NO. COA06-435

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v. Pitt County
No. 05-CRS-7577
05-CRS-54388

ELTWOYNE TERRELL CARTER
Defendant.

Appeal by defendant from judgments entered 14 October 2005 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 16 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Haral E. Carlin, for defendant-appellant.

BRYANT, Judge.

Eltwoyne Terrell Carter (defendant) was charged with attempted first degree murder, possession of a firearm by a felon and assault with a deadly weapon with intent to kill inflicting serious injury. He was found guilty of possession of a firearm by a felon and assault with a deadly weapon inflicting serious injury and appeals from judgments entered 14 October 2005.

The State presented evidence tending to show that on the evening of 22 March 2005, Officer Rudolph Oxendine of the Greenville Police Department received a call to report to 809 West

Fourteenth Street in the city. Officer Oxendine arrived at this location and found Charles Godley lying down behind an apartment building and bleeding from his upper right leg. Officer Oxendine determined that Godley had been shot. Godley did not identify the person who shot him. Bystanders told Officer Oxendine they saw running from the scene a black male by the street name of "Twon," wearing black jeans and a dark coat, and having long dreadlocks extending halfway down his back. The bystanders declined to identify themselves. Officer Oxendine remained with Godley at the scene until he was taken by emergency medical personnel to a hospital.

Officer R. W. Coltrain, Jr. of the Greenville Police Department also went to the scene of the shooting on the evening of 22 March 2005 and collected evidence, including a spent shell casing found in the walkway between two apartment units in the 809 apartment building. Officer Coltrain identified the make and caliber of the shell casing as a "Winchester 45 cartridge." Officer Coltrain also subsequently examined the bullet recovered from Godley's body and determined that it was a 45 caliber bullet, most likely fired by a handgun.

Detective Steve Pass of the Greenville Police Department took over the investigation. He visited Godley in the intensive care unit of the hospital approximately three days after the incident. He saw that Godley was not in any condition to talk so he departed and returned to the hospital about a week later. Again Godley was not able to talk so Detective Pass left his business card and asked

Godley to contact him when he got out of the hospital. About a month later Godley called him. Godley stated that "Eltwoyne Carter," whom he also called by the name of "Twon," shot him. Detective Pass assembled a photographic lineup that contained a photograph of Eltwoyne Carter, the defendant. Godley selected Carter's photograph as the person who shot him. At the time of his arrest, defendant had long dreadlocks extending to his shoulders.

Godley testified that he remembered being shot that evening, but when asked by the prosecutor to identify the person who shot him, Godley would not give an intelligible answer. When asked to identify the person whom he told Detective Pass had shot him, Godley pointed to defendant. Godley conceded that he did not want to testify against defendant because "he's my dude" with whom he had been hanging out. Godley testified that defendant "probably did it but he didn't mean it." Godley also acknowledged that some people call defendant by the name of "Twon." When asked by defendant's attorney whether someone other than defendant could have shot him, Godley failed to answer. Godley sustained a fractured thigh bone as a result of the shooting and spent a month and one week in the hospital. He could not walk on his own for three months. At the time of trial his leg was still not back to normal.

Defendant testified that he was at home with his girlfriend on the evening of the shooting. Defendant appeals.

Defendant raises two issues on appeal, whether the trial court

erred: (I) by denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury and (II) by peremptorily instructing the jury that as a matter of law, the victim sustained serious injury and the gun constituted a deadly weapon.

I

Defendant first contends the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. Defendant argues the State failed to present sufficient evidence to show defendant assaulted Godley by intentionally shooting him in the right leg. We disagree.

A motion to dismiss requires the court to determine whether there is substantial evidence to establish each element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). In deciding a motion to dismiss, the court must consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The court is required to take the State's evidence as true and to disregard conflicts and discrepancies therein, leaving them for the jury to resolve. *State v. Mize*, 315 N.C. 285, 290, 337 S.E.2d 562, 565 (1985). The court considers all of the evidence that is actually admitted, whether competent or incompetent, that is favorable to the State. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975).

"Intent is an attitude or emotion of the mind, and is seldom, if ever, susceptible of proof by direct evidence. It must ordinarily be proven by facts and circumstances from which it may be inferred." *State v. Little*, 278 N.C. 484, 487, 180 S.E.2d 17, 19 (1971). "In determining the presence or absence of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged." *State v. Riggsbee*, 72 N.C. App. 167, 171, 323 S.E.2d 502, 505 (1984).

Viewed in the light most favorable to the State, the evidence shows that Godley identified defendant, whom he considered as his friend, as the person who demanded money then shot him in the leg from behind. After shooting Godley, defendant fled the scene, leaving Godley lying in a pool of blood. "An accused's flight is 'universally conceded' to be admissible as evidence of consciousness of guilt and thus of guilt itself." *State v. Jones*, 292 N.C. 513, 525, 234 S.E.2d 555, 562 (1977). We hold a jury could find, based upon this evidence, that defendant intentionally assaulted Godley by shooting him in the leg. This assignment of error is overruled.

II

By his remaining assignment of error, defendant contends the trial court erred by peremptorily instructing the jury that as a matter of law, the victim sustained serious injury and the gun constituted a deadly weapon. He argues the trial court improperly removed these elements from jury determination. Defendant did not

object to the trial court's instructions to the jury. In order to obtain appellate review of this issue, he must show that he is excepted from the requirement of making an objection at trial by some exception or rule of law. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Defendant has not made this showing. Therefore, any review is by the plain error standard. *Id.* Under this standard, an appellate court "must be convinced that absent the error the jury probably would have reached a different verdict." *Id.* (citing *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-89 (1983)). We are not persuaded the jury probably would have reached a different verdict had the instruction not been given. This assignment of error is overruled.

No error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).