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NO. COA08-414

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v. Burke County
No. 04 CRS 1324

PHILLIP BARRY DAVIS

Appeal by defendant from judgments entered 17 October 2007 by Judge Beverly T. Beal in Burke County Superior Court. Heard in the Court of Appeals 25 September 2008.

Court of Appeals

Attorney General Roy Cooper, by Special Deputy Attorney General John G. Aldridge, III, for the State.

Slip Opinion

Mercedes O. Chut, for defendant-appellant.

CALABRIA, Judge.

Phillip Barry Davis ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of driving while impaired, two counts of assault with a firearm on a law enforcement officer ("LEO"), and assault with a deadly weapon with the intent to kill ("AWDWWITK"). We find no error.

On 2 January 2004, Linda Yount ("Yount"), an employee with Yount's Used Cars, observed a Chevy Blazer hit one of the cars in the used car lot. Yount approached the driver, smelled alcohol on the driver, and told him she would call the police. The driver drove away. Yount reported the license plate numbers to law

enforcement. North Carolina State Highway Patrol Trooper Gregory Shuffler ("Trooper Shuffler") traced the license plate numbers to a Chevy Blazer registered to Dennis Benfield ("Benfield"). Trooper Shuffler arrived at Benfield's residence. Benfield was not at home. Based on information Trooper Shuffler received from Benfield's mother, he traveled to defendant's residence. Trooper Shuffler met with Benfield at defendant's residence. Benfield agreed to meet with Yount so she could confirm whether or not he was the driver. After confirming with Yount that Benfield was not the driver, Trooper Shuffler returned to defendant's residence.

Trooper Shuffler told defendant he was investigating a hit-and-run incident and needed the Chevy Blazer for evidence. Trooper Shuffler smelled alcohol on defendant and noticed defendant's eyes were red and glassy. Defendant told Trooper Shuffler to "burn the f---ing road up." Trooper Shuffler left and asked Trooper Greg Gentieu ("Trooper Gentieu") to meet him at a store near defendant's home. After meeting at the store, both officers drove to defendant's residence and parked their patrol vehicles behind defendant's manufactured home. Trooper Shuffler parked approximately seventy-five yards from the manufactured home and Trooper Gentieu parked twenty feet from the back of the manufactured home. Trooper Shuffler exited his vehicle to examine the damage to the rear bumper on the Chevy Blazer. Trooper Shuffler heard a shot, ducked his head and glanced around to see defendant on his back deck with a shotgun. Trooper Gentieu saw defendant step onto the back deck with a shotgun and shout "burn

the f---ing road up." Defendant pointed the shotgun downward, then moved the gun toward his left hand. Trooper Gentieu backed his vehicle away from the deck. As he reversed his vehicle, he heard a gunshot.

Trooper Shuffler arrested the defendant. Trooper Shuffler noticed defendant appeared impaired. Defendant refused to submit to either an Intoxilyzer test or a field sobriety exercise. Yount later identified defendant as the driver of the Chevy Blazer that hit the car in Yount's Used Car lot.

Defendant was charged with AWDWWITK, two counts of assault with a deadly weapon ("AWDW") on a LEO, driving while license revoked, operating a vehicle without insurance, driving while impaired, careless and reckless operation of a vehicle, and hit and run.

A jury returned guilty verdicts for driving while impaired, driving while license revoked, "failure to give required information after a motor vehicle accident," two counts of assault with a firearm on a LEO, and AWDWWITK. Defendant received three consecutive sentences of forty-three months to a maximum term of sixty-one months in the North Carolina Department of Correction for the AWDW and AWDWWITK convictions. Defendant was sentenced to 120 days in the North Carolina Department of Correction for the driving while licensed revoked and failure to give required information convictions. In addition, defendant received a two year suspended sentence in the North Carolina Department of Correction with supervised probation for a five-year period beginning at the

expiration of all active sentences. Defendant was also sentenced to thirty days in the custody of the Burke County Sheriff following the expiration of the other active sentences for the driving while impaired conviction. Defendant appeals.

I. Indictment

Defendant first argues the indictment was invalid to charge defendant with two counts of assault with a firearm on a LEO. We disagree.

A valid bill of indictment is necessary for the trial court to have jurisdiction over a criminal defendant. *State v. Burroughs*, 147 N.C. App. 693, 695, 556 S.E.2d 339, 342 (2001) (citation omitted). An indictment is valid if it "state[s] the elements of the offense with sufficient detail to put the defendant on notice as to the nature of the crime charged and to bar subsequent prosecution for the same offense in violation of the prohibitions against double jeopardy." *Id.* at 695-96, 556 S.E.2d at 342 (citation omitted). We note "[t]he caption of an indictment, whether on the front or the back thereof, is not a part of it and the designation therein of the offense sought to be charged can neither enlarge nor diminish the offense charged in the body of the instrument." *State v. Bennett*, 271 N.C. 423, 425, 156 S.E.2d 725, 726 (1967) (citations omitted).

Defendant argues the indictment was invalid because the description of the assault with a firearm on a LEO charge included elements of two separate offenses: assault with a firearm on a LEO

(N.C. Gen. Stat. § 14-34.5) and AWDW upon a government official (N.C. Gen. Stat. § 14-34.2). We disagree.

The charge of assault with a firearm on a LEO is described in N.C. Gen. Stat. § 14-34.5:

> Assault with a firearm on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.
>
> (a) Any person who commits an assault with a firearm upon a law enforcement officer, probation officer, or parole officer while the officer is in the performance of his or her duties is guilty of a Class E felony.

N.C. Gen. Stat. § 14-34.5(a) (2007). "The elements of the offense of assault with a firearm on a [LEO] are: (1) an assault; (2) with a firearm; (3) on a [LEO]; (4) while the officer is engaged in the performance of his duties." *State v. Dickens*, 162 N.C. App. 632, 636, 592 S.E.2d 567, 571 (2004) (citations omitted). The defendant must also know or have reasonable grounds to know the victim was a LEO. *Id.*

Count II of the indictment reads:

> ASSAULT WITH DEADLY WEAPON ON GOVERNMENT OFFICIAL § 14-34.5[1]
>
> The jurors for the State upon their oath present that on or about the date of offense shown and in the County named above the defendant named above unlawfully, willfully and feloniously did assault SHP Trooper G.N. Gentieu a government employee of the North Carolina State Highway Patrol, with a shotgun, which is a deadly weapon, by shooting at the

[1]Count III of the indictment is identical to Count II except substituting "SHP Trooper G.L. Shuffler" for "SHP Trooper G.N. Gentieu" and "responding and investigating a Hit and Run" for "responding aid to SHP Trooper G.L. Shuffler."

> officer. At the time of the assault, the officer was performing the following duty of that office: responding aid to SHP Trooper G.L. Shuffler. This act was in violation to the law referenced above.

The indictment references the statute for AWDW on a LEO and lists the elements in sufficient detail to put defendant on notice he is charged with AWDW on a LEO. The use of the term "government official" in the heading is not fatal to the indictment where the proper elements are listed. *See State v. Allen*, 112 N.C. App. 419, 428, 435 S.E.2d 802, 808 (1993) (indictment properly charged defendant with AWDW upon a LEO although caption referred to statute for assault upon a LEO, wording in body of indictment described violation of AWDW on a LEO). This assignment of error is overruled.

II. Sufficiency of the Evidence

Defendant next argues the trial court erred in denying his motion to dismiss the charges of AWDW on a LEO, AWDWWITK, and driving while impaired. We disagree.

The standard of review for a motion to dismiss for insufficient evidence is whether the State presented substantial evidence of each element of the crime and that defendant is the perpetrator. *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998) (citation omitted). Substantial evidence is any relevant evidence a reasonable mind might accept as adequate to support a conclusion. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987) (citation omitted). The trial court must consider the evidence in the light most favorable to the State, giving the State

the benefit of every reasonable inference from the evidence. *State v. Hinton*, 155 N.C. App. 561, 565, 573 S.E.2d 609, 612 (2002) (citation omitted).

A. AWDW on a LEO

Defendant argues because the evidence established that defendant fired only one gunshot, there was insufficient evidence of assault against both officers. We disagree.

"The elements of the offense of assault with a firearm on a [LEO] are: (1) an assault; (2) with a firearm; (3) on a [LEO]; (4) while the officer is engaged in the performance of his duties." *Dickens*, 162 N.C. App. at 636, 592 S.E.2d at 571. An assault is an overt act sufficient to place a person of reasonable firmness in fear of immediate physical injury. *State v. Beal*, 181 N.C. App. 100, 103, 638 S.E.2d 541, 544 (2007) (citation omitted). In proving the assault element of a charge of assault with a firearm on a LEO, "the State does not have to show the defendant pointed a firearm at a [LEO]." *Dickens, supra*.

It is undisputed that defendant used a firearm, that Troopers Shuffler and Gentieu are law enforcement officers, and that both were engaged in performance of their duties when the shot was fired. In addition, defendant had reasonable grounds to know the Troopers were law enforcement officers, since both Troopers were in uniform while at defendant's residence. Therefore, we address whether the State presented substantial evidence that defendant assaulted both officers. Both Trooper Gentieu and Trooper Shuffler testified they were in fear for their lives. Other testimony

establishes that this fear of immediate injury was reasonable. Trooper Gentieu testified defendant pointed the shotgun in his direction while cursing at him. Trooper Gentieu had positioned himself in line with Trooper Shuffler's location. Trooper Shuffler testified he ducked after hearing the gunshot and glanced around to see defendant facing his direction with both hands on the shotgun while yelling. Although defendant did not point the shotgun at Trooper Shuffler, the State is not required to prove the gun was pointed at the officer to prove assault. *Dickens, supra.* Viewing the evidence in the light most favorable to the State, a jury could infer that both Troopers Gentieu and Shuffler would reasonably have been in fear of being shot after hearing defendant fire his shotgun in their general direction. This assignment of error is overruled.

B. AWDWWITK

Defendant argues the trial court erred in denying his motion to dismiss the AWDWWITK charge. Defendant contends there was insufficient evidence to support the element of intent to kill. We disagree.

The elements of AWDWWITK under N.C. Gen. Stat. § 14-32 are: (1) an assault; (2) with a deadly weapon; (3) with the intent to kill. *State v. Coria*, 131 N.C. App. 449, 456, 508 S.E.2d 1, 5 (1998). Intent to kill can be inferred from the circumstances. *State v. Christy*, 26 N.C. App. 57, 59, 215 S.E.2d 154, 155 (1975) ("An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.") (citation omitted).

Defendant does not contest that a shotgun is a deadly weapon. In addition, we concluded in Part II, A of this opinion that substantial evidence was presented for the jury to infer defendant assaulted Troopers Gentieu and Shuffler by firing the weapon in their direction. Therefore, we next examine whether the State presented substantial evidence of the third element: intent to kill.

Here, the evidence showed that defendant stepped onto his deck holding a shotgun, yelled, "burn the f---ing road up," and pointed a shotgun up toward the direction of Trooper Gentieu. Trooper Gentieu backed away from the manufactured home and as he backed away, he heard a gunshot. Intent to kill could be inferred from these circumstances. Given the fact Trooper Gentieu saw the gun pointed in his direction before the gun was fired, it would be reasonable to infer the gun was still pointed in his direction when he heard the gunshot. In addition, investigator Thomas Probst testified one gunshot from a twelve-gauge shotgun could kill a human being seventy-five yards away. Trooper Gentieu testified he was twenty feet away from the defendant's deck when the shot was fired. We conclude the trial court did not err in denying defendant's motion to dismiss the AWDWWITK charge.

C. Driving While Impaired

Defendant next argues the State presented insufficient evidence to support the driving while impaired charge. We disagree.

Defendant was charged with habitual impaired driving. "A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense." N.C. Gen. Stat. § 20-138.5(a) (2003). Defendant does not dispute that he "has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense." *Id.* Defendant contends the State presented insufficient evidence to support a conviction for impaired driving under N.C. Gen. Stat. § 20-138.1. The essential elements of driving while impaired are: (1) defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within the State; (3) while under the influence of an impairing substance. N.C. Gen. Stat. § 20-138.1(a)(1) (2003); *State v. Tedder*, 169 N.C. App. 446, 450, 610 S.E.2d 774, 777 (2005) (quotation omitted).

The State presented substantial evidence of each element of the offense. Yount testified she saw defendant drive the Chevy Blazer off the highway and crash into a car, saw him drive back onto the highway and had smelled alcohol on defendant's person. Yount also testified defendant's eyes were bloodshot and his speech slurred. It is reasonable for a jury to infer from the evidence presented that defendant was impaired while driving a vehicle on a public highway. *See State v. Scott*, 356 N.C. 591, 597-98, 573 S.E.2d 866, 869-70 (2002) (reasonable to infer driver was impaired

where defendant was speeding; his vehicle had no tags; he stopped in the middle of the intersection; defendant did not follow the officer's instructions; officer smelled alcohol on defendant; observed what appeared to be beer waste on defendant's coat; observed an open container in defendant's vehicle; defendant's speech was slurred; and defendant refused to take an Intoxilyzer test or an ALCO-SENSOR test).

III. Double Jeopardy

Defendant next argues that his convictions for AWDWWITK and AWDW on a LEO violate the double jeopardy clause. We disagree.

A. Motion to Arrest Judgment

Defendant moved to arrest judgment for the AWDWWITK and AWDW on a LEO charges arguing they violated double jeopardy. This motion was denied. Defendant argues the trial court erred in denying the motion because the jury relied on the same facts to prove both offenses. We disagree.

The standard of review for this issue is *de novo*. *State v. Ross*, 173 N.C. App. 569, 573, 620 S.E.2d 33, 36 (2005). The Double Jeopardy Clause of the Fifth Amendment protects against "(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). "[T]he question of whether a defendant may receive cumulative punishments for the same conduct which violates two separate statutes is primarily a question of legislative intent, i.e., whether the legislature

intended the offenses to be separate and distinct offenses." *Coria*, 131 N.C. App. at 453, 508 S.E.2d at 3-4 (discussing *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986)). An examination of legislative intent is unnecessary where "the factual elements necessary to prove the offenses were not the same[.]" *Id.* at 454, 508 S.E.2d at 4 (discussing *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997)).

In *Coria*, this Court held that separate convictions for AWDWWITK and AWDW on a LEO did not violate double jeopardy even where the same facts were relied upon to prove both crimes because each crime required proof of a separate element. *Id.* at 456, 508 S.E.2d at 5. We find this case indistinguishable from *Coria*. This assignment of error is overruled.

B. Sentencing

Defendant also argues sentencing on the AWDWWITK and AWDW convictions also violated the double jeopardy clause for the same reasons cited in the preceding argument. Defendant requested the trial court consolidate for sentencing the AWDWWITK and the two charges of AWDW on a LEO into one judgment. The trial court denied the request. As previously noted in this opinion, double jeopardy was not implicated since each offense required proof of separate elements. *See Coria, supra.* Accordingly, we find no error.

No error.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).