IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-546

No. COA19-215-2

Filed 2 August 2022

Henderson County, Nos. 16-CRS-901–907, 18-CRS-133–138.

STATE OF NORTH CAROLINA

v.

LEONARD PAUL SCHALOW

Appeal by Defendant from order entered 7 August 2018 by Judge W. Robert Bell in Henderson County Superior Court. Originally heard in the Court of Appeals 17 September 2019, with opinion issued 7 January 2020. *See State v. Schalow*, 269 N.C. App. 369, 837 S.E.2d 593 (2020). The Supreme Court of North Carolina allowed the State's petition for discretionary review on 1 April 2020, *see* 374 N.C. 263, 839 S.E.2d 340, and reversed and remanded to this Court on 17 December 2021, *see* 379 N.C. 639, 2021-NCSC-166.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 On remand from our Supreme Court, we must consider whether the

prosecution of Defendant for pending child abuse and assault charges violates Defendant's constitutional right to be free from double jeopardy. We hold that it does not.

I. Background

¶ 2 Issues pertaining to the prosecution of Defendant have twice been before this Court. *See State v. Schalow*, 251 N.C. App. 334, 795 S.E.2d 567 (2016), *disc. review improvidently allowed*, 370 N.C. 525, 809 S.E.2d 579 (2018) ("*Schalow I*"); *State v. Schalow*, 269 N.C. App. 369, 837 S.E.2d 593 (2020), *rev'd and remanded*, 379 N.C. 639, 2021-NCSC-166 ("*Schalow II*"). A full factual and procedural background is set forth in this Court's opinion in *Schalow II*. Here we briefly recite the facts relevant to the issue currently before us:

¶ 3 On 10 March 2014, Defendant was indicted in file number 14 CRS 50887 for "ATTEMPT [sic] FIRST DEGREE MURDER" for "unlawfully, willfully, and feloniously . . . attempt[ing] to murder and kill Erin Henry Schalow."

> Following the empanelment of a jury and the presentation of evidence . . . , the trial court noted that the indictment failed to allege malice aforethought, a required element of attempted first-degree murder under the short-form indictment statute, N.C. Gen. Stat. § 15-144. Over Defendant's objection that the indictment sufficiently alleged attempted voluntary manslaughter under N.C. Gen. Stat. § 15-144 and that jeopardy had attached once the jury was empaneled, the trial court declared a mistrial and dismissed the indictment as fatally defective.

Schalow II, 269 N.C. App. at 371, 837 S.E.2d at 594.

¶ 4 The State then indicted Defendant in file number 15 CRS 50922 for "ATTEMPT [sic] FIRST DEGREE MURDER" for "unlawfully, willfully, and feloniously . . . with malice aforethought attempt[ing] to murder and kill Erin Henry Schalow by torture." The trial court denied Defendant's motion to dismiss and Defendant was convicted. *Id.* In *Schalow I*, this Court held that Defendant was placed in jeopardy for attempted voluntary manslaughter in 15 CRS 50887 and vacated Defendant's conviction for attempted first-degree murder in 15 CRS 50922 on the ground that it violated the prohibition against double jeopardy. 251 N.C. App. at 353-54, 795 S.E.2d at 580.

¶ 5 The State subsequently indicted Defendant for 14 counts of felony child abuse under N.C. Gen. Stat. § 14-318.4(a5), three counts of assault with a deadly weapon with intent to kill inflicting serious injury under N.C. Gen. Stat. § 14-32(a) ("AWDWIKISI"), two counts of assault inflicting serious bodily injury under N.C. Gen. Stat. § 14-32.4(a), and one count of assault by strangulation under N.C. Gen. Stat. § 14-32.4(b) (together, "current charges").

II. Discussion

¶ 6 Defendant argues that prosecution on the current charges violates the constitutional prohibition against double jeopardy.

¶ 7 The Double Jeopardy Clause of the Fifth Amendment provides that no person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. "The U.S. Constitution's guaranty against double jeopardy applies to the states through the Fourteenth Amendment, and we have long recognized that the Law of the Land Clause found in our state's constitution also contains a prohibition against double jeopardy." *State v. Courtney*, 372 N.C. 458, 462, 831 S.E.2d 260, 264 (2019) (citations omitted). Generally, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (citation omitted). "We review de novo a defendant's claim that a prosecution violate[s] the defendant's right to be free from double jeopardy." *Courtney*, 372 N.C. at 462, 831 S.E.2d at 264.

A. Preservation and Waiver

¶ 8 We first address the State's contention that Defendant has not preserved for appellate review any double jeopardy argument regarding attempted voluntary manslaughter, for which he was placed in jeopardy in 14 CRS 50887. The State asserts that "[t]o the extent Defendant relies on the prior indictment in 14 CRS 50887, his argument should be dismissed." We agree.

¶ 9 To preserve an issue for appellate review, a party "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the

ruling the party desired the court to make if the specific grounds were not apparent from the context" and must "obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1).

¶ 10 Here, Defendant moved to dismiss the current charges in part on the ground that "he has previously been placed in jeopardy for the offenses charged in these indictments[.]" While Defendant referred to 14 CRS 50887 in the background section of his motion to dismiss, he did not assert that the current charges are the same offense as attempted voluntary manslaughter. Similarly, in his memorandum of law, Defendant did not argue that the current charges are the same offense as attempted voluntary manslaughter. Instead, Defendant's arguments focused solely on the attempted first-degree murder charge in 15 CRS 50922. Likewise, Defendant's argument during the hearing on his motion to dismiss did not refer to the attempted voluntary manslaughter charge in 14 CRS 50887. Consequently, Defendant has failed to preserve any argument that the prohibition against double jeopardy bars prosecution of the current charges because they are the same offense as the attempted voluntary manslaughter charge in 14 CRS 50887.

¶ 11 The State also contends that because the judgment entered upon Defendant's conviction for attempted first-degree murder in 15 CRS 50922 "was set aside at Defendant's own insistence" by Defendant's successful appeal in *Schalow I*, Defendant has "waived his right [to] not be tried again on the same charges." We

disagree. Nonetheless, Defendant's double jeopardy arguments stemming from 15 CRS 50922 are, for the reasons discussed below, without merit.

B. Applicable Double Jeopardy Analysis

¶ 12 Defendant urges throughout his appellate brief that a "factual analysis" must be employed to determine whether two offenses are the "same offense" under the Double Jeopardy Clause. Defendant contends that under this factual analysis, the current assault charges are the same offense as the attempted first-degree murder charge in 15 CRS 50922 because the State previously "introduced evidence of the entire course of [Defendant's] assaultive conduct against Ms. Schalow" at trial in 15 CRS 50922, the range of dates alleged by the State in 15 CRS 50922 indicated that "the State's theory of prosecution for the attempted murder was that the entire course of conduct over that three month period represented one long attempt to kill Ms. Schalow slowly," the current assault charges "all fall within the same date range," and the "injuries alleged in the new indictments were all presented in evidence" at trial in 15 CRS 50922. Similarly, Defendant contends that the current felony child abuse charges are the same offense as the attempted first-degree murder charge in 15 CRS 50922 because the child abuse charges are "based on the theory that [Defendant's] assaults against Ms. Schalow caused mental injury to their son" and, according to Defendant, the State explained at a hearing that the child abuse charges "are all based on the same evidence that was presented at the prior trial[.]"

¶ 13 The United States Supreme Court has rejected the factual analysis pressed by Defendant. In *United States v. Dixon*, 509 U.S. 688 (1993), the Court explained that "[i]n both the multiple punishment and multiple prosecution contexts, . . . where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies." *Id.* at 696. "The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *Id.*

¶ 14 The Court further explained that, under *Grady v. Corbin*, 495 U.S. 508 (1990), a successive prosecution was also required to

> satisfy a "same-conduct" test to avoid the double jeopardy bar. The *Grady* test provides that, "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," a second prosecution may not be had.

Dixon, 509 U.S. at 697 (quoting *Grady*, 495 U.S. at 510). Under *Grady*, the "critical inquiry [was] what conduct the State will prove, not the evidence the State will use to prove that conduct." 495 U.S. at 521. Thus, the State could not "avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct." *Id.* at 522. The Court applied this rule in *Grady* to hold that the Double Jeopardy Clause prohibited the state from

prosecuting homicide and assault offenses by proving "the entirety of the conduct for which [the defendant] was [previously] convicted—driving while intoxicated and failing to keep right of the median[.]" *Id.* at 523.

¶ 15 The Supreme Court overruled *Grady* in *Dixon*. 509 U.S. at 704. The Court repudiated *Grady*'s same-conduct test as "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy." *Id.* (citation omitted). We are bound both by *Dixon* and this Court's prior recognition that *Dixon* requires the same-elements test—not a factual or "same-conduct" analysis—to determine whether successive prosecutions implicated the same offense. *See State v. Gilley*, 135 N.C. App. 519, 523, 527-28, 522 S.E.2d 111, 114, 116-17 (1999) (applying the same-elements test to determine whether convictions for non-felonious breaking or entering, first-degree kidnapping, domestic criminal trespass, communicating threats, and assault on a female, following a criminal contempt prosecution for violation of a domestic violence protective order based on the same conduct, violated the prohibition against double jeopardy); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Accordingly, we will apply the same-elements test to determine whether the current charges are the same offense as the offense in 15 CRS 50922. *See Dixon*, 509 U.S. at

696.

¶ 16 Urging a different result, Defendant relies on our Supreme Court's decisions in *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986), and *State v. Gibson*, 333 N.C. 29, 424 S.E.2d 95 (1992). Defendant underscores *Gardner's* statement that the United States Supreme Court had "made it clear that a factual analysis rather than a definitional analysis must be undertaken by the courts in determining whether *successive prosecutions* are barred by the double jeopardy clause of the United States Constitution." 315 N.C. at 455, 340 S.E.2d at 709 (citing *Brown v. Ohio*, 432 U.S. 161 (1977) and *Illinois v. Vitale*, 447 U.S. 410 (1980)). Similarly, Defendant cites *Gibson* for the proposition that "double jeopardy principles prohibit the State from pursuing assault charges arising out of the same course of conduct following an unsuccessful homicide prosecution."

¶ 17 Defendant's reliance on *Gardner* and *Gibson* is misplaced. First, they are inapposite: Neither concerned successive prosecution, let alone applied a factual analysis to determine whether successive prosecutions presented the same offense. Instead, *Gardner* addressed whether a conviction and sentencing in the same trial for both felony larceny and felony breaking or entering violated the prohibition against double jeopardy, 315 N.C. at 450, 340 S.E.2d at 706, and *Gibson* addressed whether the defendant was entitled to a jury instruction on a lesser included offense, 333 N.C. at 38, 424 S.E.2d at 100. Second, *Gardner* and *Gibson* cannot support

Defendant's argument because each was decided before the United States Supreme Court's rejection of a same-conduct analysis in *Dixon*.

¶ 18 We will therefore assess whether any of the current charges are the same offense as the attempted first-degree murder charge in 15 CRS 50922 by reference to the same-elements test, which "inquires whether each offense contains an element not contained in the other." *Dixon*, 509 U.S. at 696. If they do not, "they are the 'same offence' and double jeopardy bars . . . successive prosecution." *Id.*

C. Elements of Attempted First-Degree Murder

¶ 19 The indictment in 15 CRS 50922 alleged attempted first-degree murder. "The [substantive] elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citations omitted). "The elements of an attempt to commit a crime are: "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *Id.* at 449, 527 S.E.2d at 46 (quotation marks and citations omitted). Because "[t]he crime of attempt requires an act done with the specific intent to commit the underlying offense," "to commit the crime of attempted murder, one must specifically intend to commit murder." *Id.*

D. The Current Charges

1. AWDWIKISI

¶ 20 The current charges include three counts of AWDWIKISI. "The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death." *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) (citations omitted).

¶ 21 The use of a deadly weapon and infliction of a serious injury are not elements of attempted first-degree murder. *Coble*, 351 N.C. at 449, 527 S.E.2d at 46. Conversely, attempted first-degree murder requires malice, premeditation, and deliberation, *id.*, elements not required by AWDWIKISI. Accordingly, AWDWIKISI is not the same offense as attempted first-degree murder for double jeopardy purposes, and prosecution of Defendant for the AWDWIKISI charges may proceed consistent with the prohibition against double jeopardy. *See State v. Tew*, 149 N.C. App. 456, 461, 561 S.E.2d 327, 332 (2002) (holding that "since assault with a deadly weapon with intent to kill inflicting serious injury requires proof of an additional element not required in attempted murder, Defendant was not subjected to double jeopardy" in successive prosecutions for attempted first-degree murder and AWDWIKISI).

2. Assault Inflicting Serious Bodily Injury

¶ 22 The current charges also include two counts of assault inflicting serious bodily injury. The elements of this offense are (1) an intentional assault, (2) inflicting serious bodily injury. *State v. Williams*, 154 N.C. App. 176, 180, 571 S.E.2d 619, 622 (2002) (citing N.C. Gen. Stat. § 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) (2014).

¶ 23 The infliction of serious bodily injury is not an element of attempted first-degree murder. Conversely, assault inflicting serious bodily injury does not require the intent necessary for attempted first-degree murder. Assault inflicting serious bodily injury is not the same offense as attempted first-degree murder, and prosecution of Defendant for the assault inflicting serious bodily injury charges may proceed consistent with the prohibition against double jeopardy.

3. Assault by Strangulation

¶ 24 The current charges include one count of assault by strangulation. The elements of this offense are (1) an intentional assault, (2) inflicting physical injury by strangulation. N.C. Gen. Stat. § 14-32.4(b) (2014). Infliction of physical injury by

strangulation is not an element of attempted first-degree murder, and assault by strangulation does not require the intent necessary for attempted first-degree murder. Assault by strangulation is not the same offense as attempted first-degree murder, and prosecution of Defendant for assault by strangulation may proceed consistent with the prohibition against double jeopardy.

4. Felony Child Abuse

¶ 25 Lastly, the current charges include 14 counts of felony child abuse under N.C. Gen. Stat. § 14-318.4(a5). This offense requires proof that "[a] parent or any other person providing care to or supervision of a child less than 16 years of age" committed a "willful act or grossly negligent omission in the care of the child" which "shows a reckless disregard for human life." N.C. Gen. Stat. § 14-318.4(a5) (2014). Each of these elements is not an essential element of attempted first-degree murder. Like assault by strangulation and assault inflicting serious bodily injury, felony child abuse under Section 14-318.4(a5) does not require the intent necessary for attempted first-degree murder. Felony child abuse under Section 14-318.4(a5) is not the same offense as attempted first-degree murder, and prosecution of Defendant on the felony child abuse charges may proceed consistent with the prohibition against double jeopardy.

III. Conclusion

¶ 26 Because the current charges are not the same offense as any for which

Defendant has previously been placed in jeopardy, the trial court did not err by denying Defendant's motion to dismiss these charges.

NO ERROR.

Judges CARPENTER and GORE concur.

Report per Rule 30(e).