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NO. COA11-491
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v.

Edgecombe County
No. 09 CRS 53263

RICKEY LEANDER GAMBLE,
Defendant.

Appeal by defendant from judgment entered 14 September 2010 by Judge Milton F. Fitch, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 11 October 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas R. Miller, for the State.

William D. Spence for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Ricky Leander Gamble appeals from a judgment entered after the jury found him guilty of assault with a deadly weapon inflicting serious injury on Crystal Boose ("Ms. Boose") Defendant argues on appeal that: (1) the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury; (2) he was denied effective assistance of counsel due to his trial attorney's

failure to make a motion to dismiss the charges at the close of all evidence; (3) the trial court erred by refusing to charge the jury on the lesser-included offense of misdemeanor assault with a deadly weapon; and (4) the trial court erred by denying his motion to set aside the verdict because the verdict was inconsistent with the jury's determination that defendant was not guilty of being a felon in possession of a firearm. After careful review, we hold there was no error.

Background

The evidence at trial tended to establish the following facts: On 25 September 2009, at approximately 2:00 a.m., Ms. Boose and her friend, Jeremy Walston ("Mr. Walston"), went to defendant's residence to buy drugs. Ms. Boose saw defendant; however, Ms. Boose and Mr. Walston left without purchasing drugs.

Later that morning, Ms. Boose accompanied Mr. Walston to his home on Raleigh Street in Rocky Mount. Shortly thereafter, defendant entered the Raleigh Street home, pointed a gun at Ms. Boose, and shot her in the foot. Mr. Walston ran to a neighboring residence to ask for help. An unidentified man wrapped Ms. Boose's foot in a shirt or towel in an effort to stop the bleeding. A police officer transported Ms. Boose to

the hospital where medical personnel examined and bandaged her wound. The bullet entered one side of her foot and exited the other side. The doctor gave Ms. Boose antibiotics and medication for the pain.

The police arrested defendant that same morning wearing a shirt with a small bloodstain on it. During booking, Officer Ryan Hephler overheard defendant tell an acquaintance that he shot Ms. Boose.

On 4 January 2010, a grand jury indicted defendant on charges of breaking and entering, assault with a deadly weapon on Mr. Walston, assault with a deadly weapon inflicting serious injury on Ms. Boose, and possession of a firearm by a felon. The State subsequently dismissed the breaking and entering charge. On 14 September 2010, the jury found defendant guilty of assault with a deadly weapon inflicting serious injury on Ms. Boose. The jury found defendant not guilty of the other two charges. The trial court sentenced defendant to a term of imprisonment of 53 to 73 months. Defendant gave notice of appeal in open court.

Discussion

I.

Defendant contends that: (1) the trial court erred by failing to dismiss the assault with a deadly weapon inflicting serious injury charge due to insufficiency of the evidence, and (2) that he received ineffective assistance of counsel because his attorney failed to make a motion to dismiss at the close of all evidence.

Defendant acknowledges that his attorney "did not move to dismiss the charges at the close of all the evidence and that he is now procedurally barred from attacking the sufficiency of evidence" pursuant to N.C. R. App. P. 10(a)(3). The rule states: "If a defendant makes such a motion after the State has presented all its evidence and . . . the defendant then introduces evidence, defendant's motion for dismissal . . . made at the close of State's evidence is waived." N.C. R. App. P. 10(a)(3). Consequently, defendant is precluded from arguing on appeal that the trial court erred in failing to dismiss the charges against him.

Defendant asks this Court to conduct plain error review. Our Supreme Court has previously decided that plain error analysis only applies to rulings concerning the admission of evidence and jury instructions. *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000). Furthermore, we addressed

this same issue in *State v. Tanner*, 193 N.C. App. 150, 666 S.E.2d 845, 848 (2008), *rev'd on other grounds*, 364 N.C. 229, 695 S.E.2d 97 (2010). In *Tanner*, the defendant was convicted of felony possession of stolen goods. *Id.* at 153, 666 S.E.2d at 848. At the conclusion of the State's evidence, the defendant made a timely motion to dismiss. *Id.* The defendant then put on evidence and failed to renew his motion to dismiss at the close of evidence. *Id.* On appeal, the defendant argued that his failure to renew his motion triggered a plain error analysis. However, we held that "[w]hile this is a criminal case, defendant's failure to renew his motion to dismiss does not trigger a plain error analysis.'" *Id.* at 153, 666 S.E.2d at 849 (quoting *State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004)). Here, as in *Tanner*, after making an initial motion to dismiss following the State's evidence, defendant presented his own evidence and failed to renew his motion to dismiss at the close of all evidence. Defendant has waived review pursuant to Rule 10 and is not entitled to plain error review.

Defendant alternatively asserts that defense counsel's failure to renew the motion to dismiss at the close of evidence amounts to ineffective assistance of counsel. "To prevail on a

claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 692-93 (1984)), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). Generally, "to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citation and quotation marks omitted).

The issue then turns on whether the trial court would have likely ruled in defendant's favor had defense counsel renewed the motion to dismiss at the conclusion of all evidence. The standard for ruling on a motion to dismiss is "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). The essential elements for felonious assault with a deadly weapon inflicting serious injury are: (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not

resulting in death. N.C. Gen. Stat. § 14-32(b) (2009); *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990). Defendant contends that the State presented insufficient evidence to establish that Ms. Boose was seriously injured. Whether serious injury has been inflicted turns on the facts of each case and is generally a determination for the jury. *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991). Pertinent factors for jury consideration include hospitalization, pain, blood loss, and time lost at work. *Id.* Evidence of hospitalization, however, is not necessary for proof of serious injury. *Id.*

Here, Ms. Boose was shot in the foot. A neighbor assisted Ms. Boose by wrapping her foot in a shirt or towel to stop the bleeding. Although, it was not specified as to how much blood was present at the crime scene, there was testimony that blood was "everywhere." A police officer transported Ms. Boose to the hospital where medical personnel examined and bandaged her wound. The bullet entered one side of her foot and exited the other side. The doctor gave Ms. Boose antibiotics and medication for the pain. Ms. Boose went to an orthopedist in Smithfield following her injury. Due to her injury, she was on crutches for three or four weeks and has a scar. Ms. Boose also

testified that she still feels discomfort and pain when the weather is cold or rainy.

Defendant acknowledges that this Court has previously found that gunshot wounds are serious injuries. In *State v. Hensley*, 90 N.C. App. 245, 248, 368 S.E.2d 208, 210 (1988), the defendant shot the victim multiple times with a shotgun. The victim was hospitalized for three days and three nights, and "suffered great pain and continues to suffer pain as a result of some of the pellets remaining in his body." *Id.* This Court held that the "evidence clearly show[ed] that defendant inflicted serious injuries upon the victim." *Id.* In *State v. Shankle*, 7 N.C. App. 564, 172 S.E.2d 904 (1970), the defendant shot the victim in the wrist. The evidence presented was that the victim went to the doctor, who administered medication and bandaged it. *Id.* at 565, 172 S.E.2d at 904. The victim went back to the doctor a second time because of the wound, and a scar remained on his wrist. *Id.* This Court held that the evidence was sufficient to go to the jury. *Id.* at 566, 172 S.E.2d at 905. The evidence in this case is similar to that presented in *Hensley* and *Shankle*.

In sum, the State presented sufficient evidence that Ms. Boose suffered a serious injury and it is, therefore, improbable that the trial court would have granted a motion to dismiss at

the close of evidence had the motion been raised. Consequently, counsel's alleged ineffective assistance did not prejudice defendant and defendant is not entitled to a new trial.

II.

Defendant contends that the trial court erred by failing to instruct the jury on the lesser included offense of assault with a deadly weapon. At trial, defense counsel first asked the judge to instruct the jury on assault with a deadly weapon, but after consulting with defendant, defense counsel specifically asked that no such instruction be given.

It is well established that "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443 (2009). Furthermore, a "defendant may not decline an opportunity for instructions on a lesser included offense and then claim on appeal that failure to instruct on the lesser included offense was error." *State v. Gay*, 334 N.C. 467, 489, 434 S.E.2d 840, 852 (1993). Defendant in this case informed the trial court that defendant was not seeking an instruction on the lesser included offense of assault with a deadly weapon, and, therefore, defendant has waived his argument that the trial

court erred in failing to give that instruction. *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *rev. dismissed*, 355 N.C. 216, 560 S.E.2d 142 (2002) ("[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review.").

III.

Finally, defendant argues that the trial court erred in denying his motion to set aside the jury's verdict because the jury rendered an inconsistent verdict when it convicted him of assault with a deadly weapon inflicting serious injury but found him not guilty of being a felon in possession of a firearm. Defendant's argument is without merit.

"A motion to set aside the verdict is within the sound discretion of the trial court. Thus, the trial court's decision can be overturned only if it is clear from the record that the trial judge abused or failed to exercise his discretion." *State v. Reaves*, 132 N.C. App. 615, 624, 513 S.E.2d 562, 568 (1999) (internal citation omitted).

"In North Carolina jurisprudence, a distinction is drawn between verdicts that are merely inconsistent and those which are legally inconsistent and contradictory." *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010). "It is firmly

established that when there is sufficient evidence to support a verdict, 'mere inconsistency will not invalidate the verdict.'" *Id.* (quoting *State v. Davis*, 214 N.C. 787, 794, 1 S.E.2d 104, 108 (1939)). "However, when a verdict is inconsistent and contradictory, a defendant is entitled to relief." *Id.*

The *Mumford* Court recognized that inconsistencies "may have been the result of compromise, or of a mistake on the part of the jury . . . [b]ut verdicts cannot be upset by speculation or inquiry into such matters." *Id.* at 399, 699 S.E.2d at 915. The Court explained that

"[t]he rule that the defendant may not upset [an inconsistent] verdict embodies a prudent acknowledgment of a number of factors. First . . . inconsistent verdicts — even verdicts that acquit on a predicate offense while convicting on the compound offense — should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause.

Inconsistent verdicts therefore present a situation where error, in the sense that the jury has not followed the court's

instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course."

Id. at 399-400, 699 S.E.2d at 915 (quoting *United States v. Powell*, 469 U.S. 57, 65, 83 L. Ed. 2d 461, 468-69 (1984)) (internal quotation marks omitted).

Therefore, according to *Mumford*, inconsistency alone will not lead to a new trial for a defendant. *Id.* at 401, 699 S.E.2d at 916; see *Powell*, 469 U.S. at 60, 83 L. Ed. 2d at 465 (holding that inconsistent verdict was permissible where defendant was convicted of charges related to the use of a telephone to sell and distribute cocaine, but acquitted of conspiracy to possess cocaine and possession of cocaine with the intent to sell or distribute, which were underlying offenses of the telephone facilitation charges); *State v. Sigmon*, 190 N.C. 684, 691, 130 S.E. 854, 857 (1925) (recognizing that "while the jury would have been fully justified in finding the defendant guilty on both counts, under the evidence . . ., their failure to do so, does not, as a matter of law, vitiate the verdict on the count for transporting" where the defendant was found guilty of

transporting intoxicating liquors but not guilty of unlawful possession of intoxicating liquors).

This Court recently addressed the issue raised by defendant in *State v. Cole*, 199 N.C. App. 151, 681 S.E.2d 423, *disc. review denied*, 363 N.C. 658, 686 S.E.2d 679 (2009). There, the defendants, "James" and "Kawamie," were tried on two counts of robbery with a dangerous weapon, two counts of first-degree kidnapping, two counts of felony assault with a deadly weapon, and one count of possession of a firearm by a felon. *Id.* at 153, 681 S.E.2d at 425. The jury subsequently convicted James on all counts and convicted Kawamie of two counts of first-degree kidnapping and two counts of misdemeanor assault with a deadly weapon. *Id.* at 155, 681 S.E.2d at 426. Kawamie argued, *inter alia*, that the trial court erred by: (1) accepting the jury's verdict of guilty of kidnapping the victims when the jury found Kawamie not guilty of armed robbery, and (2) accepting the jury's verdict of guilty of misdemeanor assault with a deadly weapon when the jury found Kawamie not guilty of possession of a firearm by a felon. *Id.* at 155, 681 S.E.2d at 426. This Court held "that the trial court did not err by accepting the seemingly inconsistent verdicts." *Id.* at 160, 681 S.E.2d at 429.

As in *Cole*, although the verdicts are inconsistent, they are not legally inconsistent and contradictory. The jury's verdict could be viewed as a demonstration of its lenity, and, therefore, should not be disturbed. We hold that the trial court did not abuse its discretion in not setting aside the verdict.

Conclusion

Based on the foregoing, we hold that defendant has waived arguments pertaining to the trial court's failure to: (1) dismiss the charges against him, and (2) instruct the jury on the lesser included offense of assault with a deadly weapon. We further hold that defendant did not receive ineffective assistance of counsel and the trial court did not err in refusing to set aside the verdict.

No error.

Judges McGEE and CALABRIA concur.

Report per Rule 30(e).