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NO. COA11-1054  
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Buncombe County  
Nos. 09 CRS 56018-20,  
09 CRS 56022

MAURICE LEMONT FULLWOOD

Appeal by defendant from judgments entered 18 February 2011  
by Judge Mark E. Powell in Buncombe County Superior Court.  
Heard in the Court of Appeals 10 January 2012.

*Roy Cooper, Attorney General, by Harriet F. Worley,  
Assistant Attorney General, for the State.*

*Gilda C. Rodriguez, for the defendant.*

THIGPEN, Judge.

Maurice Lemont Fullwood ("Defendant") appeals from convictions of conspiring to commit robbery with a dangerous weapon, first-degree burglary, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury. We must decide whether the trial court (I) erred by failing to declare a mistrial when it became aware that

one juror expressed fear of retaliation to the rest of the jury; (II) committed plain error by failing to instruct the jury on a lesser included offense; and (III) erred by denying Defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. After a review of the record on appeal, we find no error.

### I. Factual and Procedural Background

In the early morning hours of 3 April 2008, four intruders entered Keith Walton, Tiffany Prieur, and Christy Maynor's apartment. Two of the men entered Mr. Walton's bedroom, and Mr. Walton began fighting with one man and would not let him go. The man Mr. Walton was fighting asked the other man to shoot Mr. Walton so he would let go. After Mr. Walton was shot, he rolled off of the man he was fighting, and the two men left, taking a gun, drugs, and some money with them. As a result of the gunshot wound to his torso, Mr. Walton was in the hospital for seventeen days and had numerous surgeries.

Also on 3 April 2008, Defendant went to Park Ridge Hospital to be treated for a gunshot wound to the leg. Defendant gave doctors three different explanations for the gunshot wound, including that he accidentally shot himself, that he had been

shot at a nightclub outside of Atlanta, and that he had been shot at a nightclub outside of Greenville, South Carolina.

Detective Anne Benjamin investigated the 3 April 2008 shooting and robbery. None of the roommates could identify the intruders. However, during the course of her investigation, Detective Benjamin received information that one of the intruders was named "Maurice[,] " and she heard about Defendant being treated at the hospital for a gunshot wound on 3 April 2008. Detective Benjamin decided to talk to Defendant about the shooting and robbery and made arrangements with Defendant's probation officer to speak with Defendant at one of his probation meetings.

Detective Benjamin first met with Defendant on 23 April 2008. Defendant initially told Detective Benjamin that he was shot at a club in Greenville, South Carolina, and didn't realize he had been shot until later. Detective Benjamin testified that after she told Defendant she had the bullet that had been removed from his leg, Defendant told her he had been out on 2 April 2008 with three other men; that Defendant knew Ms. Prieur lived at the apartment; that they decided to go get some drugs; that he heard two of the other men talking about robbing them; that he went into the bedroom and he began wrestling with Mr.

Walton and the fight moved into the closet; that he was shot and Mr. Walton was shot; and that Defendant stumbled out of the apartment and got in the car with the others.

Detective Benjamin, another detective, and Defendant's probation officer met with Defendant again on 6 May 2008 at his mother's house to "get some more details." Detective Benjamin testified Defendant told them what kind of car the men were in, how they were dressed, that Parish Suber and Lucius Kennedy had guns, and that they took a ".25-caliber gun, a half-ounce of powder, and a little crack" before they left the apartment. After the 6 May 2008 conversation, warrants were issued for Parish Suber, Lucius Kennedy, and Lawrence Robinson. Detective Benjamin testified the district attorney gave Defendant the option to be arrested along with the others so they wouldn't know who gave the information, but Defendant chose not to be charged. A warrant was later issued for Defendant in May 2009 after he refused to testify at Mr. Suber's trial.

Defendant was charged with conspiring to commit robbery with a dangerous weapon, first-degree burglary, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury. At trial, Defendant testified that he was not part of the robbery and shooting, that

he was shot while leaving a club in Greenville, South Carolina, and that he did not admit to detectives that he was involved in the robbery and shooting. The jury convicted Defendant of all charges. The trial court sentenced Defendant to a concurrent sentence of 103 to 133 months imprisonment for first-degree burglary and consecutive sentences of 27 to 42 months imprisonment for conspiracy to commit robbery with a dangerous weapon, 103 to 133 months for robbery with a dangerous weapon, and 116 to 149 months for assault with a deadly weapon with intent to kill inflicting serious injury. Defendant appeals.

## II. Failure to Declare a Mistrial

Defendant first argues the trial court erred by failing to declare a mistrial when it became aware that one juror expressed fear of retaliation to the rest of the jury. Defendant admits he did not properly preserve this issue for review because he did not object at trial and did not move for a mistrial.<sup>1</sup> See

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<sup>1</sup>We note that the trial court asked for input from the attorneys when it received notes from the jury regarding the juror who expressed fear of retaliation. The second note stated, "eleven jurors [are] in agreement but we have one juror abstaining from voting out of fear for himself and his family. They live in the same neighborhood as the defendant's mother." In response, rather than objecting, defense counsel stated, "I don't know what to say. I spoke with Miss Fullwood about it. She said she didn't know anybody on the jury and didn't wave at anybody. Hopefully maybe he's confused. I don't know if he's abstaining from casting a vote whatsoever. Then perhaps we can

N.C. R. App. P. 10(a)(1). Furthermore, we note Defendant does not argue that the trial court committed plain error. See N.C. R. App. P. 10(a)(4). However, Defendant asks this Court to review pursuant to North Carolina Rule of Appellate Procedure Rule 2 "to prevent manifest injustice."

Rule 2 states, in pertinent part, "[t]o prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative[.]" N.C. R. App. P. 2. However, "Rule 2 must be applied cautiously . . . [and] the exercise of Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (citations and quotation marks omitted). "This Court has tended to invoke Rule 2 for the prevention of 'manifest injustice' in circumstances in which substantial rights of an appellant are affected." *Id.* at 316, 644 S.E.2d at 205 (citations omitted).

We conclude that Defendant's claim that the jury was exposed to "improper and prejudicial matters when a juror

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tell him it's his duty to cast a vote, and if not, declare a mistrial."

expressed fear of retaliation" is not an exceptional circumstance calling for invocation of Rule 2. Accordingly, Defendant may not raise this question for the first time on appeal.

### III. Jury Instruction

In his next argument on appeal, Defendant contends the trial court committed plain error by failing to instruct the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury because the State presented insufficient evidence of intent to kill. We disagree.

Because Defendant did not object to the jury instruction at trial, we review for plain error. *See State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (stating that "[t]his Court has elected to review unpreserved issues for plain error when they involve . . . errors in the judge's instructions to the jury"), *cert. denied*, 525 U.S. 952, 119 S. Ct. 382, 142 L. Ed. 2d 315 (1998). Plain error arises when the error "is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis omitted) (quotation and quotation marks omitted). "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) (citation omitted).

"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." *State v. Cromartie*, 177 N.C. App. 73, 76, 627 S.E.2d 677, 680 (citation omitted), *disc. review denied*, 360 N.C. 539, 634 S.E.2d 538 (2006). "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.* (quotation omitted). "The defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *Id.* (quotation omitted).

In this case, Defendant contends there was insufficient evidence of intent to kill because the intruders "did not have a plan for the robbery, and much less any intention to kill" and "one of the intruders shot Mr. Walton in a desperate effort to

have Mr. Walton release the other man." However, the evidence shows that at least three men entered the apartment with a gun; two men entered Mr. Walton's bedroom and Mr. Walton began to wrestle with one of them; Mr. Walton testified that "[t]he dude I was fighting told the guy behind me to shoot me"; and Mr. Walton was shot once in the torso.<sup>2</sup> We conclude the evidence was sufficient to prove Defendant's intent to kill. See *id.* at 77, 627 S.E.2d at 680 ("Where the defendant points a gun at the victim and pulls the trigger, this constitutes evidence from which intent to kill may be inferred.") (citation omitted). Thus, this argument has no merit.

#### IV. Motion to Dismiss

In his final argument on appeal, Defendant contends the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. 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) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether

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<sup>2</sup>We note that the trial court instructed the jury on a theory of acting in concert for the charges of robbery with a dangerous weapon, first-degree burglary, and assault with a dangerous weapon with intent to kill inflicting serious injury.

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 (quotation omitted), *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Id.* at 378-79, 526 S.E.2d at 455 (citations omitted).

The elements of assault with a deadly weapon with intent to kill inflicting serious injury are "(1) an assault, (2) with a deadly weapon, (3) an intent to kill, and (4) infliction of a serious injury not resulting in death." *State v. Grigsby*, 351 N.C. 454, 456, 526 S.E.2d 460, 462 (2000) (citation omitted).

Here, Defendant similarly contends there was insufficient evidence of intent to kill because the suspects shot Mr. Walton "to get away and not with the intention of fatally wounding" him. However, for the reasons stated above, we conclude the evidence was sufficient to prove Defendant's intent to kill.

NO ERROR.

Judges HUNTER and McCULLOUGH concur.

Report per Rule 30(e).