NO. COA08-139

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v. Alamance County
No. 07 CRS 50670-71

DAVID MARQUIS ELLIOTT

Appeal by defendant from judgment entered 6 September 2007 by Judge Richard W. Stone in Superior Court, Alamance County. Heard in the Court of Appeals 06 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Bertha L. Fields, for the State.

David W. Remington for defendant-appellant.

WYNN, Judge.

In ruling on a motion to dismiss, the court must determine "whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense."[1] Here, Defendant David Elliott argues the trial court erred by failing to dismiss a charge of communicating threats. Because there was sufficient evidence that Defendant communicated threats, we find no error.

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[1] *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

This case was originally heard in Alamance County District Court, where Defendant pled guilty to violating a domestic violence protective order, communicating threats to Karen Powers and communicating threats to Hilary Meade. Defendant appealed to superior court for a trial *de novo*.

At trial, the State's evidence tended to show that Defendant and Lisa Elliott were married for almost twenty years. During the marriage, Ms. Elliott worked for Defendant's heating and air conditioning business. In 2001, Defendant and Ms. Elliott separated. That same year, Defendant and his company obtained a default judgment against Ms. Elliott for fraud, breach of fiduciary duty and conversion. In July 2005, Ms. Elliott took out a domestic violence protective order against Defendant, which prohibited him from having any contact with Ms. Elliott and threatening a member of her family or household.

At the time the protective order was in place, around 6:00 p.m. on 9 January 2007, Defendant drove by the home of Ms. Elliott's mother, Karen Powers, stopped in front of the driveway, and told Ms. Powers that he was going to "tak[e] [her] down and [her] whole family down." Defendant also shouted to Hilary Meade, who was standing in the driveway, "I am going to [] kill you, you stupid bitch." At the close of the State's evidence, Defendant moved to dismiss the charge of communicating threats to Ms. Powers. The motion was denied.

Defendant testified that at 6:00 P.M. on 9 January 2007, he was eating dinner with his fiancée, his employee, and his fiancée's

daughter. Defendant's fiancée corroborated his testimony. At the close of all the evidence, Defendant again moved to dismiss the count of communicating threats to Ms. Powers, which the trial court denied. The jury found Defendant guilty of all three charges. The trial court sentenced Defendant to seventy-five days' imprisonment.

On appeal, Defendant argues the trial court erred by: (I) failing to dismiss the charge of communicating threats to Ms. Powers for insufficient evidence and because the arrest warrant was fatally defective and (II) precluding him from cross-examining Ms. Elliott regarding the civil judgment entered against her.

I.

In his first two assignments of error, Defendant contends the trial court erred in failing to dismiss the charge of communicating threats to Ms. Powers. Defendant first argues that the evidence was insufficient because there was no evidence that he threatened to kill Ms. Powers. We disagree.

In ruling on a motion to dismiss, the court must determine "whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). The court is to consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from the evidence. *Id.* at 99, 261 S.E.2d at 117. The elements of communicating threats are: (1) willfully threatening to physically injure the person, the person's family, or property; (2)

communicating the threat to the person orally, in writing, or by any other means; (3) making the threat in a manner and under circumstances that would cause a reasonable person to believe that it is likely to be carried out; and (4) the person threatened believes that it will be carried out. N.C. Gen. Stat. § 14-277.1(a) (2007).

Here, the State presented evidence that Defendant stopped in front of Ms. Powers' home and told her he was going to "tak[e] [her] down and the whole family down." Ms. Powers and other witnesses testified that Defendant and a passenger were shining lights in their eyes, so as not to be seen, while yelling threats and obscenities. Ms. Powers testified that she interpreted Defendant's threat to mean that "he was going to do us in," and she believed Defendant would carry out the threat of "taking [her] down." Additionally, Ms. Powers testified that Defendant had "been stalking us for about a year." Finally, at the same time he told Ms. Powers that he would "take [her] down," Defendant said to Ms. Meade "I'm going to [] kill you, you stupid bitch." Although Defendant did not specifically tell Ms. Powers that he would kill her, viewing the evidence in the light most favorable to the State, we conclude that the State presented sufficient evidence to allow a reasonable jury to infer that Defendant communicated threats to Ms. Powers.

Defendant also argues the trial court should have dismissed the charge because the arrest warrant was fatally defective. Specifically, Defendant argues that Ms. Powers testified at trial

that Defendant never communicated to her that he would kill her, but rather that Defendant stated he would "take [her] down." We disagree.

For an arrest warrant to be sufficient, it "must contain a statement of the crime of which the person is to be arrested is accused." N.C. Gen. Stat. § 15A-304(c) (2007). This Court has found that an arrest warrant used as a pleading is valid where it "substantially follows the words of the statute . . . when it charges the essentials of the offense in a plain, intelligible, and explicit manner." *State v. Garcia*, 146 N.C. App. 745, 746, 553 S.E.2d 914, 915 (2001) (quotation omitted); *see also* N.C. Gen. Stat. § 15-153 (2007).

Here, the warrant states:

> [D]efendant . . . unlawfully and willfully did threaten to physically injure the person of Karen Powers. The threat was communicated to Karen Powers by stating to Karen Powers "I'm going to kill you." and the threat was made in a manner and under circumstances which would cause a reasonable person to believe that the threat was likely to be carried out and the person threatened believed that the threat would be carried out.

Additionally, the warrant listed N.C. Gen. Stat. § 14-277.1 as the statute Defendant violated.

In this case, the warrant substantially follows the language of the statute by including the essential elements of communicating threats. Furthermore, the warrant sufficiently "charges the offense in a plain, intelligible manner," *id.*, to inform Defendant of the charge against him, protect him from a subsequent

prosecution for the same offense, enable him to prepare for trial, and allow the court to pronounce a sentence. *State v. Lancaster*, 137 N.C. App. 37, 48, 527 S.E.2d 61, 69 (2000). Thus, the fact that Defendant may not have expressly stated "I'm going to kill you" to Ms. Powers does not make the warrant fatally defective. Finally, as noted above, Ms. Powers' testimony that Defendant stated he would "take [her] down and [her] whole family down" tends to show that Defendant communicated threats to Ms. Powers. Accordingly, the trial court properly denied Defendant's motion to dismiss the charge of communicating threats to Ms. Powers.

II.

In his final assignment of error, Defendant contends the trial court erred by precluding him from cross-examining Ms. Elliott regarding the civil judgment entered against her for fraud, breach of fiduciary duty and conversion because the judgment indicates her propensity for untruthfulness. We disagree.

Rule 608(b) of our Rules of Evidence governs the admissibility of specific instances of misconduct of a witness for the purpose of attacking the witness's credibility. N.C. Gen. Stat. § 8C-1, Rule 608(b) (2007). Such evidence may be admitted if: (1) the purpose of introducing the evidence is to impeach the witness' credibility; (2) it is probative of the witness' character for truthfulness or untruthfulness and is not too remote in time; (3) the conduct did not result in a conviction; and (4) the inquiry into the specific act takes place during cross-examination. *State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986). Even if the evidence

meets the criteria enumerated in Rule 608, the trial court must determine, in its discretion and pursuant to Rule 403, that the probative value of the evidence is not substantially outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury. *Id.* at 634, 340 S.E.2d at 90; *see also* N.C. Gen. Stat. § 8C-1, Rule 403 (2007). Additionally, even if the trial court's ruling was in error, the defendant must nevertheless show that the error was prejudicial. *See* N.C. Gen. Stat. § 15A-1443(a) (2007) (stating that a defendant must show "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached").

Assuming *arguendo* that the trial court erred in excluding the testimony, we conclude that Defendant has not met his burden of showing that there is a reasonable possibility that had the error not been committed, a different result would have been reached at trial. *See id.* Although the trial court precluded Defendant from questioning Ms. Elliott about the civil judgment, similar evidence was later admitted when Defendant testified on direct examination that he and his company sued Ms. Elliott and that judgment was entered against her. Moreover, Ms. Elliott was a minor witness, who primarily testified about her marriage to Defendant and verified the conditions of the domestic violence protective order. In fact, Ms. Elliott testified that she was not at Ms. Powers' home on the date of the incident, and attacking Ms. Elliott's truthfulness for this non-critical point would not create a reasonable possibility that the jury would reach a different

outcome. Thus, Defendant has failed to show that any error in excluding the testimony in question prejudiced him.

After reviewing the record and considering Defendant's assignments of error, we find that no reversible error was committed in the trial.

No error.

Judges ELMORE and GEER concur.

Report per Rule 30(e).