NO. COA01-1486

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 99 CRS 33455
99 CRS 33456

DAVID BRUTON SMITH

Appeal by defendant from judgment entered 9 August 2001 by Judge L. Oliver Noble in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Teresa L. White, for the State.

James, McElroy & Diehl, P.A., by Lawrence W. Hewitt, and The Bailey Law Firm, by Allen A. Bailey, for defendant-appellant.

THOMAS, Judge.

Defendant, David Smith, appeals convictions of simple assault and injury to personal property. His thirty-day sentence was suspended and he was placed on unsupervised probation for eighteen months. Defendant was ordered to pay $885.27 in fines, court costs and restitution, and was ordered to complete an anger management class.

The State presented evidence at trial which tends to show the following: On 24 July 1999, defendant and four friends took his mother's boat to Lake Norman. After a couple of hours riding on

the lake, defendant noticed that the boat's engine was overheating. He pulled the engine cover up and noticed that a belt had come loose so he decided to have the boat towed.

Defendant contacted Lazar Kay, who operated a commercial rescue service. Kay told defendant that he charged "portal-to-portal $100 an hour." Defendant agreed. Kay went to where the boat was stranded and defendant pointed in the direction he wanted Kay to tow the boat. Kay towed defendant's boat to the cove where defendant's mother lived but noticed that the water was shallow. Then, Kay

> decided to do what we normally do when we're trying to put a boat in dock; that is, bring the boat alongside of our boat to move it into the dock, rather than to try and tow them at the end of a . . . line, and possibly let him go aground.

According to Kay, when he pulled the boat alongside defendant's boat, defendant became abusive, demanded to know what Kay was doing, and began questioning if Kay knew what he was doing. Because of the tone of the conversation, Kay asked for payment for the tow before they reached the dock. Kay requested $150, since he had spent an hour and a half in total since leaving his dock. Defendant refused to pay. Kay told defendant if he refused to pay, he had the right to take the boat to his own dock. At that point, Kay put the boat into first gear so that the lines between the boats would tighten up, and the boats bumped into each other, the fenders of the boats taking the shock of the blow.

After the boats bumped, defendant jumped into Kay's boat, grabbed Kay's arm with one hand, reached down and took the keys out

of the ignition and threw them into the water. When Kay went to get his cell phone to call 911, defendant grabbed the phone out of his hand and threw it in his boat, with the battery coming loose and falling into the water. Defendant then jumped back into his boat, untied the lines, pushed the boat away and paddled to shore.

Kay radioed for help, and was eventually towed into Kings Point, where an ambulance and a policeman were waiting. The skin on Kay's arm where defendant had grabbed him was torn and bleeding, and paramedics wrapped the arm in a bandage.

Defendant's evidence tends to show the following: Defendant believed Kay was overcharging him and that the tow should have cost $100, not $150. Defendant testified that when Kay threatened to take the boat to Kay's own dock, he thought Kay was "not thinking right . . . . [H]e's just mad." Defendant then decided to untie the line from the boat. When he did so, Kay put his boat in full throttle, and the boats slammed together, just about sending everybody into the water. Defendant then jumped into Kay's boat, grabbed Kay to restrain him, and pulled the throttle back into neutral. Defendant contended he reacted because he thought he and his friends were in "danger." Defendant stated that Kay then agreed to take them home. Defendant testified that he thought the ignition key had a "flotation device" attached and would float when he threw it into the water. Defendant additionally testified that he threw the phone into his boat because he "knew that making a phone call had nothing to do with taking us home[.]" Defendant asserted that he never intended to destroy the phone or hurt Kay.

Defendant's sole argument on appeal is that there was insufficient evidence to support the verdicts. First, defendant argues that the State failed to prove that he committed an assault because the evidence shows that he was merely attempting to stop Kay from damaging the boat or injuring others. Second, defendant argues that the State failed to show defendant's actions in grabbing Kay's cell phone and tossing it into his boat constituted a conscious and intentional disregard or indifference to the rights and safety of Kay. Defendant contends such a showing was necessary to show a wanton injury of property. We disagree.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)).

"All that is necessary to sustain a conviction for assault is evidence of an overt act showing an intentional offer by force and violence to do injury to another sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm." *State v. Musselwhite*, 59 N.C. App. 477, 481, 297 S.E.2d 181, 184 (1982)(citing *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967)). Here, the State presented evidence that defendant jumped in Kay's boat and grabbed his arm, causing injury. This evidence, when viewed in the light most favorable to the State, was

sufficient in itself to submit this case to the jury. Defendant's arguments that he was provoked and that he grabbed Kay only to disengage his boat goes to the weight of the evidence and not the sufficiency of the evidence on a motion to dismiss. *See State v. Haynesworth*, 146 N.C. App. 523, 527, 553 S.E.2d 103, 107 (2001)("When considering a motion to dismiss, the trial court 'is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight.' Any contradictions or discrepancies in the evidence are for resolution by the jury and do not warrant dismissal.").

As to defendant's argument that there was insufficient evidence that he intentionally injured Kay's property, it is likewise without merit. Pursuant to N.C. Gen. Stat. § 14-160(a), a person is guilty of a Class 2 misdemeanor if he should "wantonly and willfully injure the personal property of another." In order to prove that defendant's actions were "willful or wanton," the State need not prove malice. *State v. Casey*, 60 N.C. App. 414, 417, 299 S.E.2d 235, 237 (1983) (citing *State v. Sneed*, 121 N.C. 614, 28 S.E. 365 (1897)).

> "[W]ilful as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law." "Wantonness . . . connotes intentional wrongdoing. . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others."

Id. at 416-17, 299 S.E.2d at 237 (citations omitted). Here, defendant's action was wanton because it was a conscious and

intentional act done in disregard of Kay's property rights in the cell phone. *Id.* There was no "justification or excuse" for taking the phone from Kay and throwing it in his boat. *Id.* Accordingly, we find no error.

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).