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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-278

No. COA21-504

Filed 19 April 2022

Guilford County, No. 20 CRS 67932

STATE OF NORTH CAROLINA

v.

TOMMIE LEE ADAMS

Appeal by defendant from judgment entered 10 March 2021 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 23 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General M. Shawn Maier, for the State.

Benjamin J. Kull for defendant-appellant.

TYSON, Judge.

¶ 1 Tommie Lee Adams ("Defendant") appeals the trial court's denial of his motion to dismiss. He also appeals his prior record level calculation and sentence. We find no error.

I. Background

¶ 2 Stephanie White ("White") and Defendant had been friends for approximately two years in February 2020. White helped Defendant with tasks, read him his mail, filled out forms, and shopped with him. Defendant was 75 years old, and White was approximately 50 years old when the following incident occurred.

¶ 3 White was present at Defendant's apartment to help him assemble a carpet cleaner and to watch television on 8 February 2020. A box cutter was used to open the carpet cleaner box and was left on the coffee table. After Defendant and White assembled the cleaner, he went to the store to purchase beer, returned home, and began cooking dinner for White and himself. White testified she consumed a beer. Defendant ingested a twenty-four-ounce beer and had started on another can. White testified Defendant became irritated and belligerent.

¶ 4 Defendant turned on music "extremely loud." White put earphones on to listen to her preferred music, while she scrolled through social media on her cellphone. White testified Defendant became further irritated because she was using the headphones and ridiculed her for being on her phone. The two began arguing. White walked to Defendant's bedroom to get her coat and purse prior to leaving Defendant's home.

¶ 5 White testified Defendant pushed her. She turned around and pushed him back. Defendant lost his balance, collided with the coffee table, and fell. White

continued to retrieve her purse and coat. She turned around and saw Defendant was swinging at her:

> I thought he was just trying to hit me. And I just kept knocking his hand out the way. . . . And that's when I looked at his hand and realized he had the box cutter in his hand. And I knocked . . . it away and knocked him down and felt something on my face, and then I touched my face and had a handful of blood.

¶ 6 White suffered lacerations on her face and chest, and her shirt was slashed. White locked herself inside the bathroom and called 911. White heard Defendant leave the apartment briefly and then return.

¶ 7 White waited for first responders to arrive outside in the yard. She was taken to the local hospital and treated with seventeen stiches in her face and twenty-nine stiches in her chest to close the wounds.

¶ 8 Defendant asserted after he had attempted to pull White's headphones out of her ears, she pushed him. He fell over onto an end table and hurt his back. Defendant claims he was holding the box cutter, but it was not open. Defendant testified White started pulling on his arms, the box cutter opened, and White was cut.

¶ 9 Defendant denied having a knife or box cutter when the police arrived. A broken silver box cutter was later recovered from the street in front of Defendant's apartment. Defendant was arrested and charged with assault with a deadly weapon with intent to kill inflicting serious injury.

¶ 10 Defendant was indicted on that charge on 20 April 2020. A jury convicted Defendant of the lesser-included offense of assault with a deadly weapon inflicting serious injury, a class E felony. Defendant was determined to be a prior record level IV. Defendant was sentenced within the presumptive range to an active term of 38 to 58 months in prison. Defendant gave oral notice of appeal.

II. Jurisdiction

¶ 11 Appellate review is proper pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

¶ 12 Defendant raises two issues on appeal. Did the trial court commit reversible error by: (1) denying his motion to dismiss when the State failed to present substantial evidence of Defendant's intent to kill; and, (2) miscalculating Defendant's prior record level at sentencing.

IV. Analysis

A. Defendant's Motion to Dismiss

¶ 13 Defendant argues the State did not present sufficient evidence to support the element of "intent to kill," and the denial of his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury was error.

1. Standard of Review

¶ 14 "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to

dismiss de novo." *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020) (citations and quotation marks omitted).

2. Argument

¶ 15 Defendant's counsel moved at the close of the State's evidence to dismiss for lack of sufficient evidence of all the elements of assault with a deadly weapon with intent to kill inflicting serious injury. The court, after hearing from both parties, found:

> circumstantial evidence in the light most favorable to the State shows that the defendant, if the evidence is to be believed, was using a very sharp object that was long enough to cause seventeen stitches to her face, twenty-nine to her chest, and had he inflicted the same wound along her neck that he did in her chest, arguably cutting her neck open like that could have wound up in substantial injuries, if not death.
>
> So in the light most favorable to the State, that particular motion to dismiss is denied.

¶ 16 The jury's verdict convicted Defendant of the lesser-included offense of assault with a deadly weapon inflicting serious injury. Presuming, *arguendo*, the trial court erred in failing to dismiss Defendant's indicted charge, he:

> must nevertheless show that this error was prejudicial. Under N.C.G.S. § 15A-1443(a) the test for prejudicial error in matters not affecting constitutional rights is whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

State v. Gardner, 316 N.C. 605, 613, 342 S.E.2d 872, 877 (1986) (citation and internal quotation marks omitted).

¶ 17 The crime of assault with a deadly weapon with intent to kill inflicting serious injury has five elements: (1) an assault; (2) on another; (3) with the use of a deadly weapon; (4) with an intent to kill; and, (5) inflicting serious injury, not resulting in death. N.C. Gen. Stat. § 14-32(a) (2021). Defendant's conviction of assault with a deadly weapon inflicting serious injury requires proof of four of those elements: (1) assault; (2) on another; (3) with a deadly weapon; and, (4) inflicting serious injury. N.C. Gen. Stat. § 14-32(b) (2021).

¶ 18 Proof of the element intent to kill is not required for conviction of assault with a deadly weapon inflicting serious injury. *See id.* The jury determined the State had not carried its burden to prove an intent to kill, and by its verdict found Defendant was not guilty of intent to kill in the indicted offense.

¶ 19 The jury was entrusted with a verdict form supplying four possible verdicts after hearing all the evidence. The jury's verdict found Defendant was guilty of the lesser-included offense of assault with a deadly weapon inflicting serious injury.

¶ 20 Defendant has failed to show a reasonable possibility that, but for the presumed error, a different result would have occurred. Upon *de novo* review, direct and circumstantial evidence supported the State's charge of assault with a deadly weapon with intent to kill inflicting serious injury to survive Defendant's motion to

dismiss. *See State v. Berkley*, 56 N.C. App. 163, 168, 287 S.E.2d 445, 449 (1982) ("Defendant has not shown that his conviction was affected by consideration of his possible guilt of the more serious crime."). The jury considered and concluded, based upon the evidence presented, Defendant's acts did not meet the element of intent to kill and returned a verdict on a lesser-included crime.

¶ 21 Defendant made no attempt to show the jury's consideration and rejection of the with intent to kill element created any likelihood of a different verdict on the lesser-included charge. Presuming error occurred, Defendant has not shown prejudice. We find no error in the trial court's denial of Defendant's motion to dismiss on the ground the jury returned a conviction on a lesser-included offense. Defendant's arguments are overruled.

B. Defendant's Record Level

1. Standard of Review

¶ 22 Defendant argues the trial court should have calculated his prior record for the crime of possession of a weapon of mass destruction based upon the classification of that offense, which existed at the time of the underlying conviction. We review the trial court's assignment of record level *de novo*. *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007) (citation omitted).

2. Analysis

¶ 23 Our statute on prior record levels provides: "Level IV — At least 10, but not

more than 13 points." N.C. Gen. Stat. § 15A-1340.14(c)(4) (2021). "In determining the prior record level, *the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed*." N.C. Gen. Stat. § 15A-1340.14(c) (emphasis supplied).

¶ 24 Defendant was convicted in 1982 of possession of a weapon of mass destruction, a Class F felony. *See* N.C. Gen. Stat. § 14-288.8(d) (2021). The operative date for determining the prior record level classification for Defendant's conviction of possession of a weapon of mass destruction conviction is 8 February 2020, the date he committed assault with a deadly weapon. *See* N.C. Gen. Stat. § 15A-1340.14(c). The trial court's determination and conclusion that Defendant's conviction for possession of a weapon of mass destruction is a felony for the purposes of calculating his prior record level is statutorily proper. *See id.* The trial court did not err in calculating his prior record as a level IV. Defendant's argument is overruled.

V. Conclusion

¶ 25 Upon *de novo* review, the trial court properly exercised the standard of review and denied Defendant's motion to dismiss at the close of the State's evidence. Defendant has failed to show he suffered reversible prejudice by receiving a lesser-included offense verdict by the jury. Defendant's prior record level was properly calculated under the statute. *See id.*

¶ 26 Defendant received a fair trial, free from prejudicial errors he preserved and

argued. We find no error in the jury's verdict or in the judgment enter thereon. *It is so ordered.*

NO ERROR.

Judges ARROWOOD and CARPENTER concur.

Report per Rule 30(e).