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NO. COA11-74
NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2011

STATE OF NORTH CAROLINA

v.

Lincoln County
No. 07 CRS 1

SAMUEL DAVID COOK

Appeal by defendant from judgment entered 20 September 2007 by Judge Thomas W. Seay, Jr., in Lincoln County Superior Court. Heard in the Court of Appeals 24 May 2011.

Attorney General Roy Cooper, by Assistant Attorney General David D. Lennon, for the State.

Ewing Law Firm, PC, by Robert W. Ewing, for Defendant.

ERVIN, Judge.

Defendant Samuel David Cook appeals from a judgment entered by the trial court sentencing him to a minimum term of 80 months and a maximum term of 105 months imprisonment in the custody of the North Carolina Department of Correction based upon his conviction for assault with a deadly weapon with the intent to kill inflicting serious injury. On appeal, Defendant argues that the trial court erred by denying his dismissal motion

predicated on the theory that the record evidence was not sufficient to support a jury determination that the alleged victim, Paula Cook, sustained a serious injury and by failing to instruct the jury on the lesser-included offenses of assault with a deadly weapon and assault with a deadly weapon with the intent to kill on the grounds that that the record permitted a reasonable jury to determine that Ms. Cook's injuries were not "serious." After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that those challenges lack merit and that the trial court's judgments should be upheld on appeal.

I. Factual Background

A. Substantive Facts

1. State's Evidence

Defendant and the alleged victim, Paula Cook, were married on 10 May 1993 and separated on 26 December 2006. **(Tp 11)** Ms. Cook described the marriage as "rocky," and testified that "[t]here was a lot of abuse." Ms. Cook also testified that the abuse was "[p]hysical before the [2005 motorcycle] accident," in which Defendant lost his left leg and suffered considerable "damage" to his left arm, and primarily verbal after that point. As a result of the injuries that he sustained in this accident, Defendant was confined to a wheelchair.

At around noon on 30 December 2006, Defendant telephoned Ms. Cook and requested that she come to their former marital residence, a very small single wide mobile home located on Rhodes Rhyne Road in Lincolnton, to clean their pet goat's cage. Ms. Cook agreed to comply with Defendant's request and came to the mobile home.

At the time of her arrival, Ms. Cook found Defendant sitting in his wheelchair watching television. After Defendant asked if they could talk for a few minutes, Ms. Cook followed Defendant into the bedroom and sat down at the foot of the bed. In the bedroom, Defendant "transferred" himself from the wheelchair to the bed and asked Ms. Cook to come back home. Ms. Cook refused Defendant's request.

As the conversation between Defendant and Ms. Cook continued, the two of them had a heated disagreement about which vehicle Ms. Cook could take from the mobile home for her personal use. According to Ms. Cook, the conversation ended when she went to the living room to answer her cell phone, which she had left in her pocketbook. After finishing her phone call and returning her cell phone to her pocketbook, Ms. Cook heard the click of a gun, looked around the corner, and saw Defendant pointing a gun at her forehead. Although Defendant attempted to fire the gun, it "misfired."

As Ms. Cook attempted to exit the mobile home through the back door, which was secured by three locks, Defendant followed her in his wheelchair and fired several more times, most of which resulted in additional "misfires." At least one of Defendant's shots did not "misfire," however, resulting in a bullet wound to Ms. Cook's back. After managing to get the door open, Ms. Cook sought refuge at the residence of her brother-in-law, who lived down the street.

Ms. Cook's niece, Beverly Shires, took Ms. Cook to the hospital in order to obtain treatment for Ms. Cook's injuries. Ms. Shires noticed that Ms. Cook was bleeding through her shirt. At the hospital, Ms. Cook was sore and bleeding. According to photographs of Ms. Cook's injuries that were admitted into evidence, the bullet entered her back and exited from her shoulder. The bullet stemming from the shot that Defendant fired at Ms. Cook was found on top of her shoulder. When Detective Lee Keller of the Lincoln County Sheriff's Department took a statement from Ms. Cook at the hospital, she appeared "very uncomfortable" despite having been "medicated." At the conclusion of the interview, Ms. Cook was unable to sign the statement that Detective Keller took from her.

2. Defendant's Evidence

Defendant phoned Ms. Cook around noon on 30 December 2006 and asked her to come over to the mobile home for the purpose of

helping him feed their pet goat. After the two of them went into the bedroom to talk, their conversation became heated. Defendant testified that Ms. Cook pushed him from behind and knocked him to the floor as he attempted to transfer from the bed to his wheelchair. At that point, Defendant saw Ms. Cook go to the living room and pull a pistol, or something black that looked like a pistol, from her purse.

As Defendant attempted to get up off the floor, Ms. Cook came at him while holding a gun in her hand. After Ms. Cook tried to kick him, Defendant pushed her back into a table. At the time that Ms. Cook, who had left the bedroom and gone down the hallway, returned, Defendant fired a shot into the ceiling. Ms. Cook continued to come toward him, causing Defendant to fire at her again. The gun that Defendant was holding misfired a couple of times. After Defendant pulled the trigger two more times, the gun went off, at which point Ms. Cook yelled, "You shot me in the back, you SOB[!]" Defendant claimed that, when he fired, he did not know where the bullets were going or if he was hitting anything. Following Ms. Cook's departure, Defendant called 911 out of concern that Ms. Cook had been hurt.

B. Procedural History

On 30 December 2006, a Warrant for Arrest charging Defendant with assaulting Ms. Cook with a deadly weapon with the intent to kill inflicting serious injury was issued. On 8

January 2007, the Lincoln County grand jury returned a bill of indictment charging Defendant with assaulting Ms. Cook with a deadly weapon with the intent to kill inflicting serious injury. The charge against Defendant came on for trial before the trial court and a jury at the 17 September 2007 criminal session of the Lincoln County Superior Court. After the presentation of the evidence and the arguments of counsel, the trial court submitted the issue of whether Defendant was guilty of assault with a deadly weapon with the intent to kill inflicting serious injury, assault with a deadly weapon inflicting serious injury, or not guilty to the jury for its consideration. On 20 September 2007, the jury returned a verdict convicting Defendant as charged. At the ensuing sentencing hearing, the trial court found that Defendant had one prior record point and should be sentenced as a Level II offender. Based upon these determinations, the trial court sentenced Defendant to a minimum term of 80 months and a maximum term of 105 months imprisonment in the custody of the North Carolina Department of Correction. On 8 July 2010, Defendant petitioned for the issuance of a writ of *certiorari* allowing review of the trial court's judgment. On 23 July 2010, this Court granted Defendant's petition.

II. Legal Analysis

A. Sufficiency of the Evidence

On appeal, Defendant initially contends that the trial court erred by denying his motion to dismiss the assault with a deadly weapon with the intent to kill inflicting serious injury charge on the grounds that the record did not contain sufficient evidence tending to show that Ms. Cook suffered a serious injury. We disagree.

In reviewing a trial court's ruling on a motion to dismiss for insufficiency of the evidence, this Court determines whether there is substantial evidence to establish the existence of each element of the offense charged. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982); *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *State v. Harris*, 145 N.C. App. 570, 578, 551 S.E.2d 499, 504 (2001) (citations omitted), *disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002). "In this determination, all evidence is considered 'in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.'" *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (quoting *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005)).

In order to obtain a conviction for assault with a deadly weapon with the intent to kill inflicting serious injury, the

State must show that Defendant committed: "(1) an assault, (2) with a deadly weapon, (3) with [the] intent to kill, (4) inflicting serious injury, (5) not resulting in death." *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994) (citing *State v. Meadows*, 272 N.C. 327, 331, 158 S.E.2d 638, 640 (1986); *State v. Cain*, 79 N.C. App. 35, 46, 338 S.E.2d 898, 905 (1986)). In challenging the denial of his dismissal motion, Defendant focuses his attention on the sufficiency of the evidence to establish that Ms. Cook sustained a serious injury.

The extent to which a serious injury has been inflicted depends on the facts of each case. *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991) (citing *State v. James*, 321 N.C. 676, 365 S.E.2d 579 (1988)), *cert. denied*, 529 U.S. 1006, 146 L. Ed. 2d 223, 120 S. Ct. 1274 (2000); *State v. Everhardt*, 326 N.C. 777, 780, 392 S.E.2d 391, 392 (1990). A "serious injury" is a physical or bodily injury causing great pain and suffering, short of death, with mental as well as physical injuries potentially qualifying as serious injuries. *State v. Hensley*, 90 N.C. App. 245, 248, 368 S.E.2d 208, 210 (1988) (citations omitted); *Everhardt*, 326 N.C. at 780, 392 S.E.2d at 393 (citations omitted). In *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983), this Court indicated that the "serious injury" analysis should focus on a number of factors, including the extent to which the record contains evidence of

hospitalization, pain, bleeding, and time lost from work. "[A]s long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious." *State v. Walker*, __ N.C. App. __, 694 S.E.2d 484, 495 (2010) (quoting *State v. Alexander*, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994)). A "through and through" bullet wound, whereby the bullet "enters the flesh and exits the flesh[,] is a serious injury." *Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318.

The record clearly reflects that Defendant shot Ms. Cook in the back with a .22 Magnum. More particularly, the undisputed evidence tends to show that a bullet fired from Defendant's gun entered Ms. Cook's back and exited at the top of her shoulder, with blood from this wound having soaked through her shirt. Ms. Cook was treated at the hospital as a result of this gunshot wound. According to Detective Keller, Ms. Cook appeared to be "very uncomfortable" and had limited mobility in her arm the day she was treated at the hospital. When taken in light most favorable to the State, this evidence is more than sufficient to support a jury finding that Ms. Cook sustained a serious injury at the time that Defendant assaulted her.

In seeking to persuade us to reach a different result, Defendant argues that, in reliance on our decision in *Owens*, the State was required to present more evidence of pertinent factors

such as hospitalization, pain, loss of blood, and time lost at work, to determine the level of Ms. Cook's pain and suffering as a precondition for the submission of an offense requiring proof of "serious injury." *Owens*, 65 N.C. App. at 111, 308 S.E.2d at 498. A careful analysis of Defendant's argument indicates that it rests on the assumption that the existence of some minimal number of these factors is a necessary prerequisite for a jury finding that a "serious injury" had been inflicted on the victim. Although, as the Supreme Court explained in *Alexander*, 337 N.C. at 189, 446 S.E.2d at 87 (citing *Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318), "[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," that decision does not, contrary to Defendant's argument, hold that a certain number of the *Owens* factors must be established in order to support a conviction for an offense involving the infliction of a serious injury. Instead, according to clearly-established North Carolina law, the issue of whether an assault victim suffered a serious injury may be submitted to the jury despite the absence of evidence tending to show the existence of some pre-established number of the *Owens* factors. See *State v. Tice*, 191 N.C. App. 506, 509-10, 664 S.E.2d 368, 371 (2008) (serious injury issue submitted to the jury on the basis of a gunshot wound in the absence of hospitalization or evidence of time lost

from work); *State v. Brunson*, 180 N.C. App. 188, 194-95, 636 S.E.2d 202, 206 (2006) (serious injury issue submitted to the jury on the basis of injuries sustained in a beating despite the absence of evidence that the victim lost time from work or exhibited signs of bleeding), *aff'd*, 362 N.C. 81, 653 S.E.2d 144 (2007); *State v. Everhardt*, 96 N.C. App. 1, 21-29, 384 S.E.2d 562, 569-70 (1989) (serious injury issue submitted on the basis of evidence tending to show severe depression, insomnia, anorexia, and severe, chronic headaches despite the absence of evidence tending to show time lost from work or bleeding), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990); *State v. Shankle*, 7 N.C. App. 564, 566, 172 S.E.2d 904, 905 (1970) (serious injury issue submitted to the jury in a case involving a bullet wound that did not result in hospitalization); *State v. Rotenberry*, 54 N.C. App. 504, 511, 284 S.E.2d 197, 201-202 (1981) (serious injury issue submitted to the jury based on a beating inflicted with a shotgun despite any evidence of hospitalization), *cert. denied*, 305 N.C. 306, 290 S.E.2d 705 (1982). Simply put, the jury is permitted to consider the factors delineated in *Owens* in determining whether the injury that the victim sustained was serious; however, the *Owens* factors are not, as Defendant appears to suggest, necessary components of proof that a serious injury has been sustained. Indeed, the only one of the *Owens* criteria that appears to be shared among all of the cases that

make up our "serious injury" jurisprudence is some level of pain or suffering, a fact that reflects the breadth of the definition that the Supreme Court and this Court have given to the statutory term "serious injury." The record clearly reflects that Ms. Cook experienced discomfort and was given medication as a result of the gunshot wound that she sustained. As a result, the trial court did not err by denying Defendant's dismissal motion.

B. Assault with a Deadly Weapon

Secondly, Defendant contends that the trial court erroneously failed to instruct the jury on the issue of Defendant's guilt of the lesser included offense of assault with a deadly weapon, which differs from assault with a deadly weapon with the intent to kill inflicting serious injury because guilt of that offense does not require proof of serious injury. According to Defendant, reasonable minds could differ about the extent to which Ms. Cook sustained a serious injury at the time of Defendant's assault. We disagree.

This Court reviews a defendant's challenge to a trial court's decision to instruct the jury on the issue of the defendant's guilt of a lesser included offense, such as assault with a deadly weapon, using a *de novo* standard of review. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (stating that "[a]ssignments of error challenging the trial

court's decisions regarding jury instructions are reviewed de novo") (citing *State v. Ligon*, 332 N.C. 224, 241-42, 420 S.E.2d 136, 146-47 (1992); *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 434 (1990)). "[A] judge presiding over a jury trial must instruct the jury as to a lesser included offense of the crime charged where there is evidence from which the jury could reasonably conclude that the defendant committed the lesser included offense." *State v. McConnaughey*, 66 N.C. App. 92, 95, 311 S.E.2d 26, 28-29 (1984) (citing *State v. Wallace*, 309 N.C. 141, 145, 305 S.E.2d 548, 551 (1983); *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976), *disapproved on other grounds in State v. Collins*, 334 N.C. 54, 61-62, 431 S.E.2d 188, 193 (1993)). In determining whether the evidence is sufficient to support the submission of the issue of a defendant's guilt of a lesser included offense to the jury, "courts must consider the evidence in the light most favorable to [the] defendant." *State v. Clegg*, 142 N.C. App. 35, 46, 542 S.E.2d 269, 277 (citing *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)), *cert. denied*, 353 N.C. 453, 548 S.E.2d 529 (2001). However, "[i]f the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense." *State v. Smith*, 351

N.C. 251, 267-68, 524 S.E.2d 28, 40, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 1000, 121 S. Ct. 151 (2000).

Although the question of whether the State presented sufficient evidence to establish that the alleged victim sustained a serious injury is frequently one for the jury, the trial court may remove the element of serious injury from the jury's consideration in certain circumstances. *Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318 (quoting *State v. Pettiford*, 60 N.C. App. 92, 97, 298 S.E.2d 389, 392 (1982)); *see also State v. Bagley*, 183 N.C. App. 514, 527, 644 S.E.2d 615, 623-24 (2007) (citations omitted). A failure on the part of the trial court to instruct on the issue of the defendant's guilt of a lesser included offense in cases where the the difference between the lesser included offense and the greater offense is the existence or non-existence of a particular element is tantamount to the delivery of a peremptory instruction concerning that element. *See State v. Tillery*, 186 NC. App. 447, 451, 651 S.E.2d 291, 294 (2007) (holding that, since the trial judge did not peremptorily instruct the jury that a "2x4 board" was a deadly weapon as a matter of law, it should have instructed the jury on the issue of the defendant's guilt of a lesser included offense that did not have the use of a deadly weapon as an element). As we have already noted, "[t]he test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether

the jury could convict the defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements." *State v. Leroux*, 326 N.C. 368, 378, 390 S.E.2d 314, 322 (1990) (citations omitted), *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155, 111 S. Ct. 192 (1990). The trial court may not properly allow the jury to consider the issue of whether the defendant is guilty of a lesser degree of assault based on the possibility that the injury sustained by the alleged victim was not "serious" in the event that the undisputed record evidence tends to show, if believed, that the injury sustained by the alleged victim was a "serious" one. See *Hedgepeth*, 330 N.C. at 38, 409 S.E.2d at 309.

According to the undisputed record evidence, Defendant shot Ms. Cook in the back with a .22 caliber Magnum revolver. The bullet in question entered Ms. Cook's back and exited her shoulder, resulting in bleeding, discomfort, and loss of mobility in the affected arm. Due to the fact that Ms. Cook sustained an injury as the result of an assault committed with a deadly weapon, *Jones*, 258 N.C. at 91, 128 S.E.2d at 3; *Musselwhite*, 59 N.C. App. at 480, 297 S.E.2d at 184; *Parker*, 7 N.C. App. at 194, 171 S.E.2d at 666, that consisted of a "through and through" bullet wound, *Hedgepeth*, 330 N.C. at 53,

409 S.E.2d at 318, we conclude that Ms. Cook sustained a "serious injury" as a matter of law.

In seeking to persuade us to reach a different result, Defendant essentially argues that the absence of certain types of evidence suffices to require the delivery of an instruction concerning the issue of Defendant's guilt of assault with a deadly weapon. *State v. Millsaps*, 356 N.C. 556, 563, 572 S.E.2d 767, 772 (2002) (citations omitted). In essence, Defendant argues that, "[w]ithout addressing two of the four factors set forth in *Owens* in determining whether an injury is serious, differing minds could differ on the issue of whether the personal injury was in fact serious." Nothing in our reported decisions, however, in any way indicates that the submission of a lesser included offense that does not involve the infliction of a "serious injury" is, in any way, dependent upon the presence or absence of any of the factors set out in *Owens*. As a result, the fact that Ms. Cook stated that she did not know "how bad [she] was hit;" that the record contains no evidence tending to show the amount of work, if any, that Ms. Cook missed; and the fact that no witness directly testified that Ms. Cook's injuries were "serious" does not in any way tend to show the absence of a "serious injury" given the undisputed evidence concerning the injury that Ms. Cook actually sustained. Thus, the trial court did not err by refusing to instruct the jury on

the issue of Defendant's guilt of the lesser included offense of assault with a deadly weapon.

C. Assault with a Deadly Weapon with the Intent to Kill

Finally, Defendant argues that the trial court erred by failing to instruct on the lesser included offense of assault with a deadly weapon with the intent to kill. In view of the fact that Defendant did not object to the trial court's failure to submit this lesser included offense to the jury at the time of trial, this argument is subject to review under a "plain error" standard. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

The plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," . . . or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or . . . "had a probable impact on the jury's finding that the defendant was guilty."

Id. at 655, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 514, 103 S. Ct. 381 (1982)). "[T]he test for 'plain error' places a much heavier burden upon the defendant than that imposed by [N.C. Gen. Stat.] § 15A-1443 upon defendants who have preserved their rights by timely

objection.'" *State v. Ramey*, 318 N.C. 457, 463, 349 S.E.2d 566, 570 (1986) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

The proper resolution of the issue raised by this aspect of Defendant's challenge to the trial court's judgments hinges upon whether the record would have supported a jury verdict finding Defendant guilty of a crime that did not include the infliction of "serious injury" as an essential element. Earlier in this opinion, we held that the trial court did not err by failing to instruct the jury on the issue of Defendant's guilt of assault with a deadly weapon. The same logic that led us to reach that conclusion necessitates a determination that the trial court did not err, much less commit plain error, by failing to instruct the jury concerning the issue of Defendant's guilt of assault with a deadly weapon with the intent to kill. As a result, Defendant's final challenge to the trial court's judgment lacks merit.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court correctly denied Defendant's dismissal motion and properly refrained from instructing the jury on the issue of Defendant's guilt of assault with a deadly weapon and assault with a deadly weapon with the intent to kill. As a result, we find no error in the proceedings leading to the entry of the

trial court's judgment and leave the trial court's judgment undisturbed.

NO ERROR.

Judges MCGEE and MCCULLOUGH concur.

Report per Rule 30(e).