NO. COA08-677

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA,
Plaintiff,

v. Pitt County
No. 07CRS052627-29

GREGORY CHERRY,
Defendant.



Appeal by defendant from judgments entered on or about 21 September 2007 by Judge W. Russell Duke, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 20 November 2008.



*Attorney General Roy A. Cooper, III, by Assistant Attorney General Charles E. Reece, for the State.*

*Appellate Defender, Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellant.*

STROUD, Judge.

Defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury, discharging a weapon into a motor vehicle occupied and being operated, and possession of a firearm by a felon. Defendant appeals arguing "the trial court erred by entering against . . . [defendant] judgment for assault with a deadly weapon with intent to kill inflicting serious injury after the jury returned a mutually exclusive verdict acquitting . . . [defendant] of attempted murder for the same conduct[.]" For the following reason, we dismiss defendant's appeal.

## I. Background

The State's evidence tended to show the following: In early 2007, Marquida Roberson ("Ms. Roberson") was dating and living with defendant. On 20 March 2007, defendant went through Ms. Roberson's cell phone and started questioning her about text messages she was receiving from Mr. Fenner Harding ("Mr. Harding"). On 21 March 2007, Mr. Harding was walking to his car after work when defendant began questioning him. Mr. Harding got into his car and saw that defendant had a silver revolver in his pants. Defendant tried to open Mr. Harding's car door. Mr. Harding started to drive away, and defendant got in another vehicle and followed him. Mr. Harding stopped at a stop sign, and then he heard "a loud bang[,]" and his rear passenger window shattered. Mr. Harding "attempted to go ahead and keep [his] left turn but [his] right foot went numb, and when [he] looked down [he] noticed [his] pants--[his] pants leg was soaked with blood." Mr. Harding then drove himself to the hospital, and about two weeks later a bullet was removed from his leg.

On or about 9 April 2007, defendant was indicted for attempted murder, assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), discharging a weapon into an occupied motor vehicle, and possession of a firearm by a felon. The jury found defendant not guilty of attempted murder and guilty of the three other charges. Defendant appeals arguing "the trial court erred by entering judgment against . . . [defendant] for . . .

[AWDWIKISI] after the jury returned a mutually exclusive verdict acquitting . . . [defendant] of attempted murder for the same conduct." For the following reason, we disagree.

II. Rule 2

Defendant concedes that he "did not raise this issue at trial," and therefore has not properly preserved his argument for appeal. "[D]efendant respectfully asks the Court to review the issue under Rule 2 of the North Carolina Rules of Appellate Procedure."

North Carolina Rule of Appellate Procedure 2 reads,

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2. Our Supreme Court has also stated,

> Rule 2 permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to prevent manifest injustice to a party or to expedite decision in the public interest. Rule 2, however, must be invoked cautiously, and we reaffirm our prior cases as to the exceptional circumstances which allow the appellate courts to take this extraordinary step.

*Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citations and quotation marks omitted).

*State v. Tirado* noted,

> The elements of attempted first-degree murder are: (1) a specific intent to 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. The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death. Therefore, assault with a deadly weapon with intent to kill inflicting serious injury requires proof of the use of a deadly weapon, as well as proof of serious injury, neither of which are elements of attempted first-degree murder. Similarly, attempted first-degree murder includes premeditation and deliberation, which are not elements of assault with a deadly weapon with intent to kill inflicting serious injury.

358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) (citations omitted).

Though defendant uses the language of "mutual exclusivity," it is not implicated in this case as a verdict of "guilty" or "not guilty" of one of the two crimes of AWDWIKISI and attempted murder does not preclude a verdict of "guilty" or "not guilty" on the other. *See Tirado* at 579, 599 S.E.2d at 534. The jury could have convicted defendant of both, neither, or either one of the two crimes of AWDWIKISI and attempted murder. *See id.* Therefore, we do not deem this case to present the "exceptional circumstance[]" which necessities that we exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure in order "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C.R. App. P. 2; *Dogwood Dev. & Mgmt. Co., LLC* at 196, 657 S.E.2d at 364. This appeal is dismissed.

DISMISSED.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).