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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1146

Filed: 16 May 2017

Wake County, No. 13 CRS 228201

STATE OF NORTH CAROLINA

v.

TRAVIS LANIER WILKINS

Appeal by defendant from judgment entered 15 July 2015 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 18 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kenneth A. Sack, for the State.

Anne Bleyman for defendant-appellant.

DAVIS, Judge.

Travis Lanier Wilkins (“Defendant”) appeals from his conviction of assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, he argues that the trial court erred in denying his motion to dismiss based on insufficiency of the evidence as to the essential element of intent to kill. After careful review, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: At approximately 8:00 p.m. on 16 November 2013, Curtis Moyer was purchasing beer, cigarettes, and a cigarette lighter at “a little community store” at the intersection of Lenoir Street and Swain Street in Raleigh, North Carolina. Defendant entered the store while Moyer was purchasing these items. As he walked by Moyer, Defendant attempted to take the cigarette lighter off of the store counter while Moyer was completing his purchase. Defendant walked out of the store with the lighter, and Moyer followed him out. Moyer testified that Defendant “squared up in front of me and he said why you going to do that to me like that and then he swung on me.” Moyer went back into the store, and the store owner gave him a second lighter.

Approximately ten minutes later, Defendant walked back into the store and said to Moyer, “let me talk to you for a minute” Moyer followed him outside, and the two men walked across the street. Moyer reached out his hand to indicate to Defendant that he wanted to shake hands. At that point, Defendant stated, “You thought I forgot.” Defendant then attempted to punch Moyer, and Moyer began to punch Defendant in response. Moyer “tried to run” at which point Defendant repeatedly stabbed Moyer in multiple parts of his body. Moyer fell to the ground, and Defendant began kicking him in the back. Moyer got up, began running away, and ultimately sat down on the porch of a nearby house.

At the same time, Yvonne Massenburg was walking past the store on Swain Street on her way home. As she walked by the community store, she noticed that ten feet away from her Defendant and Moyer were “grabbing each other.” She recognized Defendant as an individual who she believed was “stay[ing] in [her] neighborhood.” She noticed that Moyer had fallen to the ground and was trying to get up. She also observed Defendant kick Moyer at least once.

When Massenburg reached her house, she saw that Moyer was “coming down the street . . . stumbling and he fell on the porch . . . next door [sic] where [I] stayed at.” She also noticed that Moyer was bleeding. Massenburg went into her house and told her step-father, Jerry Harrington,¹ that Defendant was “jumping on that boy” and that “[h]e came down the street behind me and he was bleeding” Massenburg called 911 while Harrington waited for an ambulance to arrive.

Officer Prairie Reep of the Raleigh Police Department responded to the 911 call. When Officer Reep arrived at the scene, Harrington informed her that Massenburg had “seen the altercation” between Moyer and the suspect. Officer Reep then arranged for Massenburg to be transported to the Raleigh Police Department where she gave a full statement of the events that occurred. Massenburg identified the suspect as “Dirty Trav” and stated that she had “observed the victim being kicked about his head and face.” She described the suspect as wearing “a black toboggan on

¹ During trial, Massenburg identified Harrington as her “step-father,” but other witnesses identified Harrington as Massenburg’s “boyfriend.”

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his head and a black hooded sweatshirt.” Massenburg subsequently identified Defendant from a photographic lineup.

An ambulance arrived, and Moye was transported to the hospital. Detective Michael Crep of the Raleigh Police Department testified that Moye had sustained “a total of six stab wounds.” A stab wound had punctured one of his lungs, and another stab wound had “gone through his cheek and into his tongue.” The remainder of the stab wounds were in his left shoulder and back. Moye was hospitalized for three days.

On 17 November 2013, Detective Chad Miller of the Raleigh Police Department was assigned as the lead detective in the case. That same day, Detective Miller learned from dispatch that a witness who had seen the stabbing had called in to report that “the suspect [was] walking into an apartment on East Lenoir street.” Detective Miller followed up on the tip and arrived at an apartment complex where he found Defendant sitting on a chair “in the breezeway at 581 East Lenoir street.” Defendant was subsequently brought to the Raleigh Police Department, interviewed, and charged with assault with a deadly weapon with intent to kill inflicting serious injury.

On 24 and 25 February 2014, a grand jury returned bills of indictment charging Defendant with assault with a deadly weapon with intent to kill inflicting serious injury and attaining the status of a habitual felon. A jury trial began on 13 July 2015 before the Honorable Henry W. Hight, Jr. The State presented testimony

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from Moye, Massenburg, Officer Reep, Detective Crep, Detective Miller, and four other officers. Sheila Ebron — a friend of Defendant’s — testified for the defense. Defendant did not testify.

At the close of the State’s case, Defendant moved to dismiss based on insufficiency of the evidence. The trial court denied the motion. At the close of all the evidence, Defendant renewed his motion to dismiss, which the court also denied.

On 15 July 2015, the jury returned a verdict finding Defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury. The State dismissed the habitual felon charge, and the trial court sentenced Defendant to 126 to 164 months imprisonment.

Analysis

I. Appellate Jurisdiction

As an initial matter, we must determine whether we have jurisdiction over the present appeal. Rule 4 of the North Carolina Rules of Appellate Procedure provides that a defendant may appeal from an order or judgment in a criminal action by (1) “giving oral notice of appeal at trial,” or (2) “filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]” N.C. R. App. P. 4(a). A failure to comply with Rule 4 deprives this Court of jurisdiction to hear the appeal. *State v. McCoy*, 171 N.C.

App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005).

Here, Defendant’s trial counsel failed to give oral notice of appeal at trial or file a written notice of appeal. Accordingly, Defendant’s appeal is subject to dismissal.

However, Defendant has filed a petition for writ of *certiorari*. Pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, this Court may — in its discretion — issue a writ of *certiorari* and review an order or judgment entered by the trial court “when the right to prosecute an appeal has been lost by failure to take timely action.” N.C. R. App. P. 21(a)(1). Here, Defendant lost his right to appeal through no fault of his own but rather due to his trial counsel’s failure to give proper notice of appeal. We therefore elect to grant Defendant’s petition for writ of *certiorari* and proceed to address the merits of his argument. *See State v. Holanek*, __ N.C. App. __, __, 776 S.E.2d 225, 232 (allowing petition for writ of *certiorari* pursuant to Rule 21 where defendant’s notice of appeal was defective), *disc. review denied*, 368 N.C. 429, 778 S.E.2d 95 (2015).

II. Motion to Dismiss

The sole issue on appeal is whether the trial court erred in denying Defendant’s motion to dismiss. “A trial court’s denial of a defendant’s motion to dismiss is reviewed *de novo*.” *State v. Watkins*, __ N.C. App. __, __, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, __ N.C. __, 792 S.E.2d 508 (2016). On appeal, this Court

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must determine “whether 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[.]” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citation omitted). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State’s favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). “Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.” *Smith*, 300 N.C. at 78, 265 S.E.2d at 169 (citation omitted).

The essential elements of the offense for which Defendant was convicted are “(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death.” *State v. Cain*, 79 N.C. App. 35, 46, 338 S.E.2d 898, 905 (citation omitted), *disc. review denied*, 316 N.C. 380, 342 S.E.2d 899 (1986). Here, Defendant’s sole argument is that the State presented insufficient evidence as to whether he acted “with intent to kill.”

“The State bears the burden of proving intent and the assault with a deadly weapon does not establish a presumption of an intent to kill.” *State v. Barlowe*, 337

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N.C. 371, 379, 446 S.E.2d 352, 357 (1994) (citation omitted). Instead, “[s]uch intent must be found by the jury as a fact from the evidence.” *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972) (citation omitted), *disapproved on other grounds by North Carolina v. Butler*, 441 U.S. 369, 60 L. Ed. 2d 286 (1979). “Intent must normally be proved by circumstantial evidence, and an 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.” *Barlowe*, 337 N.C. at 379, 446 S.E.2d at 357 (citation and quotation marks omitted).

In the present case, Defendant argues that the State presented no circumstantial evidence from which an intent to kill could have been inferred. He contends that Moye’s injuries were “not equivalent to those that have been found to support the inference of an intent to kill.” We disagree.

We have previously found the intent to kill element was satisfied in analogous circumstances. *See, e.g., State v. Grigsby*, 351 N.C. 454, 456, 526 S.E.2d 460, 462 (2000) (defendant stabbed victim in either the back or shoulder, puncturing his lung); *Thacker*, 281 N.C. at 455, 189 S.E.2d at 150 (defendant repeatedly stabbed victim in arm and stomach with six-inch knife blade); *State v. Ransom*, 41 N.C. App. 583, 584, 255 S.E.2d 237, 238 (1979) (victim stood up while attempting to withdraw from fight and defendant “caught him with his guard down and cut a five-inch long slash across his face”).

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We find particularly instructive our decision in *State v. Nicholson*, 169 N.C. App. 390, 610 S.E.2d 433 (2005). In that case, the State's evidence established that the defendant stabbed the victim "once in the chest and four times in the back[.]" *Id.* at 394, 610 S.E.2d at 436. After repeatedly stabbing the victim, the defendant then began "punching and kicking" the victim. *Id.* The victim "attempted to escape defendant's grasp by slipping out of her shirt." *Id.* at 392, 610 S.E.2d at 434. The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. *Id.* at 393, 610 S.E.2d at 435.

On appeal from the denial of his motion to dismiss, the defendant argued that the evidence presented was insufficient to give rise to an inference of intent to kill. We held that "[t]he nature of the assault, as evidenced by both the fighting between defendant and [the victim] and her attempts to disengage from the argument and escape the grasp of defendant, as well as the deadly character of the weapon used in the attack constitute sufficient proof from which defendant's intent to kill may be reasonably inferred." *Id.* at 394, 610 S.E.2d at 436. Thus, we concluded that "sufficient evidence was offered to permit a reasonable inference of defendant's intent to kill." *Id.*

Here, Moya testified that he sustained "a total of six stab wounds," one of which resulted in a punctured lung. One stab wound went through his left shoulder, multiple wounds were inflicted in his back, and the final stab wound pierced the left

side of his cheek, resulting in a cut on his tongue. In addition to Moye's testimony regarding the placement of the wounds, Moye and Massenburg both testified that after stabbing Moye, Defendant proceeded to kick him.

In sum, Defendant's stabbings resulted in serious injury and could potentially have resulted in Moye's death. Thus, we are satisfied that taking the evidence in the light most favorable to the State — as we must — the “viciousness of the assault and the deadly character of the weapon used” support a reasonable inference that Defendant acted with intent to kill. *See Thacker*, 281 N.C. at 455, 189 S.E.2d at 150. Therefore, we hold that the State presented substantial evidence that was sufficient to survive a motion to dismiss.

Conclusion

For the reasons stated above, we conclude Defendant received a fair trial free from error.

NO ERROR.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).