NO. COA09-351

NORTH CAROLINA COURT OF APPEALS

Filed: 6 October 2009

STATE OF NORTH CAROLINA

v. Cleveland County
Nos. 07 CRS 54338-39;
07 CRS 54344

TRAVIS OBRIAN BLACK

Appeal by defendant from judgments entered 17 September 2009 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 16 September 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathleen N. Bolton, for the State.

James N. Freeman, Jr., for defendant-appellant.

JACKSON, Judge.

Defendant Travis Black ("defendant") appeals his 17 September 2008 convictions for robbery with a dangerous weapon, assault with a deadly weapon causing serious injury, and possession of a firearm by a felon. For the reasons stated herein, we hold no error.

In the early morning of 6 July 2007, Joshua Woods was walking on Buffalo Street in Shelby, when three men with guns took $630, cigarettes, and a cell phone from his pockets. Woods then heard "a pow" and began to run away. A bullet passed through Woods's thigh.

Officer Luis Hernandez of the Shelby Police Department was called to the scene, where he observed a black male hopping on one leg and trying to flag down the officer. When Officer Hernandez approached Woods, Woods screamed, "My leg. My leg." Officer Hernandez saw that Woods had been shot in the leg and saw blood. He attempted to calm Woods until the ambulance arrived. Woods told Officer Hernandez that the men who attacked him were Lamont Marion, Kevin Lockhart, and defendant. He also told the officer that all three of the men had guns but that defendant was the one who had shot him. Woods went to the hospital, where his leg was bandaged, but he did not receive any pain medication. Woods testified that his leg hurt a "little bit" for one or two days.

Defendant was indicted on 13 November 2007 for one count of robbery with a dangerous weapon, one count of assault with a deadly weapon causing serious injury, and one count of possession of a firearm by a felon. During his trial, defendant appeared not to understand the concepts of "stipulating" or his attorney's speaking "on his behalf." A jury convicted defendant of all three charges on 17 September 2008. After his conviction, but prior to sentencing, defendant attempted to escape from custody. He also claimed to be unable to walk back into the courtroom following his attempted escape. The State offered a sentencing worksheet to the trial court, and defendant, through counsel, stipulated to the convictions and prior record level. Defendant was sentenced as a prior record level IV offender with nine prior record level points and was sentenced, in total, to a minimum of 183 months and a

maximum of 239 months in the Department of Corrections. Defendant appeals.

Defendant first argues that the trial court erred by failing to order a competency examination of defendant *sua sponte* in order to ascertain whether he was competent to stand trial. We disagree.

North Carolina General Statutes, section 15A-1001(a) provides

> [n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001(a) (2007). "The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court," so long as the motion "detail[s] the specific conduct that leads the moving party to question the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(a) (2007). "When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002(b) (2007). Our Supreme Court has recognized that, pursuant to these provisions, "the trial court is *only* required to 'hold a hearing to determine the defendant's capacity to proceed *if* the question is raised.'" *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221, *cert. denied*, __ U.S. __, 169 L. Ed. 2d 351 (2007) (quoting *State v. King*, 353 N.C. 457, 466, 546 S.E.2d 575, 584 (2001), *cert. denied*, 534 U.S. 1147, 151 L. Ed. 2d 1002 (2002)). If the statutory right to a competency hearing is

not asserted at trial, it is waived. *Id.* (citing *King*, 353 N.C. at 466, 546 S.E.2d at 584–85; *State v. Young*, 291 N.C. 562, 567, 231 S.E.2d 577, 580–81 (1977)).

In the case *sub judice*, defendant does not contend that he either raised this issue or made a motion concerning a competency examination at any point during trial. Rather, he argues simply that the court should have examined defendant's capacity to stand trial *sua sponte*. Although the court could have raised the issue of competency on its own motion, it was not required by statute to do so. Because the issue was not raised at trial, defendant waived his statutory right to a competency hearing.

Notwithstanding the foregoing analysis, defendant does have a constitutional right to be competent while standing trial. Pursuant to the Due Process Clause of the United States Constitution, a "criminal defendant may not be tried unless he is competent." *Godinez v. Moran*, 509 U.S. 389, 396, 125 L. Ed. 2d 321, 330 (1993) (citing *Pate v. Robinson*, 383 U.S. 375, 378, 15 L. Ed. 2d 815, 818 (1966)). With respect to this constitutional mandate, a "trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *King*, 353 N.C. at 467, 546 S.E.2d at 585 (quoting *Young*, 291 N.C. at 568, 231 S.E.2d at 581). "In enforcing this constitutional right, the standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding

and has a rational as well as factual understanding of the proceedings against him." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221 (quoting *Godinez*, 509 U.S. at 396, 125 L. Ed. 2d at 330) (internal quotations omitted).

Here, defendant points to the following as evidence of his lack of competency to stand trial: (1) his apparent lack of understanding regarding the meaning of "stipulate", (2) his attempt to escape prior to sentencing, (3) his throwing down his cane and later stating that he could not walk back into the courtroom, and (4) his apparent lack of understanding regarding his counsel's speaking "on behalf" of defendant. Although defendant labels these actions as "red flags", we do not agree that they rise to the requisite level of substantial evidence, at which point the trial court's duty to examine defendant's competency *sua sponte* would have arisen. Furthermore, additional evidence shows that defendant was able to respond directly and appropriately to the trial court's questions regarding his decision whether to offer evidence or testify in his defense and the effect those decisions would have on counsel's closing statements. Accordingly, we hold that the trial court did not err in failing to institute a competency hearing *sua sponte*.

Second, defendant contends that the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury due to insufficiency of evidence. We disagree.

"The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991); *Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 478, 617 S.E.2d 61, 64 (2005)) (internal citations omitted). "On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citing *Vause*, 328 N.C. at 236, 400 S.E.2d at 61). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* "If there is substantial evidence -- whether direct, circumstantial, or both -- to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988)). "In ruling on a motion to dismiss, 'the trial court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence." *Id.* at 73, 472 S.E.2d at 926 (citing *State v. Saunders*, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986)).

Defendant in this case was charged with assault with a deadly weapon inflicting serious injury. This offense consists of four

elements: "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997) (quoting *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990)). Defendant argues that the State lacked sufficient evidence on the third element of this charge — inflicting serious injury — to withstand a motion to dismiss. According to defendant, this Court should analogize "serious injury" from North Carolina General Statutes, section 14-32(b) with "serious bodily injury" as defined in North Carolina General Statutes, section 14-32.4(a):

> 'Serious bodily injury' is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4(a) (2007). However, this Court previously has "declined to define serious injury for purposes of assault prosecutions other than stating that the term means physical or bodily injury resulting from an assault, . . . and that further definition seems neither wise nor desirable." *State v. Morgan*, 164 N.C. App. 298, 303, 595 S.E.2d 804, 808-09 (2004) (internal citations omitted). Furthermore, "'serious bodily injury,' as set forth in N.C.G.S. § 14-32.4, requires proof of more severe injury than the 'serious injury' element of other assault offenses." *State v. Williams*, 150 N.C. App. 497, 503, 563 S.E.2d 616, 619-20 (2002) (citing *State v. Hannah*, 149 N.C. App. 713, 717, 563 S.E.2d 1, 4 (2002)). "Whether a serious injury has been

inflicted is a factual determination within the province of the jury." *Morgan*, 164 N.C. App. at 303, 595 S.E.2d at 809. "A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious." *Williams*, 150 N.C. App. at 502, 563 S.E.2d at 619.

In the case *sub judice*, the State introduced evidence that Woods was shot in the upper thigh; that he was bleeding; that Officer Hernandez heard him scream, "My leg. My leg."; that the officer had to calm him down before the ambulance arrived; that Woods went to the hospital; and that he has scars on his leg from the entrance and exit wounds. We think that these facts are substantial evidence from which a reasonable mind could conclude that Woods suffered serious injury, especially when interpreted in the light most favorable to the State. We hold, therefore, that the trial court did not err in denying defendant's motion to dismiss based upon insufficient evidence.

Defendant's final argument is that the trial court erred in determining his prior record level for sentencing purposes because the State failed to present sufficient evidence of his prior convictions. We disagree.

"The State bears the burden of proving that a prior conviction exists and that the defendant is the same person as the offender in the prior conviction." *State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85 (2007) (citing *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002)). North Carolina General Statutes, section 15A-1340.14(f) provides:

> A prior conviction shall be proved by any of the following methods:
>
> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2007). "Standing alone, a sentencing worksheet prepared by the State listing a defendant's prior convictions is insufficient proof of prior convictions." *Wade*, 181 N.C. App. at 298, 639 S.E.2d at 85 (citing *Eubanks*, 151 N.C. App. at 505, 565 S.E.2d at 742).

"While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them." *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005) (quoting *State v. Powell*, 254 N.C. 231, 234, 118 S.E.2d 617, 619 (1961)) (internal quotations omitted). "A stipulation does not require an affirmative statement and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object and failed to do so." *Wade*, 181 N.C. App. at 298, 639 S.E.2d at 85 (citing *Alexander*, 359 N.C. at 828–29, 616 S.E.2d at 917–18). The dialogue between counsel and the trial court also informs whether defendant stipulated to prior convictions. *See, e.g.*, *Eubanks*, 151

N.C. App. at 506, 565 S.E.2d at 743 ("[W]e hold that the statements made by the attorney representing defendant in the present case may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet.").

In addition, both defendant and counsel for the defense have the authority to stipulate to facts. *See, e.g.*, *State v. Watson*, 303 N.C. 533, 279 S.E.2d 580 (1981).

> It is well-established that stipulations are acceptable and desirable substitutes for proving a particular act. Statements of an attorney are admissible against his client provided that they have been within the scope of his authority and that the relationship of attorney and client existed at the time. In conducting an individual's defense an attorney is presumed to have the authority to act on behalf of his client. The burden is upon the client to prove lack of authority to the satisfaction of the court.

Id. at 538, 279 S.E.2d at 583 (internal citations omitted). "Moreover, there is no requirement that the record show that the defendant personally stipulated to the element or that the defendant knowingly, voluntarily, and understandingly consented to the stipulation." *State v. Jernigan*, 118 N.C. App. 240, 245, 455 S.E.2d 163, 166 (1995) (citing *State v. Morrison*, 85 N.C. App. 511, 514-15, 355 S.E.2d 182, 185, *disc. rev. denied and appeal dismissed*, 320 N.C. 796, 361 S.E.2d 84 (1987)).

Here, the sentencing worksheet presented by the State did not suffice to show defendant's prior record level. However, defendant stipulated to his prior convictions through counsel. Although silence may be adequate in some situations, defendant in this case affirmatively made a verbal statement that was "definite and

certain" as to the stipulation. *Alexander*, 359 N.C. at 828, 616 S.E.2d at 917. Defendant has not shown that his counsel had no authority to act for him when counsel responded to a question from the trial court regarding stipulation. Therefore, defendant's stipulation, through counsel, as to his prior convictions and prior record level was sufficient to satisfy the State's statutory burden. Accordingly, we hold that the trial court did not err in sentencing defendant as a prior record level IV based on the State's evidence.

For these reasons, we hold that the trial court did not err in failing to order a competency exam *sua sponte*, in denying defendant's motion to dismiss, nor in determining defendant's prior record level.

No error.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).