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NO. COA08-264

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

STATE OF NORTH CAROLINA

v.

Henderson County  
Nos. 07 CRS 50138-41

LUCIOUS BERNARD SULLIVAN

Appeal by defendant from judgments entered on or after 19 September 2007 by Judge Dennis L. Winner in Henderson County Superior Court. Heard in the Court of Appeals 17 November 2008.

*Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Samper, for the State.*

*Mary March W. Ezum for defendant-appellant.*

TYSON, Judge.

Lucious Bernard Sullivan ("defendant") appeals from judgments entered after a jury found him to be guilty of: (1) discharging a weapon into occupied property pursuant to N.C. Gen. Stat. § 14-34.1(a); (2) assault with a deadly weapon inflicting serious injury pursuant to N.C. Gen. Stat. § 14-32(b); and (3) two counts of assault with a deadly weapon pursuant to N.C. Gen. Stat. § 14-33(c)(1). We hold there to be no error in the jury's verdict or the judgments entered thereon.

I. Background

On the evening of 6 January 2007, Bryon Newborn ("Newborn"), Deshay Walker ("Walker"), Wendell Shamar Flowers ("Flowers"), and a man called "Hershey" (collectively, "Newborn's group") went to the Club Matrix nightclub in Greenville, South Carolina. They drove to the nightclub in a Ford 500 rental car, leased by Newborn's girlfriend, Sequence Kennedy ("Kennedy"). Defendant and his brother were also present at the club. At the club, Newborn and defendant's brother argued, which led to a fight between Newborn and defendant. Defendant was escorted out. Newborn admitted to using drugs and alcohol while he was at the club.

Newborn's group left the club after it closed in the early morning of 7 January 2007. Newborn's brother was riding in another car leading Newborn's group, who were in a car driven by Hershey. When they turned onto Newborn's street in East Flat Rock, North Carolina, a car pulled out of Newborn's driveway. The car let Newborn's brother's car pass, but stopped Newborn's group's car. Defendant got out of the car and Newborn saw that he had a gun. As Newborn's group tried to drive away, Newborn saw defendant shoot at the car. Walker was grazed on the arm by a bullet, and Flowers was hit. The group drove to the Pardee Hospital Emergency Room immediately after the shooting.

At the Pardee Hospital, Newborn spoke with a law enforcement officer and identified defendant as the shooter. Newborn identified defendant by his nickname "Wiggy" and did not mention that Hershey was also present at the shooting.

Henderson County Sheriff's Detective Andrew Anderson ("Detective Anderson") also spoke with Newborn at Pardee Hospital. According to Detective Anderson, Newborn identified defendant as the shooter. Henderson County Sheriff's Sergeant Ben McKay ("Sergeant McKay") interviewed Newborn and Kennedy on 25 January 2007. During the interview, Newborn again identified defendant as the shooter. Newborn and Kennedy were told about the Victim's Compensation Commission by Sergeant McKay.

Testimony from several witnesses provided circumstantial evidence of defendant's guilt. Kennedy testified that after the shooting defendant told her that he could be paying her instead of his lawyer, and stated, "[i]t didn't have to go down like this . . . ." Walker testified defendant apologized to him, telling him what had occurred was not intended for Walker. Paula Gray ("Gray"), wife of Flowers and first cousin of defendant, testified that early on the morning of 7 January 2007, she received a call and was told, "[c]uz, I didn't mean to shoot Shamar." At first, Gray believed the caller was defendant, but testified she later became unsure, because defendant and another cousin of hers sound alike on the phone. Gray also testified that someone from the District Attorney's office told her that she would have to go to jail if she didn't testify that she was "a hundred percent sure it was [defendant]."

Following the conclusion of the State's evidence, defendant moved to dismiss all charges. The trial court reduced the charge of assault upon Walker from assault with a deadly weapon inflicting

serious injury to assault with a deadly weapon. The trial court denied the motion regarding the remaining charges.

Defendant then presented evidence on his behalf. He called Henderson County Sheriff's Officer Jason Cordell ("Officer Cordell"), who spoke with Newborn, Flowers, and Walker at the hospital. None of them were cooperative or forthcoming. According to Officer Cordell's notes, Newborn told Officer Cordell that he was driving and did not see the shooter.

Defendant also called two alibi witnesses: Latisha Collington ("Collington") and her cousin, Arika Rudisill ("Rudisill"). Both women testified that defendant came to Rudisill's house around 3:30 a.m. on 7 January 2007 and that he did not have a gun. The three of them talked until approximately 5:30 a.m. Defendant remained asleep when both women woke up later that morning. Later that day, Collington watched the local news and learned that a warrant had been issued for defendant's arrest. She told Rudisill about the arrest warrant, who in turn told defendant. He then contacted an attorney and made arrangements to turn himself in to the authorities.

At the conclusion of all the evidence, defendant renewed his motion to dismiss all the charges, which was denied. On 14 September 2007, the jury returned guilty verdicts on all charges. On 19 September 2007, the trial court sentenced defendant to: (1) two consecutive 150-day sentences for each assault with a deadly weapon offense; (2) a consecutive term of a minimum of 29 to a maximum of 44 months for the conviction of assault with a deadly

weapon inflicting serious injury, suspending all but 11 months of the sentence and placing defendant on supervised probation for 60 months; (3) another consecutive term of a minimum of 29 to a maximum of 44 months imprisonment for the conviction of discharging a weapon into occupied property, suspending all but 5 months of the sentence and placing defendant on supervised probation for 60 months. Defendant was also ordered to pay restitution in the amount of \$18,000.00. Defendant appeals.

### II. Issue

Defendant only argues that the State's evidence was insufficient to establish that he was the perpetrator of the crimes.

### III. Standard of Review

When reviewing a motion to dismiss, we view "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). A trial court may properly deny a motion to dismiss where "substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator . . . ." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

### IV. Sufficiency of Evidence

Defendant argues the trial court erred in denying the motion to dismiss all charges. Defendant argues that Newborn's testimony cannot be relied upon to establish identity because Newborn is not credible. As a basis for this argument, defendant relies on Newborn's prior record, lack of employment, inconsistent statements to law enforcement authorities, and drug and alcohol use on the night of the shooting. Defendant ultimately argues that Newborn's credibility issues, taken with defendant's alibi witnesses, Kennedy's financial motivation, Gray's doubts as to who telephoned her, and the State's failure to call Officer Cordell, lead to the conclusion that the State's evidence was not sufficient to establish defendant as the perpetrator of the shooting. We disagree.

All of the issues defendant raises are questions for the jury, not this Court. It is well-established that the jury must determine credibility and resolve all contradictions and discrepancies in the evidence. *See, e.g., State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003); *State v. Fritsch*, 351 N.C. 373, 381-82, 526 S.E.2d 451, 457, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000); *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996).

In *Hyatt*, the defendant argued that the State's evidence was insufficient, because the State relied largely on the testimony of witnesses who had criminal records, made prior inconsistent statements, and gave self-serving testimony. 355 N.C. at 666, 566 S.E.2d at 77. Our Supreme Court rejected this argument and stated:

This argument ignores the fact that when weighing a challenge to the sufficiency of the evidence, we are to construe all evidence in the light most favorable to the [S]tate. Defendant's proposition would occasion the fall of a long-standing principle in our jurisprudence that we are unprepared to abandon: that it is the province of the jury, not the court, to assess and determine witness credibility.

*Id.* at 666, 566 S.E.2d at 77 (internal citations omitted).

Here, defendant's alibi evidence does not warrant dismissal. The jury determined the facts and it is within the province of the jury to reject defendant's alibi. *See State v. Bowman*, 183 N.C. App. 631, 644 S.E.2d 596 (finding that the defendant's alibi created a contradiction, which was a question of fact for the jury), *disc. review and cert. denied*, 361 N.C. 570, 650 S.E.2d 816 (2007).

The State presented: (1) Newborn's direct testimony identifying defendant as the shooter and (2) circumstantial evidence of defendant's guilt established by Walker, Gray, and Kennedy. Viewing the evidence in the light most favorable to the State, substantial evidence was presented to establish defendant as the perpetrator of the 7 January 2007 shooting. *Morgan*, 359 N.C. at 161, 604 S.E.2d at 904. The trial court did not err in denying defendant's motion to dismiss. This assignment of error is overruled.

#### V. Conclusion

The trial court did not err in denying defendant's motion to dismiss where the State presented substantial evidence sufficient to establish each element of the offenses and that defendant was

the perpetrator of the crimes. *Id.* The credibility of that evidence and testimony was solely a question for the jury to resolve. *Hyatt*, 355 N.C. at 666, 566 S.E.2d at 77. Defendant received a fair trial, free from the prejudicial errors he preserved, assigned, and argued. We hold there to be no error in the jury's verdict or the judgement entered thereon.

No error.

Judges BRYANT and ARROWOOD concur.

Report per Rule 30(e).