NO. COA13-1193
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v. Wilson County
No. 12 CRS 51365

TREMAYNE ANTIONE LYNCH

Appeal by defendant from judgment entered 5 June 2013 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 6 March 2014.

Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton, III, for the State.

McCotter Ashton, P.A., by Rudolph A. Ashton, III, for defendant-appellant.

CALABRIA, Judge.

Tremayne Antione Lynch ("defendant") appeals from a judgment entered upon jury verdicts finding him guilty of felony assault with a deadly weapon with the intent to kill ("AWDWIK") and felony discharge of a weapon into an occupied vehicle. We find no error in defendant's trial. However, we remand for correction of a clerical error.

I. Background

On 29 March 2012, the driver of a white van ("the van") on Barnes Street in Sharpsburg, North Carolina, positioned his vehicle close to a Toyota Camry ("the Camry") driven by Terrance Carr ("Carr"). Defendant, along with another man, Matthew Leake ("Leake"), exited the van. Both men carried handguns. Defendant, wearing a blue bandana covering his face, chased Carr around the Camry. Carr attempted to escape by jumping into the Camry's front seat. Defendant fired a shot through the front windshield, opened the driver's side door, and tried to remove Carr from the vehicle by pulling his legs. In the process, Carr's shorts and underwear were also removed. Defendant aimed another shot at Carr, but missed. After Leake's firearm jammed as he attempted to shoot into the back window of the Camry, he reached through the open door and struck Carr in the face with his firearm.

As Carr attempted to leave the parking space, his Camry struck a parked vehicle. Carr reversed the Camry with the driver's side door still open, dragging defendant and Leake. The Camry hit the van, and Carr escaped from his assailants.

Officer Willie Hopkins, III ("Officer Hopkins"), Captain Ron Thompson ("Capt. Thompson"), and other Sharpsburg Police

Department officers responded to investigate. The officers discovered bullet holes in the Camry's windshield, bullets lodged in the driver's seat and back seat, and numerous shell casings of various sizes and calibers. The officers also found $1,840 in cash, 21 grams of a hard off-white substance, and a plastic bag containing a green leafy substance inside Carr's discarded shorts.

Capt. Thompson interviewed defendant, Carr, Leake, and Andrew Leake ("Andrew"). Carr identified the men who assaulted him as Leake and "Pocco," defendant's nickname. Carr also identified defendant in a photo lineup. Leake indicated that he, his brother Andrew, Tavoris Battle, and defendant were the men in the white van on the day of the incident.

Defendant was arrested and charged with AWDWIK and discharging a firearm into an occupied vehicle. At trial, the State presented several witnesses, including Carr, Leake, Officer Hopkins, and Capt. Thompson. At the close of the State's evidence, defendant unsuccessfully moved to dismiss the offenses. Defendant did not present any evidence and renewed the motion to dismiss. The trial court again denied the motion. On 5 June 2013, the jury returned verdicts finding defendant guilty of both offenses. Defendant was sentenced to two

consecutive sentences of a minimum of 33 months to a maximum of 52 months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

II. Rule 602

Defendant argues that the trial court erred by overruling his objection to Capt. Thompson's testimony and allowing him to testify that Carr was "confident" as to the identity of the man who fired the weapon at him. Specifically, defendant contends that Capt. Thompson offered an opinion regarding Carr's credibility. We disagree.

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2013). "The purpose of Rule 602 is to prevent a witness from testifying to a fact of which he has no direct personal knowledge, and [p]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." *State v. Sharpless*, ___ N.C. App. ___, ___, 725 S.E.2d 894, 899 (2012) (citations and internal quotation marks omitted).

In the instant case, defendant challenges the following portion of Capt. Thompson's testimony:

> Q: Okay. When you spoke with Terrance Carr, do you remember what day it was?
>
> A: I believe it was the day after the incident.
>
> Q: Okay. And was he confident in who it was that fired the weapon at him in the car?
>
> [Defense Counsel]: Objection.
>
> [The Court]: Overruled.
>
> [Capt. Thompson]: Yes, sir.
>
> [District Attorney]: And who did he say that was?
>
> A: It was Pocco, Tremayne Lynch.

Defendant cites *State v. Hewett*, 93 N.C. App. 1, 376 S.E.2d 467 (1989) to support his contention that his objection to Capt. Thompson's testimony should have been sustained because it was impermissible on direct examination. Defendant contends that the State was basically trying to vouch for the character and truthfulness of Carr, the prosecuting witness. In *Hewett*, a child victim was asked during re-direct examination whether she had testified truthfully. *Id.* at 15, 376 S.E.2d at 476. On appeal, the defendant argued that the victim's testimony in response to the State's questions regarding truthfulness constituted improper character evidence. *Id.*, 376 S.E.2d at 475. This Court held that the victim's testimony was not

improper since the question was analogous to a question in which a witness makes an in-court identification of someone and the State asks "Are you sure that person was the one you saw?" *Id.*, 376 S.E.2d at 476.

In the instant case, the State asked Capt. Thompson whether the person he interviewed was confident about the identity of his assailant. The State did not ask Capt. Thompson any questions regarding whether he believed Carr was being truthful or whether Carr had testified truthfully. Capt. Thompson asked Carr the same type of question that this Court held was proper in *Hewett*. In essence, Capt. Thompson asked Carr, "Are you sure that person was the one who fired the weapon?" Since Capt. Thompson had an opportunity to observe Carr during the interview, and testified regarding Carr's demeanor during the interview according to his own personal observations that Carr appeared confident in his identification of defendant as one of the individuals involved in the assault, Capt. Thompson did not offer an opinion that he believed Carr was being truthful. Therefore, this argument is overruled.

III. Intent to Kill

Defendant argues that the trial court erred in denying his motion to dismiss the AWDWIK offense. Defendant contends there

was insufficient evidence to support the element of the 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). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* N.C. Gen. Stat. § 14-32(c) (2013) provides that "[a]ny person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon."

In making a determination regarding a motion to dismiss, "the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). Moreover, "if the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable

inferences of the defendant's innocence." *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994) (citation omitted).

In the instant case, since defendant concedes that shooting into an occupied vehicle with a handgun is an assault with a deadly weapon, there is no dispute that defendant is the perpetrator. However, defendant claims that an essential element of the offense is missing because he only intended to scare Carr, and did not intend to kill Carr. Defendant cites three cases, *State v. Ferguson*, 261 N.C. 558, 135 S.E.2d 626 (1964), *State v. Thacker*, 281 N.C. 447, 189 S.E.2d 145 (1972), and *State v. White*, 307 N.C. 42, 296 S.E.2d 267 (1982), to support his contention that an assault with a deadly weapon, even one inflicting serious injury, does not establish the intent to kill. In *Ferguson*, the Court stated that "[a]n intent to kill is a mental attitude" which must be proved by circumstantial evidence. 261 N.C. at 561, 135 S.E.2d at 629 (citation omitted). The Court granted the defendant a new trial because the trial court's jury instructions indicated that the jury could find the defendant guilty of AWDWIK even if the jury found that the defendant only intended to "inflict great bodily harm" upon the victim. *Id.*, 135 S.E.2d at 628.

In *Thacker*, the Court reiterated the premise in *Ferguson*, stating that "[p]roof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill. Such intent must be found by the jury as a fact from the evidence." 281 N.C. at 455, 189 S.E.2d at 150.

In *White*, the defendant stabbed the victim over twenty times in the neck and chest with an ice pick before announcing that he intended to kill the victim with a switchblade knife. 307 N.C. at 49, 296 S.E.2d at 271. The Court held that "mere proof of an assault with a deadly weapon inflicting serious injury does not by itself establish an intent to kill[,]" and that "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." *Id.* at 49, 296 S.E.2d at 271 (citations omitted). The Court held that the facts in *White* provided sufficient evidence to support the offense of AWDWIK inflicting serious injury. *Id.*

Defendant is correct that *Ferguson*, *Thacker*, and *White* stand for the premise that "mere proof of an assault with a deadly weapon inflicting serious injury does not by itself

establish an intent to kill." *White*, 307 N.C. at 49, 296 S.E.2d at 271. However, multiple cases from our Court and the Supreme Court of North Carolina support the proposition that shooting a firearm at a person is sufficient to allow a jury to infer an intent to kill. *See Alexander*, 337 N.C. at 188, 446 S.E.2d at 87 ("when a person fires a twelve-gauge shotgun into a moving vehicle four times while . . . his accomplice is firing a pistol at the vehicle, it may fairly be inferred that the person intended to kill whoever was inside the vehicle"); *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988) (intent to kill could be inferred from viciousness of the assault and the deadly character of the .22 caliber rifle used); *State v. Maddox*, 159 N.C. App. 127, 132, 583 S.E.2d 601, 604 (2003) (substantial evidence of intent to kill when defendant shot at victim five times with a nine-millimeter handgun as victim attempted to escape). This Court has specifically held that "[w]here the defendant points a gun at the victim and pulls the trigger, this constitutes evidence from which intent to kill may be inferred." *State v. Cromartie*, 177 N.C. App. 73, 77, 627 S.E.2d 677, 680, *disc. rev. denied*, 360 N.C. 539, 634 S.E.2d 538 (2006).

In the instant case, Carr testified at trial that defendant shot at him, and both Andrew and Leake testified that defendant pointed a gun at Carr, pulled the trigger, and shot at Carr several times. The State presented further evidence that there were bullet holes in Carr's windshield, the driver's seat, and in the driver's side door frame. Witnesses also testified that Carr jumped into the Camry's front seat to escape from defendant. Since defendant shot at Carr multiple times, a reasonable inference existed from the evidence that defendant intended to kill Carr. Therefore, since shooting a handgun at a person multiple times allows a reasonable inference of the element of intent to kill, the trial court correctly denied defendant's motion to dismiss and submitted the matter to the jury.

IV. Lesser Included Offense

Defendant further argues that the trial court erred by failing to submit the lesser included offense of misdemeanor assault with a deadly weapon ("misdemeanor AWDW") as a possible verdict for the jury's consideration, since misdemeanor AWDW includes most of the essential elements of the felony AWDWIK. Specifically, defendant contends that there was substantial evidence that he merely intended to scare Carr. In addition,

defendant argues that the State failed to prove that defendant had the intent to kill Carr since Carr sustained no gunshot wounds despite the ample opportunity to shoot Carr at close range. We disagree.

"Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citing *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985)). "The only difference in what the State must prove for the offense of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon with intent to kill inflicting serious injury is the element of intent to kill." *Cromartie*, 177 N.C. App. at 76, 627 S.E.2d at 680. "Where all the evidence tends to show a shooting with a deadly weapon with the intent to kill, the trial court does not err in refusing to submit the lesser included offense of assault with a deadly weapon." *Id.* (citation omitted).

Defendant cites several cases to support his contention that the trial court should have instructed the jury on misdemeanor AWDW as a lesser included offense, including *State v. Lowe*, 150 N.C. App. 682, 564 S.E.2d 313 (2002), *State v.*

Tillery, 186 N.C. App. 447, 651 S.E.2d 291 (2007), and *State v. Harrington*, 95 N.C. App. 187, 381 S.E.2d 808 (1989). Defendant's cases are distinguishable. The defendants in *Tillery* and *Lowe* prevailed on appeal because they were denied instructions on lesser included offenses when the State's evidence on the deadly weapon element was not positive. *Tillery*, 186 N.C. App. at 451, 651 S.E.2d at 294; *Lowe*, 150 N.C. App. at 687, 564 S.E.2d at 316. In *Harrington*, the defendant testified that his first shot was a "warning shot" in the air, and that his second shot was an attempt to scare the victim. 95 N.C. App. at 188, 381 S.E.2d at 808. Considering the defendant's direct testimony regarding his intentions, this Court held that the defendant was entitled to an instruction on a lesser included offense that did not require the intent to kill. *Id.* at 190-91, 381 S.E.2d at 810.

In the instant case, the State's evidence was positive as to each element of the charged offense, and there is no contradictory evidence of defendant's intent to kill in the record. The evidence that defendant considers as evidence of his intent to scare Carr was the State's evidence regarding Leake's conduct. Defendant specifically believes Leake's testimony, that Leake struck Carr in the face instead of shooting him, supports his argument. However, Leake's testimony

does not support defendant's argument because Leake's conduct is not evidence of defendant's conduct or intent.

At trial, Carr testified that defendant shot at him, and both Andrew and Leake testified that defendant pointed a gun at Carr, pulled the trigger, and shot at Carr several times. In addition, witnesses testified that Carr jumped into the front seat of the Camry in an effort to escape from defendant. Furthermore, there were bullet holes in the Camry's windshield, the driver's seat, and the driver's side door frame, and there is no evidence that defendant fired a "warning shot." From this evidence, the jury determined that defendant intended to kill Carr. *See Cromartie*, 177 N.C. App. at 77, 627 S.E.2d at 680. Since the evidence supported a showing of AWDWIK, the trial court was not required to give an instruction on a lesser included offense, and did not err in refusing to instruct the jury on misdemeanor AWDW. *Id.* at 76, 627 S.E.2d at 680.

V. Jury Instruction

Defendant further argues that the trial court plainly erred in its jury instruction on the offense of discharging a firearm into an occupied vehicle by including as an element that the vehicle was in operation. Specifically, defendant contends that

the instruction elevated the offense submitted to the jury from a Class E felony to a Class D felony. We disagree.

Defendant concedes that he failed to object to the instruction at trial. Therefore, we apply the plain error standard. *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 error in the instructions must be so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005) (citation and internal quotation marks omitted).

Defendant concedes that since he was convicted and sentenced as a Class E felon in accordance with the offense presented in the indictment, it would be difficult to meet the above-referenced burden of prejudice on this issue. Therefore, we hold that the error in the jury instruction was harmless, and defendant is not entitled to a new trial on this error.

Finally, we note that while defendant presents no arguments regarding the court's judgment, according to the transcript of

the sentencing hearing, defendant was sentenced to a minimum of 33 to a maximum of 52 months in the custody of the Division of Adult Correction for the AWDWIK offense. However, the judgment for defendant's AWDWIK offense lists his maximum sentence as 55 months. As such, the length of the sentence is a clerical error. We remand to the trial court for correction of the clerical error in the judgment. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record 'speak the truth.'").

VI. Conclusion

Capt. Thompson's testimony regarding Carr's demeanor did not constitute any commentary on Carr's credibility because of Capt. Thompson's personal knowledge. Due to the nature of the assault and the weapon used, the State presented evidence sufficient to support the AWDWIK charge. This evidence was proper to submit to the jury since the intent to kill may be inferred. *Cromartie*, 177 N.C. App. at 77, 627 S.E.2d at 680. The trial court did not err in denying defendant's motion to dismiss. Since the evidence supported AWDWIK and there was no

contradictory evidence, the trial court was not required to instruct the jury on the lesser included offense of misdemeanor AWDW. *Id.* at 76, 627 S.E.2d at 680. Finally, defendant fails to show how the alleged error in the jury instructions rises to the level of plain error. However, we do find that the clerical error in the judgment must be corrected. Therefore, while we find no error in defendant's trial, we remand for correction of the judgment.

No error. Remanded for correction of judgment.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).