NO. COA08-461

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

STATE OF NORTH CAROLINA

v.

LATROY CLAYTON ALLISON

Guilford County
Nos. 07 CRS 24316;
07 CRS 78657-58;
07 CRS 78707

Appeal by defendant from judgments entered 4 December 2007 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 17 November 2008.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Sofie W. Hosford for defendant-appellant.

BRYANT, Judge.

Defendant appeals from judgments entered 4 December 2007 consistent with jury verdicts finding him guilty of attempted first degree murder, assault with intent to kill inflicting serious injury, felonious breaking or entering, and misdemeanor larceny. For the reasons stated below, we find no error.

The evidence tended to show that in 2006 defendant lived with Sherica Wilson in a rented townhouse in Greensboro, North Carolina. Defendant had a key to the townhouse. Defendant moved out of the townhouse in October of 2006 when Wilson ended the two-and-one-half

year relationship. In February of 2007, Sherica Wilson resided in the townhouse with two roommates.

After the relationship ended, Wilson spoke to defendant as a friend. However, defendant wanted to continue the relationship. On 4 February 2007, defendant asked Wilson to come to his residence because "something had happened to his mother." When Wilson arrived, she found there was nothing wrong with defendant's mother. Instead, defendant wanted to talk about reconciling. Wilson informed defendant that she was not interested in a relationship and that she was seeing other people.

The next day, Monday, 5 February 2007, Wilson attended morning college classes. She returned home at about 1:30 p.m. Forty minutes later, Wilson went to her bedroom, set her alarm for 3:00 p.m., and took a nap. When she went to sleep, no one else was in the house. Wilson heard a noise, woke up, and saw defendant standing at the edge of her bed. She asked defendant what he was doing there and he replied, "shut up, bitch." Defendant then jumped on Wilson, grabbed her by the neck, and started to choke her. Defendant strangled Wilson while she tried to pry his hands off of her neck.

Defendant picked up a fireplace poker and held it across Wilson's neck while he punched her in the back of the head. At some point, Wilson passed out. When Wilson regained consciousness, defendant again strangled her with the poker until she passed out a second time. Wilson regained consciousness, and this time defendant beat her in the head with the poker. Wilson tried to

block the assaults and sustained two broken fingers and one dislocated finger. Wilson passed out a third time. However, when she regained consciousness again, Wilson kept her eyes closed and remained on the floor. She heard footsteps near her dresser; she heard her keys jingle and her cell phone being disconnected from its charger. Finally, she heard footsteps go down the stairs and the main door open, close, and lock.

Wilson crawled to her bedroom door and locked it. She then crawled to her window, kicked out the screen, and jumped onto the roof below. Physically unable to call out for help, Wilson remained on the roof until a neighbor spotted her and called 911. When the police arrived, Wilson was curled up on the roof and appeared to be in a state of shock.

Wilson was transported to a hospital where she stayed for approximately twenty-four hours. A medical examination by a trauma surgeon revealed abrasions to the back of Wilson's head, tenderness around her neck, bleeding in her eyes and swelling of her tongue. At trial, the surgeon testified that these injuries were consistent with strangulation, which interrupts the flow of oxygen to the brain and can result in death. Doctors installed four rods in two of her broken fingers and the rods remained in place for eight weeks. Wilson had physical therapy for her hands, but she did not have the full use of her hands at the time of trial. Upon her release from the hospital, Wilson could not swallow solid food and her voice did not return for approximately one week.

Defendant testified that he was upset after Wilson told him that she had "messed with some other guys." He testified that the day before the assault he consumed at least sixteen beers and nine or ten shots of gin. At some point that evening, defendant passed out. Defendant testified that the "[n]ext thing I remember, I recall I was in [] Wilson's vehicle on the highway wondering how I got there and I looked down and I had - I had a little blood on me."

The jury found defendant guilty of attempted first degree murder, assault with intent to kill inflicting serious injury, breaking and/or entering, and misdemeanor larceny. The trial court sentenced defendant to consecutive terms of 125 to 198 months and 58 to 79 months imprisonment. Defendant appeals.

On appeal defendant raises two arguments: (I) the trial court erred in denying the motions to dismiss the charges of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury and (II) the trial court committed reversible error in failing to provide the complete pattern jury instruction on attempted first degree murder.

I

Defendant first contends the trial court erred by denying his motion to dismiss the charges of attempted first degree murder and assault with intent to kill inflicting serious injury based on insufficiency of evidence. Defendant argues that the State failed to prove the intent element in these two offenses. We disagree.

The standard for ruling on a motion to dismiss for insufficiency of evidence "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994) (citation omitted). In ruling on a motion to dismiss, the trial court should consider all of the evidence "in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998) (citation omitted). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citation omitted).

The elements of attempted first-degree murder are: (1) a specific intent to unlawfully kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing. *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000) (citation omitted). The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: "(1) an assault; (2) the use of a deadly weapon; (3) an intent to

kill; and (4) the infliction of serious injury not resulting in death. *Id.* (citation omitted).

> 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) (citations and internal quotation marks omitted).

Here, Wilson testified that defendant entered her town house without Wilson's knowledge or permission, appeared in her bedroom while she slept and, when Wilson questioned his presence, defendant jumped on Wilson, strangled her with his hands and then with a fireplace poker. When Wilson revived, defendant would either choke her or beat her with the poker until she passed out. Eventually, defendant left while Wilson lay with her eyes closed on the bedroom floor.

Viewing the evidence in the light most favorable to the State, we hold the jury had sufficient evidence to reasonably infer defendant formed the required specific intent to kill Wilson. Accordingly, defendant's assignment of error is overruled.

II

Defendant also contends that the trial court committed reversible error in failing to provide the complete pattern jury instruction on attempted first-degree murder. Specifically,

defendant contends the trial court erred in failing to include the following italicized language under the second element in the pattern jury instructions for attempted first degree murder:

> Second, that at the time the defendant had this intent, he performed an act which was calculated and designed to accomplish the crime [but which fell short of the completed crime] [*and which came so close to bringing it about that in the ordinary and likely course of things would have proximately resulted in death of the victim had he not been stopped or prevented from completing his apparent course of action*].

N.C.P.I. Crim. 206.17A (2007). We disagree.

This Court reviews jury instructions only for abuse of discretion. *State v. Shepherd*, 156 N.C. App. 603, 607, 577 S.E.2d 341, 344 (2003) (citation omitted). Abuse of discretion means "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hutchinson*, 139 N.C. App. 132, 137, 532 S.E.2d 569, 573 (2000) (citation omitted).

"This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions" so long as the pattern instruction "is an accurate summary of the law." *In re the Will of Allen*, 148 N.C. App. 526, 533, 559 S.E.2d 556, 560 (2002). In general, jury instructions must be supported by the evidence. *State v. Dammons,* 293 N.C. 263, 272, 237 S.E.2d 834, 840 (1977). And, all essential issues arising from the evidence require jury instructions. *State v. Owen*, 111 N.C. App. 300, 307, 432 S.E.2d 378, 383 (1993) (citation omitted). However, where evidence does

not support an instruction, the trial court is not required to instruct the jury thereon. *See State v. Haywood*, 144 N.C. App. 223, 234-35, 550 S.E.2d 38, 45-46 (2001) (no error where the trial court failed to instruct the jury on the defense of duress where the defendant failed to present evidence that he engaged in sexual acts with the victim in order to prevent another assailant from inflicting immediate death or serious bodily injury if he did not perform).

In pertinent part, the pattern jury instruction for attempted first degree murder under North Carolina Pattern Instruction, Criminal section 206.17A states the following:

> First, that the defendant intended to commit [first degree murder,] and,
>
> Second, that at the time the defendant had this intent, he performed an act which was calculated and designed to accomplish the crime [but which fell short of the completed crime] [*and which came so close to bringing it about that in the ordinary and likely course of things would have proximately resulted in the death of the victim had he not been stopped or prevented from completing his apparent course of action*].

N.C.P.I. Crim. 206.17A.

At the charge conference, the following colloquy occurred:

> THE COURT: All right. Moving then to 206.17A. Now, there's a parenthetical there, you'll see on page thirteen. I don't know there's any evidence of that.
> . . .
>
> [DEFENSE COUNSEL]: The second, that at the time the defendant had this intent, he performed an act which was calculated and designed to accomplish the crime but which fell short of the completed crime and which came so close to bringing it about that in the

> ordinary and likely course of things would have proximately resulted in the death of the victim had he not been stopped or prevented from completing his apparent course of action.
>
> The Court: Well, there are two choices there. . . . One that it wasn't completed, one that some event intervened that stopped it. And we didn't have any of that. Such as somebody hearing somebody come in the door and stopped it or anything like that.
> . . .
> All right. So with respect to - - [Defense counsel], I'm going to decline her request because I don't think the evidence fits that and will include but which fell short language.
>
> [Defense counsel]: Okay. I just note my objection on the record.

Following the charge conference, the trial court instructed the jury in pertinent part as follows:

> The defendant has been charged with attempted first degree murder. For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt.
>
> First. That the defendant intended to commit first degree murder.
>
> And second. That at the time the defendant had this intent he performed an act which was calculated and designed to accomplish the crime but which fell short of the completed crime.

Here, there was no evidence to support an instruction regarding an intervening event that interrupted defendant's course of conduct. Therefore, we hold the trial court did not abuse its discretion by declining to include the requested alternate parenthetical language in the pattern jury instruction on attempted first degree murder in its charge to the jury. Accordingly, defendant's assignment of error is overruled.

No error.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).