NO. COA08-1252

NORTH CAROLINA COURT OF APPEALS

Filed: 16 June 2009

STATE OF NORTH CAROLINA

v. Halifax County
Nos. 07 CRS 2782,
07 CRS 54159-60

CHRISTOPHER THOMAS DAVIS

Appeal by defendant from judgments entered 24 April 2008 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 8 June 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Robert M. Curran, for the State.

Adrian M. Lapas, for defendant.

JACKSON, Judge.

Christopher Thomas Davis ("defendant") appeals from judgments dated 24 April 2008 and entered pursuant to jury verdicts finding him guilty of felonious assault with a deadly weapon with intent to kill inflicting serious injury, felonious assault on a law enforcement officer inflicting serious bodily injury, and misdemeanor resisting a public officer. The trial court found that defendant had a prior record level of II and sentenced defendant to a term of 100 to 129 months imprisonment for the offense of assault with a deadly weapon with intent to kill inflicting serious injury, a consecutive term of nineteen to twenty-three months imprisonment

for the offense of assault on a law enforcement officer inflicting serious bodily injury, and a term of forty-five days imprisonment for the offense of resisting a public officer, to be served concurrently with the prior sentences. On 8 May 2008, defendant entered written notice of appeal. For the reasons set forth below, we hold no error.

At trial, the State's evidence tended to show that on 29 June 2007, Officer Wesley Thorpe ("Officer Thorpe") of the Roanoke Rapids Police Department was in uniform and serving outstanding warrants. Officer Thorpe approached defendant at his home in an attempt to serve several outstanding warrants whereupon defendant fled, and Officer Thorpe gave chase. Officer Thorpe caught up with defendant in a neighboring yard and sprayed defendant with mace, but the mace did not have a perceptible effect on defendant. Defendant ran back to his yard with Officer Thorpe in pursuit and subsequently struck Officer Thorpe twice in the face with a four-by-four inch square piece of wood that was approximately two feet long. Officer Thorpe suffered a bruised wrist, a contusion behind his left ear, a broken nose, a broken jaw, and extensive damage to his teeth. Four of Officer Thorpe's front upper teeth were broken, and the front lower teeth were pushed out of alignment.

At the time of the trial, Office Thorpe still was out of work on worker's compensation. Officer Thorpe was seeing a psychiatrist and a psychologist for post-traumatic stress disorder, and continued to experience daily headaches and memory loss. Defendant

did not testify, but defendant's father and sister testified on his behalf. Both stated that they saw defendant and Officer Thorpe wrestling in the backyard, but never saw defendant holding a four-by-four or using one to hit Officer Thorpe.

Defendant now argues the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant contends the State presented insufficient evidence to support the determination that defendant had the requisite intent to kill Officer Thorpe. We disagree.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense and that the defendant is the perpetrator. *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.'" *Cross*, 345 N.C. 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 considering a motion to dismiss, "the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (citation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). "[C]ontradictions and inconsistencies do not warrant dismissal; the trial court is not to be concerned with the weight of the evidence." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citation omitted).

"[I]f the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Ford*, 136 N.C. App. 634, 641, 525 S.E.2d 218, 223 (2000).

Here, defendant only argues that the State did not present sufficient evidence that defendant had the requisite intent to kill Officer Thorpe. The Supreme Court of North Carolina has held:

> An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred. The nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred. Moreover, an assailant must be held to intend the natural consequences of his deliberate act.

State v. Grigsby, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000). (internal citations and quotations omitted); *see also State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001) (holding the State presented sufficient evidence of intent to kill where evidence established that defendant swung a steel bat at victim's head).

At trial, the State's evidence showed that defendant twice struck Officer Thorpe in the head with a four-inch square board. Defendant struck Officer Thorpe with sufficient force to knock Officer Thorpe temporarily unconscious. The blows were delivered with enough force to break Officer Thorpe's nose and jaw, to break four of his teeth, leaving one hanging out of his mouth by a piece

of gum tissue, and to cause profuse bleeding from his nose and mouth. Dr. Otter, Officer Thorpe's attending physician at the hospital, opined that the blow which struck Officer Thorpe behind his left ear, at the base of his skull could have lead to paralysis or death given the sensitive nature of the area. Ten months later, Officer Thorpe still could not return to work as a result of the injuries caused by defendant's attack, and he continued to suffer from debilitating headaches and memory loss. Taken in the light most favorable to the State, we hold that this evidence was sufficient to infer defendant's intent to kill, to withstand defendant's motion to dismiss, and to allow for the jury's consideration of the matter. This assignment of error is overruled.

Defendant also argues the trial court erred in instructing the jury that a four-by-four inch piece of wood is a deadly weapon as a matter of law. Defendant did not raise an objection to the jury instruction and we review this argument for plain error. *State v. Maready*, 362 N.C. 614, 621, 669 S.E.2d 564, 568 (2008). However, although defendant argues plain error in his brief to this Court, he did not "specifically and distinctly" allege plain error in his assignments of error on appeal. *See* N.C. R. App. P. 10(c)(4) (2007) ("In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.").

Accordingly, defendant is not entitled to appellate review of this issue and these assignments of error are dismissed. *State v. Dennison*, 359 N.C. 312, 312–13, 608 S.E.2d 756, 757 (2005). Defendant's remaining assignments of error set forth in the record on appeal, but not argued in his brief to this Court, are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007).

No error.

Judges HUNTER, Robert C., and STEELMAN concur.

Report per Rule 30(e).