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NO. COA12-590  
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

STATE OF NORTH CAROLINA,  
Plaintiff,

v.

Washington County  
No. 10 CRS 50183

GARY L. THOMAS,  
Defendant.

Appeal by defendant from judgment entered 5 October 2011 by Judge J. Carlton Cole in Washington County Superior Court. Heard in the Court of Appeals 24 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Steven Armstrong, for the State.*

*William D. Spence for defendant.*

ELMORE, Judge.

On 5 October 2011, Gary L. Thomas (defendant) was found guilty upon a jury conviction of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced defendant to 83-109 months imprisonment. Defendant gave notice of appeal in open court. After careful consideration, we conclude that defendant received a trial free from error.

### **I. Background**

At approximately 9:00 p.m. on 8 April 2010, Larry Knight, Jr. (Knight) went to "The Candy Shop," (the store) a local convenience store and pool room, to "hang out." When Knight arrived, he purchased a beer inside the store and then proceeded outside where forty to fifty people were gathered. Knight became involved in a verbal altercation with two patrons; he called them "troublemakers" and threw his beer bottle on the ground, causing it to break inside a brown bag. At some point after Knight broke his beer bottle, defendant approached Knight and struck him in the head with an object Knight believed to be brass knuckles. Knight reacted by punching defendant several times. The two became engaged in a fist fight outside of the store. During the fight, defendant pulled out a gun and fired multiple shots in close proximity to Knight. One of the bullets grazed the left side of Knight's skull; it did not penetrate his head. While witnesses' accounts vary, the record suggests that defendant fired approximately 5-6 shots in total.

After sustaining the gunshot wound, Knight was taken to Washington County Hospital. The doctors at Washington County Hospital prepared Knight to be transported by helicopter to Pitt County Hospital in Greenville, North Carolina. At Pitt County

Hospital, Knight received medical treatment which included X-rays and the stapling of his wound. Knight was released from the hospital the following morning.

**I. Motion to Dismiss**

Defendant first argues that the trial court erred in denying his motion to dismiss because the State failed to prove that defendant formed the requisite intent to kill. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "If the evidence presented is circumstantial, the court must consider whether a reasonable

inference of defendant's guilt may be drawn from the circumstances." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. When ruling on a motion to dismiss, the trial court must determine "whether a reasonable inference of the defendant's guilt may be drawn from the evidence presented at trial." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citation omitted).

The elements of assault with a deadly weapon with intent to kill are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death. See *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). Our Courts have held that the mere use of a deadly weapon is not enough to infer intent to kill.

A person might intentionally and without justification or excuse assault another with a deadly weapon and inflict upon him serious injury not resulting in death, but such an assault would not establish a presumption of felonious intent, or the intent to kill. Such intent must be found by the jury as a fact from the evidence.

*State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 628 (1964). Furthermore, "[i]ntent' and 'willfulness' are mental emotions and attitudes and are seldom capable of direct proof; they must ordinarily be proven by circumstances from which they may be inferred[;] . . . the jury may consider the acts and

conduct of defendant and the general circumstances existing at the time[.]” *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965).

We first note that this argument contradicts defendant’s later contention that the trial court erred in failing to submit to the jury the lesser included offense of assault with a deadly weapon *with intent to kill*. In any event, it is clear from the record that the trial court made a reasoned decision in denying defendant’s motion to dismiss on the issue of intent. The fact that defendant stood in close proximity to Knight while firing multiple gunshots in his direction constitutes sufficient evidence to put the issue of defendant’s intent to kill before the jury. As such, the trial court made a reasonable inference of defendant’s guilt and any question as to the evidence presented was for the jury to resolve. Accordingly, we are unable to agree that the trial court erred in denying defendant’s motion to dismiss on this ground.

### **III. Serious Bodily Injury**

Defendant next argues that the trial court erred in denying his motion to dismiss because the State failed to prove that Knight sustained a “serious injury” under N.C. Gen. Stat. § 14-32. We disagree.

The bodily injury resulting from an assault with a deadly weapon

must be serious but it must fall short of causing death. Whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question for the jury. Some factors the courts consider in determining whether an injury is serious include but are not limited to pain and suffering, loss of blood, hospitalization and time lost from work.

*State v. Hensley*, 90 N.C. App. 245, 248, 368 S.E.2d 208, 210 (1988) (citations omitted).

In the instant case, the State's evidence tended to show that Knight had to be transported by helicopter to Pitt Memorial Hospital in order to receive medical treatment, which included having his head stapled in order to close his gunshot wound. Furthermore, Knight testified that he now has difficulty lifting his left arm, he suffers from headaches, and his vision blurs occasionally. The evidence presented is sufficient to establish that the gunshot wound inflicted by defendant was sufficiently serious. As such, the trial court properly submitted this question to the jury. Accordingly, we are unable to agree that the trial court erred in denying defendant's motion to dismiss.

#### **IV. Lesser Included Offense**

Defendant next argues that the trial court erred in failing to instruct the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury. We disagree.

We first note that defendant neither requested a lesser instruction at trial nor did he object to its omission; therefore, we shall review this issue on appeal for plain error. We review "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

The trial court is required to submit lesser included degrees of the crime charged in the indictment when and only when there is evidence of guilt of the lesser degrees. When the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, no instruction by the trial court on a lesser included offense is required.

*State v. Hensley*, 90 N.C. App. 245, 249, 368 S.E.2d 208, 211 (1988) (citations omitted). Our Supreme Court has held that

“[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.” *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed. 2d 203, 212 (1977)).

In *State v. Lilley*, the defendant was found guilty of assault with a deadly weapon inflicting serious injury. He appealed his conviction on the basis that the trial court erred in failing to instruct the jury as to the fact that the defendant owed no duty to retreat when attacked in his own home. This Court concluded that, while the trial court failed to provide such instruction, such error did not amount to plain error. See 318 N.C. 390, 391-92, 348 S.E.2d 788, 790 (1986).

We again recognize that a high bar must be met in order to warrant reversal based on improper jury instructions. Assuming *arguendo* that the trial court erred in the present case, a review of the record would not convince us that absent such error the jury would have likely reached a different verdict.

However, based on these facts, we can conclude that the State presented substantial evidence to satisfy each element of the offense charged. Accordingly, the trial court did not err in failing to instruct the jury on the lesser included offense.



### **V. Presumptive Range Sentencing**

Finally, defendant argues that the trial court erred in sentencing defendant at the top of the presumptive range. We disagree.

This Court has held that a trial court is not required to find mitigating or aggravating factors where the trial court has sentenced defendant within the presumptive guidelines for his offense. *See State v. Brooks*, 136 N.C. App. 124, 523 S.E.2d 704 (1999); *see also State v. Campbell*, 133 N.C. App. 531, 542, 515 S.E.2d 732, 739 (1999). As such, the trial judge has discretion to sentence a defendant within the presumptive range.

In the case at hand, the trial court sentenced defendant to a minimum of 83 months and a maximum of 109 months imprisonment. Defendant's sentence falls within the presumptive range. In fact, the maximum sentence in the presumptive range is 112 months; therefore, defendant received a lesser sentence than the maximum. As the trial judge sentenced defendant within the presumptive range, defendant's argument is without merit. Accordingly, we cannot agree that the trial court erred.

### **VI. Conclusion**

In sum, the trial court properly denied defendant's motion to dismiss. The trial court was not required to instruct the

jury on any lesser included offense as the State presented sufficient evidence of each element of the crime charged. Finally, the trial court did not err in sentencing defendant within the presumptive range. After careful consideration, we conclude that defendant received a trial free from error.

No error.

Judges STROUD and BEASLEY concur.

Report per Rule 30(e).