

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-1429
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Wake County
No. 08 CRS 78910

CHARLES JAMES CLARKE JACK

Appeal by Defendant from judgment entered 10 December 2010
by Judge Paul G. Gessner in Wake County Superior Court. Heard
in the Court of Appeals 25 April 2012.

*Attorney General Roy Cooper, by Special Deputy Attorney
General R. Marcus Lodge, for the State.*

Anne Bleyman for Defendant.

BEASLEY, Judge.

Charles James Jack (Defendant) appeals from judgment
entered on his conviction of assault with a deadly weapon with
intent to kill. For the following reasons, we find no error.

Drew Coulson (Coulson) and Defendant's daughter were
married in 2005 and had one child together. During their
divorce and subsequent custody battle, Defendant and Coulson had
several heated exchanges.

On 4 November 2008, Coulson arrived at his home, gathered the groceries he had just purchased, got out of his car, and went to unlock his front door. As Coulson got his keys into the lock, he heard someone moving quickly towards him. He saw a man wearing a hood coming towards him, and was struck in the chest with an ax. Coulson identified his attacker as Defendant, and testified that Defendant said several times that he was going to kill Coulson. Coulson testified that Defendant also struck his face with his hand, and his ear and cheek with the ax during the attack. Coulson ran into the street yelling for help and saw his attacker walking across the street with an ax towards a pickup truck he identified as belonging to Defendant.

On 5 January 2009, Defendant was indicted for the crime of assault with a deadly weapon inflicting serious injury. On 14 September 2009, a superseding indictment was issued, charging Defendant with assault with a deadly weapon with intent to kill inflicting serious injury. On 6 December 2010, the case came to trial and the jury returned a verdict finding Defendant guilty of assault with a deadly weapon with intent to kill. Defendant was sentenced to a term of twenty to thirty-three months imprisonment which was suspended and Defendant was placed on supervised probation for thirty-six months. As a special

condition of probation, Defendant was ordered to serve a six month active sentence. From this judgment, Defendant now appeals.

I.

Defendant first argues that the trial court erred in denying his motion to dismiss for insufficient evidence.

It is well settled that upon a motion to dismiss in a criminal action, all the evidence admitted . . . must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury.

State v. Brown, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

A motion to dismiss is properly denied where "the State presented substantial evidence of: (1) each essential element of each offense defendant was charged with; and (2) defendant [as] perpetrator. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Nettles*, 170 N.C. App. 100, 102-03, 612 S.E.2d 172, 174 (2005) (citations and internal quotations omitted).

"In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue

presented on appeal unless a motion to dismiss the action . . . is made at trial." N.C.R. App. P. 10(a)(3). "[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008). However, appellate courts are permitted to suspend the requirements of the Rules of Appellate Procedure when necessary to "prevent manifest injustice to a party." N.C.R. App. P. 2. Such suspensions must be made cautiously, and only in exceptional circumstances. *See Dogwood*, 362 N.C. at 196, 657 S.E.2d at 364.

The trial court denied Defendant's motions to dismiss made both at the close of the State's evidence and at the close of Defendant's evidence. Defendant concedes that he failed to renew his motion to dismiss after the case was reopened to allow Defendant to introduce an exhibit. Defendant now argues that this Court should excuse this failure and review his claim of insufficiency of the evidence to prevent the manifest injustice of allowing him to be convicted when the State did not prove his guilt beyond a reasonable doubt. We do not see the "exceptional

circumstances" justifying the invocation of Rule 2 of the Rules of Appellate Procedure present here.

Even assuming, *arguendo*, that we did consider the issue on the merits, the State has produced sufficient evidence of all essential elements of the crime. The elements of the crime for which Defendant was convicted¹ are "that defendant (1) assaulted the victim, (2) with a deadly weapon, (3) with an intent to kill." *State v. Ware*, 31 N.C. App. 292, 294, 229 S.E.2d 249, 251 (1976). "A deadly weapon is any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Rogers*, 153 N.C. App. 203, 210, 569 S.E.2d 657, 662 (2002) (citation and internal quotations omitted). "[W]here the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is [a question] of fact to be determined by the jury." *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978). "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." *State v.*

¹ Defendant's motion to dismiss was for insufficiency of the evidence of the charge of assault with a deadly weapon with intent to kill inflicting serious injury. However, the jury returned a verdict finding Defendant guilty of the lesser included offense of assault with a deadly weapon with intent to kill.

Grigsby, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (citations omitted).

Here there was ample evidence to support a conviction of assault with a deadly weapon with intent to kill. Coulson testified that Defendant swung an ax at his head after saying "I'm going to kill you." Given the manner in which the ax was used, including the part of the body it was aimed at, in conjunction with the threats and actual injury to Coulson, and taking this evidence in the light most favorable to the State, all elements of the crime were sufficiently established. Although Defendant argues that there is insufficient evidence to support the element of serious injury, that is not an element of assault with a deadly weapon with intent to kill, and thus is irrelevant to our analysis.

II.

Defendant next argues that his conviction should be vacated because he was denied effective assistance of counsel by his counsel's failure to move to dismiss at the close of all evidence. We disagree.

The standard of review for alleged violations of a defendant's constitutional rights, such as ineffective assistance of counsel, is *de novo*. *State v. Graham*, 200 N.C.

App. 204, 214, 683 S.E.2d 437, 444 (2009). To prevail on a claim of ineffective assistance of counsel, Defendant must show both that counsel's performance falls below an objective standard of reasonableness, and that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984)).

As discussed in Section I, *supra*, the motion to dismiss was properly denied. There was sufficient evidence to prove each element of the crime for which Defendant was convicted. Thus, there is no reasonable probability that the trial court would have granted Defendant's motion to dismiss had defense counsel renewed the motion at the close of all the evidence. Defendant has failed to show a reasonable probability that the result of the proceeding would have been different had defense counsel renewed his motion to dismiss. Accordingly, Defendant's argument for ineffective assistance of counsel fails.

III.

Finally, Defendant argues that the trial court erred in not submitting the lesser included offenses of misdemeanor assault inflicting serious injury and assault to the jury.

Defendant did not request that the jury be charged on any lesser offenses, nor did Defendant object to the jury instructions given at trial. Thus our review is limited to plain error. See N.C.R. App. P. 10(a)(4). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). "[E]ven when the 'plain error' rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 660-61, 300 S.E.2d at 378 (internal quotations, brackets, and citations omitted).

"A trial court is required to give instructions on a lesser-included offense only when there is evidence to support a verdict finding the defendant guilty of the lesser offense." *State v. Singletary*, 344 N.C. 95, 103, 472 S.E.2d 895, 900 (1996) (citation omitted). However, this Court has held that "[w]here the evidence is sufficient to support the offense

submitted to the jury, it is not plain error for the trial court to refuse to submit a lesser charge." *State v. Wright*, __ N.C. App. __, __, 708 S.E.2d 112, 124 (2011).

In the case *sub judice*, the evidence is sufficient to support the offense of assault with a deadly weapon with intent to kill. Because there was sufficient evidence to support the verdict returned by the jury, there is no support for the assertion that this instruction had a probable impact on the outcome of the trial. Thus, it was not plain error for the trial court to refuse to submit the lesser charges argued by Defendant.

Defendant further argues that the lesser offenses of misdemeanor assault inflicting serious injury and assault should have been submitted to the jury because "a jury should not be coerced into a verdict because there was no lesser included offense submitted to the jury which better fit the evidence." *State v. Coleman*, 161 N.C. App. 224, 233, 587 S.E.2d 889, 895 (2003). Defendant contends that if the jury felt that he was culpable in any way, the jury had no choice but to convict him of the greater offenses they were instructed on. However, the jury was instructed as to four possible offenses: (1) assault with a deadly weapon with intent to kill inflicting serious

injury; (2) assault with a deadly weapon with intent to kill; (3) assault with a deadly weapon inflicting serious injury; and (4) assault with a deadly weapon. Despite the two lesser offenses submitted to the jury, the jury found Defendant guilty of assault with a deadly weapon with intent to kill. The presence of lesser offenses in the jury instruction demonstrates a lack of coercion into a verdict, and Defendant's argument fails.

No Error.

Judge CALABRIA and STEELMAN concur.

Report per Rule 30(e).