

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-771

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

STATE OF NORTH CAROLINA

v.

Pasquotank County
Nos. 00 CRS 0328
00 CRS 0329

DONALD EUGENE CHAMBERS

Appeal by defendant from judgments dated 28 February 2001 by Judge W. Russell Duke, Jr. in Superior Court, Pasquotank County. Heard in the Court of Appeals 20 May 2001.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

Paul Pooley for defendant-appellant.

McGEE, Judge.

Donald Eugene Chambers (defendant) was indicted on charges of (1) assault with a deadly weapon with intent to kill inflicting serious injury on Gwenette Renea Askew (Officer Askew) in violation of N.C. Gen. Stat. § 14-32(a), (2) assault with a deadly weapon on Officer Askew, a law enforcement officer, in violation of N.C. Gen. Stat. § 14-34.2 and (3) assault on Kimberly Paul (Officer Paul), a law enforcement officer, in violation of N.C. Gen. Stat. § 14-33.

Evidence for the State at trial tended to show the following. Officer Askew, a correctional officer at Pasquotank Correctional Center (the prison), testified that on the night of 20 December

1999 she was on duty at the prison. She saw defendant and another inmate playing cards and told them to take off their "wave cap," or head rag, because the caps were not supposed to be worn while inmates were outside their cells. Officer Askew stated that defendant responded, "I don't want to hit at s[---]" and that defendant was "getting hostile." Officer Askew went to a control room at the prison to complete her paperwork before her shift ended. While doing her paperwork, Officer Askew was notified by a fellow officer that an inmate wanted to speak with her. Officer Askew went to the inmate dormitory area, and she then followed defendant into the staff break room. Officer Askew stopped in the doorway and defendant told her not to tell him what to do and put his finger in her face. Officer Askew reached for her handcuffs and defendant hit her on the left side of her face. She turned to run to a nearby gate, but it was closed. When Officer Askew turned around, defendant was "standing directly in [her] face." Defendant grabbed Officer Askew and threw her up against a shower made of solid glass and "kept . . . hitting [her] in [her] face." Officer Askew stated that after about four hits she "stopped counting and didn't feel anything else." She tried to spray defendant with pepper spray but her spray did not work.

Officer Paul, another correctional officer at the prison, entered the room and grabbed defendant. Defendant picked her up and threw her down on the concrete floor. Officer Paul got up and again grabbed defendant. Officer Askew hit defendant one time, and then he grabbed something out of the front of his pants and started

hitting Officer Askew on her chest, back and neck.

Officer Askew testified that Sergeant Victor Mason (Sergeant Mason), a correctional officer at the prison, entered the room and he, Officer Paul, and Officer Askew sprayed defendant with pepper spray. Officer Jennings, a correctional officer at the prison, came in, grabbed defendant, and hit him with a baton. Officer Askew was taken into the sergeant's office. She stated she was bleeding but she did not know where the blood was coming from. She testified that she "[j]ust laid there and was gasping for breath. My whole left side-- I didn't have any feeling on the left side so I knew I was hurt on the left side."

Officer Askew was taken to the emergency room of Albemarle Hospital where it was determined that she had been stabbed twice in the back, with one wound close to her lungs. She also had a wound in her chest, was nicked on her neck, and her jaw was "knocked out of place." She remained in the emergency room until the next day. She was prescribed painkillers for two weeks and she was "real sore" for three or four days. She stated that it was very painful for her to wash her wounds as she was required to do three times a day. Officer Askew testified that she will have scars from the wounds for the rest of her life. At the time of trial she had not returned to work. She stated she was currently under the care of a psychiatrist, took sleeping pills, and had flashbacks and nightmares about the incident.

Officer Paul testified that she saw defendant pin Officer Askew up against a wall and hit her. Officer Paul saw that

defendant had a homemade shank -- a homemade knife -- in his hand and that defendant was "thrusting it" at Officer Askew. Officer Paul tried to knock the shank out of defendant's hand but he hit her and knocked her to the floor.

Officer Christy Jordan, a control booth officer at the prison, testified she saw defendant hit and stab Officer Askew around her chest and neck area, and saw blood on Officer Askew's back.

Sergeant Mason testified that he saw Officer Askew "against the wall holding her throat" and he "observed blood on her shirt and blood coming from between her fingers." Sergeant Mason got between defendant and Officer Askew and sprayed defendant with pepper spray. He yelled at defendant to drop the shank. Defendant dropped the shank and other officers arrived and handcuffed defendant.

At the close of the State's evidence, defendant moved to dismiss the charges against him, which the trial court denied. Defendant did not present any evidence. At the close of all the evidence, defendant renewed his motion to dismiss, which the trial court denied.

The jury found defendant guilty of: (1) assault with a deadly weapon with intent to kill inflicting serious injury on Officer Askew, (2) assault with a deadly weapon on Officer Askew, a correctional officer, and (3) assault on Officer Paul, a correctional officer. The trial court sentenced defendant to a term of 168 to 211 months in prison for assault with a deadly weapon with intent to kill inflicting serious injury; thirty-nine

to forty-seven months for assault with a deadly weapon on a law enforcement officer, and 150 days for assault on a law enforcement officer. All sentences were to run consecutively and consecutive to all other sentences which defendant was previously serving. Defendant appeals.

In the record on appeal, defendant raises five assignments of error; however, in his brief to our Court he argues only assignments of error numbers four and five. The assignments of error not argued in defendant's brief are deemed abandoned. N.C.R. App. P. 28(a). ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.").

I.

Defendant first argues the trial court erred in imposing punishment upon him for both assault with a deadly weapon with intent to kill inflicting serious injury in violation of N.C. Gen. Stat. § 14-32(a) and assault with a deadly weapon on a law enforcement officer in violation of N.C. Gen. Stat. § 14-34.2.

N.C. Gen. Stat. § 14-32(a) (1999) provides that "[a]ny person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon." N.C. Gen. Stat. § 14-34.2 (1999) states that

[u]nless a person's conduct is covered under some other provision of law providing greater punishment, any person who commits an assault with a firearm or any other deadly weapon upon an officer or employee of the State . . . , in the performance of his duties shall be guilty of a Class F felony.

Defendant concedes in his brief that the two offenses are separate and distinct offenses for which a defendant may be punished without offending double jeopardy principles, with each crime containing an element not required to be proven in the other crime. Defendant argues, however, that "the language of G.S. § 14-34.2 prohibits punishment for the same conduct under that statute when a defendant, as in the case here, is prosecuted, convicted, and punished for the same conduct under a statute providing for greater punishment." Defendant states that his argument "turns on whether the same conduct is covered under another provision of law providing greater punishment, and the legislative enactment that in such a case a defendant may not be punished under G.S. § 14-34.2."

The State contends the "conduct" referred to in N.C.G.S. § 14-34.2 is the conduct of assaulting a law enforcement officer with a deadly weapon, and such "conduct" is not "covered" by N.C.G.S. § 14-32, which does not mention law enforcement officers.

Our Court in *State v. Coria* held that the General Assembly clearly intended "to authorize cumulative punishments for those who, by a single act, violate both G.S. § 14-32(c) and G.S. § 14-34.2." *State v. Coria*, 131 N.C. App. 449, 457, 508 S.E.2d 1, 6 (1998). In *Coria*, the defendant was sentenced based upon convictions for both assault with a deadly weapon upon a law enforcement officer in violation of N.C.G.S. § 14-34.2, and assault with a deadly weapon with intent to kill in violation of N.C.G.S. § 14-32(c). Both offenses arose from the same act of shooting at a law enforcement officer.

Our Court first determined in *Coria* that N.C.G.S. § 14-32(c) and N.C.G.S. § 14-34.2 are separate offenses for which a defendant may be punished. We next considered the distinct legislative purposes underlying each statute and concluded that the General Assembly in fact intended that a defendant could properly be separately punished for each violation. We stated that "[t]he essence of G.S. § 14-34.2 'is the legislative intent to give greater protection to the law enforcement officer by proscribing a greater punishment for one who knowingly assaults such an officer.'" *Coria*, 131 N.C. App. at 456, 508 S.E.2d at 6 (quoting *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985), *disc. review denied*, 326 N.C. 51, 389 S.E.2d 96 (1990)). "On the other hand, the stated purpose of G.S. § 14-32(c) is to protect life or limb." *Id.* (citing *State v. Cass*, 55 N.C. App. 291, 285 S.E.2d 337, *disc. review denied*, 305 N.C. 396, 290 S.E.2d 366 (1982)). "Thus there is a clear indication that the legislature intended to authorize cumulative punishments for those, who, by a single act, violate both G.S. § 14-32(c) and G.S. § 14-34.2" and the trial court did not err in so punishing the defendant. *Coria*, 131 N.C. App. at 457, 508 S.E.2d at 6.

Defendant in the case before us was convicted of two offenses arising out of the same act. Defendant contends that because a violation of N.C.G.S. § 14-32(a) imposes a greater punishment than a violation of N.C.G.S. § 14-34.2, the General Assembly intended that defendant not be additionally punished for the same conduct under N.C.G.S. § 14-34.2.

The legislative purpose of N.C.G.S. § 14-34.2 is to impose greater punishment upon those who knowingly assault a law enforcement officer, thus giving law enforcement officers greater protection. *Coria*, 131 N.C. App. at 456, 508 S.E.2d at 6. The stated legislative purpose of N.C.G.S. § 14-32(a), like N.C.G.S. § 14-32(c), is to protect life and limb. *Id.* Thus, the General Assembly did intend, in cases like the one before us, to authorize cumulative punishments for those who, by a single act, violate both N.C.G.S. § 14-32(a) and N.C.G.S. § 14-34.2.

Although the language of N.C.G.S. § 14-34.2 does limit its application in certain circumstances, those circumstances are not before us. Rather, if assault with a firearm or any other deadly weapon upon a law enforcement officer in the performance of the officer's duties imposes a greater punishment under some other provision of law, that greater punishment applies. However, if there is no greater punishment provided under some other provision of law, such as N.C. Gen. Stat. § 14-34.5 which imposes Class E felony punishment for assault with a firearm on a law enforcement officer in the performance of the officer's duties, the defendant shall be sentenced as a Class F felon. In this case, defendant was not convicted under any other provision of the law that would punish him for his conduct of assaulting a law enforcement officer as proscribed by N.C.G.S. § 14-34.2. Therefore, separate punishments were properly imposed on defendant who, by a single act, violated both N.C.G.S. § 14-32(a) and N.C.G.S. § 14-34.2. Defendant's fifth assignment of error is overruled.

II.

Defendant next contends the trial court erred in its peremptory instruction to the jury on the "serious injury" element of the charge of assault with a deadly weapon with intent to kill inflicting serious injury on Officer Askew. Specifically, defendant argues that the trial court erred in instructing the jury that "[p]hysical stab wounds to the upper body or upper part of the body would be a serious injury."

According to defendant, whether a serious injury has occurred is a question for the jury and in this case, reasonable minds could differ as to the seriousness of Officer Askew's injuries. By giving the jury the peremptory instruction, defendant argues that the trial court "relieved the state of its obligation to prove each element to a unanimous jury beyond a reasonable doubt" and "had a probable impact on the jury's finding that the defendant was guilty of the greater offense because they did not need to prove this critical element to the satisfaction of a unanimous jury."

Defendant is correct that "[w]hether a serious injury has been inflicted depends upon the facts of each case and is *generally* for the jury to decide under appropriate circumstances." *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991) (emphasis added), *cert. denied*, 529 U.S. 1006, 146 L. Ed. 2d 223 (2000) (citing *State v. James*, 321 N.C. 676, 365 S.E.2d 579 (1988)). When determining whether a serious injury was inflicted, "[a] jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is

serious." *Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318 (citing *State v. Owens*, 65 N.C. App. 107, 308 S.E.2d 494 (1983)). "Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury." *Id.* (citing *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978)). Our Court has held that "[i]n the absence of conflicting evidence, a trial judge may instruct the jury that injuries to a victim are serious as a matter of law if reasonable minds could not differ as to their serious nature." *Hedgepeth*, 330 N.C. at 54, 409 S.E.2d at 318-19.

Defendant did not present any evidence. Therefore, we determine only whether reasonable minds could differ as to the seriousness of Officer Askew's injuries from the State's evidence, since there is no conflicting evidence as to the officer's injuries.

The evidence in the case before us shows that Officer Askew suffered stab wounds to her chest and back, with one wound close to her lungs, as well as a "nick" to her neck. These injuries were inflicted by defendant with a homemade shank. Officer Askew testified that after she was stabbed, she was bleeding, she was gasping for breath, and she could not feel the left side of her body. Officer Askew was taken to the hospital where she stayed in the emergency room until the next day. She testified that she was on pain killers for two weeks and was "real sore" for three or four days. She stated that it was very painful for her to wash her wounds as she was required to do three times a day. Officer Askew testified that she still had scars at the time of trial and would

have them "for . . . life." Further, she stated that she had not returned to work at the time of trial.

From the evidence presented at trial by the State, we do not find that reasonable minds could differ as to the seriousness of Officer Askew's injuries. The trial court did not err in its instruction to the jury. Defendant's fourth assignment of error is overruled.

No error.

Chief Judge EAGLES and Judge TYSON concur.

Report per Rule 30(e).