An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-1218

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Guilford County
No. 00 CRS 96123

GWENDOLYN MARIE ALSTON

Appeal by defendant from judgment entered 22 January 2001 by Judge Henry E. Frye, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 13 June 2002.

Roy Cooper, Attorney General, by Daniel D. Addison, Assistant Attorney General, for the State.

Miles & Montgomery, by Lisa Miles, for defendant-appellant.

THOMAS, Judge.

Defendant, Gwendolyn Marie Alston, appeals a conviction of assault with a deadly weapon inflicting serious injury. She asserts two assignments of error, including that the trial court should have instructed the jury on self-defense and defense of others. For the reasons discussed herein, we find no error.

The State's evidence tends to show the following: Defendant is Tonya Alston's mother. On 15 July 2000, fifteen year-old Shantina Smith and Tonya arranged to fight one another after school. Smith walked to Tonya's home with two of her siblings, a friend, and her cousin, Tarisha Chavis. Smith was carrying a wooden stick,

approximately one foot long and two inches thick.

When Smith arrived, Tonya and a friend were waiting on the porch. The two sides were measuring each other up when defendant drove into the driveway. Defendant declared the fight would be fair, one on one with no one else joining in.

Tonya and Smith began fighting, and soon fell to the ground, still struggling with each other. As Smith gained the upper hand against Tonya, defendant hit Smith in the face with a bat. Smith and her cousin, Chavis, then began to fight with defendant. Defendant punched Chavis in the nose. The fight ended when a neighbor intervened and sent Smith home.

When Smith arrived at her home, she telephoned her mother, who immediately went home and took her for medical care. Eight stitches were required to close a laceration over Smith's eye. Officers J. E. Combs and Steve Simpson of the Greensboro Police Department took a report and subsequently arrested defendant. In her statement to the officers, defendant said she struck Smith with the bat because she was afraid Smith would hit her as well as her daughter.

Defendant's evidence tends to show the following: Smith hit Tonya with the bat, with defendant then grabbing the bat from Smith. After Chavis attempted to get the bat from defendant, defendant punched Chavis in the face. Defendant threw the bat into the street. Tonya picked up the bat and hit Smith with it. The only person on the ground was Chavis, who was being held down by defendant. After Tonya hit Smith with the bat, Smith ran home and

the fight ended.

Defendant was found guilty in a jury trial of assault with a deadly weapon inflicting serious injury as to Smith. She pled guilty to simple assault against Chavis. Defendant was sentenced to a minimum term of twenty-three months and a maximum of thirty-seven months in the North Carolina Department of Correction. The sentence was suspended with defendant placed on thirty-six months of supervised probation. As part of the split sentence, defendant also was ordered to spend ninety days in jail. Defendant appeals.

By her first assignment of error, defendant argues the trial court committed plain error by refusing to instruct the jury on self-defense and defense of others where the evidence required such instructions. We disagree.

We note that defendant did not object to the jury instructions. Consequently, we review this argument under a plain error analysis. N.C.R. App. P. 10(b)(2). Plain error is "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) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

"A defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-defense." *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) (citations omitted). However, self-defense is only available to "'a person who is without fault,

and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.'" *State v. Skipper*, 146 N.C. App. 532, 553 S.E.2d 690 (2001)(quoting *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977)).

In the instant case, there is no evidence in the record which would support even an inference that defendant did not voluntarily enter into the altercation. In fact, it was defendant who set the ground rules. She was therefore an integral part of the fracas from the beginning. There is no evidence that either Smith or Chavis drew defendant into the fight nor that defendant ever abandoned or withdrew from the fight once she entered it. Moreover, our Supreme Court has stated that one's right to defend another is no greater than the right to defend oneself. *See State v. Gaddy*, 166 N.C. 341, 81 S.E. 608 (1914). There is no evidence that justice was not done because of a fundamental error that was prejudicial. Accordingly, we hold defendant has not shown plain error and we reject defendant's argument.

By her second assignment of error, defendant argues the trial court erred in denying her motion to dismiss at the close of the State's evidence and at the close of all the evidence. We disagree.

A motion to dismiss is properly denied if "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). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

The elements of the crime for which defendant was convicted are: "an assault, the use of a deadly weapon, and the infliction of serious injury, not resulting in death." *State v. Daniels*, 59 N.C. App. 63, 65, 295 S.E.2d 508, 510 (1982). Here, the State presented evidence that defendant attacked Smith with a bat that resulted in injury to Smith's eye. Hitting someone with an object is clearly an assault. This Court has previously upheld a baseball bat as a deadly weapon where it was viciously used. *See State v. Parker*, 7 N.C. App. 191, 171 S.E.2d 665 (1970). A "serious injury" is one that falls short of death, but is physical or bodily injury resulting from an assault with a deadly weapon. Smith's injury to her face which required eight stitches falls into this category. As such, we hold that the State's evidence was sufficient for the trial court to deny defendant's motion to dismiss. Accordingly, we reject defendant's argument and find no error.

NO ERROR.

Judges MARTIN and TYSON concur.

Report per Rule 30(e).