

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-845

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

STATE OF NORTH CAROLINA

v.

CLEVELAND MAXWELL JAMES

Pender County
Nos. 05 CRS 50509
05 CRS 51037
05 CRS 3269

Appeal by Defendant from judgment entered 26 January 2006 by Judge Jay D. Hockenbury in Superior Court, Pender County. Heard in the Court of Appeals 8 January 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for the State.

Thomas R. Sallenger for Defendant-Appellant.

McGEE, Judge.

Defendant was convicted on 26 January 2006 of assault with a deadly weapon inflicting serious injury, assault on a female, and possession of a firearm by a felon. Defendant pled guilty to being an habitual felon. The trial court sentenced Defendant to 110 months to 141 months in prison. Defendant appeals. We find no error.

The State's evidence at trial tended to show the following: Defendant's cousin, Patricia Codie Miller (Miller), borrowed Defendant's car and drove to a local "hang out" known as the Corner

on 22 February 2005. At the Corner, Miller got out of Defendant's car, left the car running, and went into the Corner. When Miller came back outside, defendant's car was gone. Miller smoked "crack" at the Corner that evening and testified that Defendant "pulled a gun on [her]" while she was at the Corner. Miller said she "took [Defendant's action] as a joke[.]"

Miller testified she stayed out all night and smoked crack. The next morning, 23 February 2005, Miller returned to her home and found Defendant asleep. She awakened Defendant and the two of them walked to the Corner. Miller testified that Defendant "fuss[ed]" at her about his car and about what Miller was doing with her life. Miller and Defendant went their separate ways when they arrived at the Corner. Later, Tikisha Codie (Codie), Miller's niece and Defendant's cousin, drove up to the Corner. Defendant was in the car with Codie. Miller told Codie to "put [Defendant] out of your car. He just pulled a gun on me last night." Codie then drove away.

Later that day, two men pulled up to the Corner in a car. Miller sat "on the edge of the car" talking to the two men. Miller testified Defendant walked up to the car and hit her in the head with a black handgun, causing her to bleed. She testified that when Defendant hit her, she "jump[ed] up" and Defendant then shot her in her left arm. Miller was asked if she had any doubt as to who shot her and she replied: "No, . . . [Defendant]."

Nancy James (James), Miller's sister and Defendant's sister-in-law, was driving past the Corner on her way to work when she saw

Miller trying "to pick herself up off of the ground." James stopped to see what was wrong and saw blood coming down Miller's face. Miller was also holding her arm, which James observed was "twisted all the way back." James testified she saw five or six people, including Defendant, near the Corner and that they all left the scene in different directions. James drove Miller to the rescue station, and on the way, James asked Miller who had done this to her and Miller said Defendant. At the rescue station, EMT personnel cut off Miller's sleeve, and James saw the bullet hole in Miller's arm.

Miller was then transported by ambulance to the hospital. Miller had surgery on her arm; a plate, bolts and screws were put into her arm. She spent three or four days in the hospital. At the time of the trial, she still experienced pain in her arm and had not been able to work since she was injured.

Codie testified she picked Defendant up at the Corner on 23 February 2005, and brought him back to the Corner approximately fifteen minutes later. Codie testified that while Defendant was in her car, he told her he was going to shoot Miller. Codie did not take Defendant seriously because "he [was] always fuss[ing]." When Codie returned to the Corner with Defendant, she saw Miller who told her to "let [Defendant] out because he had threatened to shoot [Miller]."

Detective Sergeant Jim Hock (Detective Hock), with the Pender County Sheriff's Office, testified he and Detective Sanders interviewed Miller while she was in the emergency room at the

hospital. Miller informed Detective Hock that Defendant had approached her at the Corner, hit her in the head with a black handgun, and shot her. When Detective Hock asked Miller whether she was positive it was Defendant who had shot her, Miller confirmed she was positive because Defendant was her cousin.

Sergeant Linwood Darden (Sergeant Darden) with the Onslow County Sheriff's Office testified he came into contact with Defendant on 18 April 2005, when he was working on a separate investigation involving larceny of a motor vehicle. Sergeant Darden approached Defendant and two other individuals in Jacksonville. Sergeant Darden had his weapon out and instructed the three men to get face down on the ground. Defendant informed Sergeant Darden that he believed Sergeant Darden was serving a Pender County warrant on him in reference to Defendant shooting his female cousin. Defendant also informed Sergeant Darden he did not believe his cousin was going to proceed with the charges against Defendant because they were cousins.

Detective D. L. Wells (Detective Wells), with the Pender County Sheriff's Office, testified he accompanied Detective Hock to Jacksonville on 18 April 2005 to serve Defendant with an arrest warrant. Detective Wells advised Defendant of his *Miranda* rights. He asked Defendant about the incident with Miller. Defendant said he "had been in [a] fight with [Miller][,] . . . [and] had struck [Miller] in the head with his right fist after [Miller] had come at him with a razor." Defendant denied having a firearm and claimed he had not shot Miller.

Defendant presents three arguments on appeal. First, Defendant argues the trial court erred by sentencing Defendant as an habitual felon, where one of the underlying convictions used to support the habitual felon indictment was also used in convicting Defendant of possession of a firearm by a felon. Second, Defendant argues the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon based upon insufficiency of the evidence. Third, Defendant argues the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury on the ground there was insufficient evidence that Defendant was the perpetrator of the crime.

Defendant first contends the trial court erred or, in the alternative, committed plain error, by sentencing him as an habitual felon because his prior conviction of felony breaking and entering was used to support both the habitual felon indictment and the "felon" portion of the offense of possession of a firearm by a felon. Defendant acknowledges that in *State v. Glasco*, 160 N.C. App. 150, 585 S.E.2d 257, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003), this Court held it is not a violation of double jeopardy to use the same felony conviction to support both a charge of habitual felon and the offense of possession of a firearm by a convicted felon. *Glasco* held that our Courts have determined that "elements used to establish an underlying conviction may also be used to establish a defendant's status as an habitual felon. *Id.* at 160, 585 S.E.2d at 264 (citations omitted). Nevertheless,

Defendant requests this Court reconsider our previous decision. This issue has already been decided by this Court and we are bound by that decision. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). This assignment of error is overruled.

In Defendant's next two arguments, he contends the trial court erred by denying his motion to dismiss the charges of possession of a firearm by a felon and assault with a deadly weapon inflicting serious injury at the close of all the evidence. We disagree.

A motion to dismiss should be denied if there is substantial evidence "(1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). When reviewing a motion to dismiss based on insufficiency of the evidence, we must:

view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. . . . Once the court decides that a reasonable inference of [a] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Id. at 75-76, 430 S.E.2d at 918-19 (internal citations and

quotation marks omitted). "The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *Id.* at 75, 430 S.E.2d at 918-19. "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury[.]" *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

In this case, Defendant contends the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon based upon insufficiency of the evidence. Defendant was charged with possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1, which provides in relevant part:

(a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c).

N.C. Gen. Stat. § 14-415.1(a) (2005). Defendant does not challenge his status as a convicted felon. His contention on appeal is that the evidence was insufficient for the jury to find he possessed a firearm on 23 February 2005.

The evidence, considered in the light most favorable to the State and giving the State the benefit of every reasonable inference that may be drawn from the evidence, as we are required to do, shows Defendant pulled out a black handgun when he saw Miller, hit Miller on the head with the handgun, and then fired the handgun at Miller. Nevertheless, Defendant attacks Miller's credibility, arguing the evidence was insufficient because Miller

was "intoxicated and high from her own use of crack cocaine." However, "[t]he trial court, in considering a motion to dismiss, may not weigh the credibility of the witnesses." *State v. Lewis*, 172 N.C. App. 97, 107, 616 S.E.2d 1, 7 (2005). Rather, it is the province of the jury to weigh the credibility of the witnesses. See *id.* We conclude the State presented sufficient evidence to submit this charge to the jury and the trial court did not err in denying Defendant's motion to dismiss.

Defendant further contends the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury on the ground there was insufficient evidence that Defendant was the perpetrator of the crime. Miller, Defendant's cousin, identified Defendant as the perpetrator of the crime. Further, Codie testified Defendant was in the car with her on the day of the incident and that Defendant told her he was going to shoot Miller. Defendant again attacks the credibility of Miller, arguing it was error to allow him to be convicted by "the singular testimony of an unreliable witness for the State, . . . who was an admitted drug abuser and was high on the evening in which she was injured." As stated above, the credibility of witnesses is for the jury to determine. See *Lewis*, 172 N.C. App. at 107, 616 S.E.2d at 7. This assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge HUNTER concur.

Report per Rule 30(e).