is of consequence. Thus, even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.

State v. Wallace, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citations omitted), *disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

In the instant case, the State offered the evidence concerning gangs when establishing the reasoning and conduct of the officers investigating the shooting. The shooting in this case was one of three that occurred on 3 May 2003. In fact, Ms. McClain was shot after returning home from visiting her son who was in the hospital, a victim of one of the earlier shootings. Officers testified that Ms. McClain's sons were associated with a local gang and that they went to an area in which rival gang members were known to "hang around" to look for the gold Nissan. This was the reason officers were able to quickly locate the gold Nissan and observe that defendant was driving the vehicle. Because the evidence regarding gangs was relevant to explain the conduct of the officers in the early moments of their investigation, the trial court did not err

in admitting this testimony. This assignment of error is overruled.

IV

Defendant lastly assigns as error that it was ineffective assistance of counsel to not request complete recordation of the entire trial. In the case at hand, counsel's opening and closing arguments, bench conferences and the majority of the jury selection were not recorded. However, in his brief to this Court, defendant states that he "cannot raise an ineffective assistance of counsel claim at this time as the bare record does not reveal the contents of the unrecorded bench conferences, opening statements, or closing arguments, and thus appellate counsel, who did not represent the defendant at trial, cannot prove prejudice resulted from this deficiency in the record." Moreover, defendant concedes "that the present state of the law does not support this argument" and that he raises it now solely as a preservation issue. Our Supreme Court has held that "when it appears to the appellate court further development of the facts would be required [to properly review an ineffective assistance of counsel claim], the proper course is for the Court to dismiss the defendant's assignments of error without prejudice." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). Defendant's ineffective assistance of counsel argument cannot be adequately reviewed from the record evidence before this Court. Accordingly, this assignment of error is dismissed without prejudice.

No error at trial. Defendant's claim of ineffective assistance of counsel is dismissed.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).