IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-92

Filed: 3 September 2019

Anson County, No. 17CRS051196

STATE OF NORTH CAROLINA

v.

MARIO SMITH, Defendant.

Appeal by Defendant from judgment entered 27 June 2018 by Judge Tanya Wallace in Anson County Superior Court. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Orlando L. Rodriguez, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for the Defendant.

BROOK, Judge.

I. Background

On 4 August 2017, two corrections officers transported a prisoner to a new housing unit within the Lanesboro Correctional facility in Anson County, North Carolina. When they entered the new unit, two prisoners rushed forward and attacked the prisoner being transferred. Mario Smith ("Defendant") was identified as one of these attackers. The prisoner being transferred had four stab wounds on

his back, one of which caused a hemopneumothorax. A shank was retrieved from Defendant's possession.

On 11 September 2017, Defendant was indicted with one count of Assault with a Deadly Weapon Inflicting Serious Injury ("ADWISI") and one count of Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury.[1] The jury returned guilty verdicts for both charges following the 26 June 2018 trial. Immediately following the verdicts and outside the presence of the jury, a sentencing hearing was held. During the hearing, the following exchange between counsel for the Defendant and the State as well as the trial judge occurred:

> MR. McCRARY: [H]e'd just ask the Court to be as kind to him as you can on this. I know the State had mentioned the possibility of boxcarring[2] these. My concern being that while I understand the Court's point that it's possible to do so because there's that different element, the logic of why you can't boxcar, say, alphabet assault with assault with a deadly weapon still applies. It may not legally—but it still applies. I mean, this is one instance that happened just one time. And the State pursued basically two legal theories against my client. I don't know that that

[1] Throughout the briefs this charge is referred to as "Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury." However, this charge has various titles. In the indictment it is listed as "Possess Dangerous Weapon in Prison Inflict Injury." This crime is codified in the North Carolina General Statutes as "Possession of Dangerous Weapon in Prison." N.C. Gen. Stat. § 14-258.2 (2017). It is referred to in the North Carolina Pattern Jury instructions as "Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury." N.C.P.I – Crim. 208.65. And, finally, at trial, the parties referred to the charge as "Assault with a Weapon Capable of Inflicting Serious Bodily Injury or Death, thereby Inflicting Bodily Injury while a Prisoner." We will use the Pattern Jury Instructions title as the parties do in their briefing.

[2] Boxcarring is a term commonly used in the North Carolina court system and case law to describe when multiple prison sentences run consecutive to one another. *See State v. Jacobs*, 233 N.C. App. 701, 704-05, 757 S.E.2d 366, 368-69 (2014) (quoting the trial court transcript where consecutive sentences are proposed and referred to as "boxcar" sentencing).

> necessarily makes things substantively different. . . .
>
> THE COURT: Mr. McCrary, what's your position?
>
> MR. McCRARY: The State would ask that, Your Honor. But given our conversation at the bench – I mean, the State wasn't really expecting it.
>
> THE COURT: Well, that didn't have anything to do with boxcarring. . . .

The trial court determined Defendant to be a prior record level II. The court sentenced Defendant to the presumptive range of 29 to 47 months for ADWISI and the presumptive range of 15 to 27 months for Assault by a Prisoner with a Deadly Weapon Inflicting Serious Bodily Injury. The sentences were ordered to run consecutively.

The trial concluded at 12:30 p.m. on 27 June 2018, but the Court was called back later that afternoon and Defendant's trial counsel gave an oral notice of appeal at 3:25 p.m. Due to the time gap between the conclusion of trial and the oral notice of appeal, Defendant has filed a petition for writ of certiorari. We grant Defendant's petition and the writ shall issue for the reasons that follow. We also reject Defendant's Fifth Amendment double jeopardy argument and affirm the trial court's ruling.

II. Appellate Jurisdiction

a. Notice of Appeal

As stated previously, Defendant's trial counsel gave oral notice of appeal shortly after the conclusion of Defendant's trial. The State argues that this failed to comply with Rule 4(a) of the North Carolina Rules of Appellate Procedure, which requires notice of appeal at trial. N.C. App. R. P. 4(a)(1). As we see fit to grant Defendant's petition for certoriari, we need not resolve the question of whether Defendant complied with Rule 4(a). *Compare State v. Holaneck*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 231-32 (2015) (deciding the oral notice of appeal was ineffective when it was entered six days after trial had concluded) *with State v. Smith*, 246 N.C. App. 636, 784 S.E.2d 236, 2016 WL 1010526, at *3 (2016) (unpublished opinion) (holding the oral notice of appeal given twelve minutes after the conclusion of trial as valid).

b. Writ of Certiorari

Due to questions about trial counsel's notice of appeal, Defendant has filed a petition for writ of certiorari in order to preserve his right to appeal the immediate matter. Writs of certiorari are considered to be "extraordinary remedial writ[s]" and can serve as substitutes for an appeal. *State v. Roux*, 263 N.C. 149, 153, 139 S.E.2d 189, 192 (1964) (citation omitted). Rule 21 of the North Carolina Rules of Appellate Procedure indicates that a petition must include "a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or

opinion[.]" N.C. R. App. P. 21(c). Our Rules of Appellate Procedure further permit the issuance of a writ of certiorari in this Court's discretion "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). Given the writ's sufficiency and the fact that questions about the timeliness of Defendant's appeal turn on his trial attorney's action, we exercise our discretion and grant the petition in accordance with the analysis below.

First, Defendant's writ complies with the requirements of Rule 21(c). Defendant's petition includes reasons why the writ should issue and the requisite certified documents relevant to the writ's issuance. While the petition for writ of certiorari does not include a statement of facts, the Court will recognize the statement of facts presented in the brief since the petition and the brief were filed contemporaneously.

Second, it is within the Court's discretion to issue the writ of certiorari in the current controversy pursuant to Rule 21(a)(1). *See In re A.S.*, 190 N.C. App. 679, 683, 661 S.E.2d 313, 316 (2008) (granting petition for certiorari where there was no evidence that respondent contributed to the error and the consequences of the adjudication order were serious). As noted above, the alleged defect was attributable to Defendant's trial counsel. Further, as discussed below, the consequences of rejecting Defendant's double jeopardy argument are surely serious.

Thus, the petition for certiorari is legally sufficient and within our discretion to issue. Accordingly, we grant the petition and issue the writ.

c. Preservation of Issue

The State also argues that Defendant waived the issue now before our Court: that he is being punished twice for the same crime in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion stating specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent." N.C. R. App. P. 10(a)(1). Constitutional arguments such as the "double jeopardy protection may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court." *State v. White*, 134 N.C. App. 338, 342, 517 S.E.2d 664, 667 (1999) (citation omitted). "[T]he complaining party [must also] obtain a ruling upon the party's request, objection or motion." N.C. R. App. P. 10(a)(1). The denial of the relief sought in is an implicit rejection of the argument in support of which it is offered. *See In re Hall*, 238 N.C. App. 322, 329, 768 S.E.2d 39, 44 (2014) (citation omitted) (noting trial court denial of petition sought by defendant terminating his sex offender registration requirement constituted "reject[ion] [of] petitioner's *ex post facto* argument[]").

Defendant preserved his double jeopardy argument at trial. "[T]he constitutional guaranty against double jeopardy protects a defendant from multiple *punishments* for the same offense." *State v. Spellman*, 167 N.C. App. 374, 380, 605 S.E.2d 696, 700 (2004) (citation omitted). Though not a model of clarity, trial counsel made a double jeopardy argument when he asserts that the State "pursued basically two different legal theories against my client" based on "one instance that happened just one time." He further requested that the court "be as kind to him as you can on this." Further, the trial court engaged with the argument made by Defendant's trial counsel by questioning the State about boxcarring, revealing not only that the argument had been brought to the court's attention, but also that the court understood it. Finally, in imposing two consecutive sentences based on the respective convictions, the trial court rejected Defendant's double jeopardy argument. This satisfies the preservation requirement of Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure in that the Defendant raised and obtained a ruling (albeit implicit rather than explicit) on the issue now raised before our Court. *See In re Hall*, 238 N.C. App. at 329, 768 S.E.2d at 44.

III. Merits

Defendant contends that the ADWISI charge he was convicted of is a lesser included offense of Assault by a Prisoner with a Deadly Weapon Inflicting Bodily

Injury and thus his consecutive sentences for these respective convictions violate the Double Jeopardy Clause of the Fifth Amendment. We disagree.

A lesser included offense occurs where "the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment." *State v. Banks*, 295 N.C. 399, 415-16, 245 S.E.2d 743, 754 (1978). "By definition, all the essential elements of a lesser included offense are also elements of the greater offense. Invariably then a lesser included offense requires no proof beyond that required for the greater offense, and the two crimes are considered identical for double jeopardy purposes." *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987) (citations omitted). Of particular relevance to Defendant's argument, "[i]f neither crime constitutes a lesser included offense of the other, the convictions will fail to support a plea of double jeopardy." *Id.* at 50, 352 S.E.2d at 683 (citing *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982)).

To determine whether a charge is a lesser included offense of another charge, we look to the definition of the offense, not to the facts surrounding the situation. *See State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 378 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993) ("the definitions accorded the crimes determine whether one offense is a lesser included offense of another crime."). Here, the charge of ADWISI is classified as a Class E

Felony with the following elements: (1) an assault; (2) with a deadly weapon; (3) inflicting serious injury. *See* N.C. Gen. Stat. § 14-32(b) (2017). The charge of Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury is classified as a Class F felony with the following elements: (1) an assault; (2) with a weapon capable of inflicting serious bodily injury; (3) inflicting bodily injury; (4) while in the custody of the Section of Prisons in the Department of Adult Corrections. *See* N.C. Gen. Stat. § 14-258.2 (2017).

While the offenses bear similarities, they are distinct for two reasons pertaining to the respective injuries required to prove the charges. "The term 'inflicts serious injury,' under G.S. 14-32(b), means physical or bodily injury" and hinges upon a jury determination of whether such injury was indeed serious. *State v. Alexander*, 337 N.C. 182, 188, 446 S.E.2d 83, 87 (1994). The need for that factual determination underlines the obvious: not every bodily injury is serious. *See id.* The inverse is true as well; not every serious injury is a bodily injury. A "serious mental injury" satisfies the injury prong of the ADWISI offense, *see State v. Everhardt*, 326 N.C. 777, 780, 392 S.E.2d 391, 393 (1990), while, of course, it cannot satisfy the "inflicting bodily injury" prong of the Assault by a Prisoner with a Deadly Weapon Inflicting Bodily Injury charge, *see* N.C. Gen. Stat. § 14-258.2 (2017). For these reasons, "serious injury" and "bodily injury" are not synonymous and, thus, Defendant's double jeopardy argument fails.

IV. Conclusion

We grant Defendant's petition for writ of certiorari and find Defendant's constitutional argument properly preserved for this Court's review. Given the distinctions between the two charges, we must reject Defendant's Fifth Amendment argument and affirm the lower court's ruling.

NO ERROR.

Judges DILLON and ZACHARY concur.