NO. COA02-20

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

STATE OF NORTH CAROLINA

v. Carteret County
No. 01 CRS 50553

SHIRROD HENDERSON WARREN

Appeal by defendant from judgment entered 8 June 2001 by Judge James L. Baker in Superior Court, Carteret County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Ann B. Wall, for the State.

Sofie W. Hosford for defendant-appellant.

WYNN, Judge.

Defendant Shirrod Henderson Warren was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tends to show that on 13 February 2001, defendant and two friends went to an apartment shared by defendant's cousin, Henry Ward, and Michael Sherrod. Defendant entered Ward's room and talked to him about Sherrod's girlfriend, Gail Willis, who he believed was interfering in his relationship with his girlfriend. Sherrod overhearing the conversation, became upset and confronted defendant. Defendant and Sherrod began to

argue and defendant asked Sherrod to "cool down." Ward asked them to take the argument outside. Sherrod, however, continued to argue and told defendant that he "would stick a gun in [defendant's] mouth." Thereafter, Sherrod returned to his room to get dressed, when Sherrod came out of the room, he moved quickly toward defendant. Sherrod disregarded all attempts by others to calm him down, and continued into the kitchen, whereupon defendant stabbed Sherrod approximately seven or eight times from behind. Sherrod reacted by grabbing defendant and slamming him against the refrigerator. Subsequently, the two were separated by defendant's friends and defendant dropped the knife.

Sherrod was taken to the hospital, where he underwent emergency surgery and was hospitalized for three days. Sherrod testified that he can no longer perform his job duties in construction due to his injuries.

Officer Samuel Smith, of the Morehead City Police Department, testified that defendant was at all times cooperative with the police in their investigation. Officer Smith stated that defendant told police during his initial interview that he and Sherrod were having an argument, when "Sherrod told him sit right here and I am going to get something and come back and show you. . . . And he stated that he took this to mean that the victim was going to get a gun and come back and shoot him." It was not until a second interview the officer stated that defendant told police Sherrod "actually stated that he was going to get a gun."

After the State's presentation of evidence, defendant

testified on his own behalf. Defendant stated that after the 13 February 2001 altercation with Sherrod, he called 911 from the scene, and later called the Morehead City Police Department from K-mart. Defendant further stated that he stabbed Sherrod because Sherrod had threatened to shoot him and he believed that Sherrod had gone to his bedroom to obtain a gun. He explained, "I didn't want to get shot and it was a knife on the kitchen table and when he got close enough to me I grabbed the knife and started sticking him. I figured that I would stick him until he dropped the gun or until he left me alone."

At the close of all of the evidence, defendant moved to dismiss the charge against him, which was denied by the trial court. The jury then found defendant guilty of assault with a deadly weapon inflicting serious injury and the trial court, imposed an intermediate punishment and placed defendant on supervised probation for 48 months. Defendant appeals.

While defendant argues "plain error" in the trial court's denial of his motion to dismiss, the record shows that he properly preserved the issue of the sufficiency of the evidence for appellate review pursuant to N.C.R. App. P. 10(b)(3). *See* N.C.R. App. P. 10(b)(3) (2001)(providing that regardless of whether a defendant makes a motion to dismiss at the close of the State's evidence, he "may make a motion to dismiss . . . at the conclusion of all the evidence"). As an aside, we note that contrary to defendant's belief, "plain error" analysis is not available in this jurisdiction to determine the issue of the sufficiency of the

evidence. *See State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (2000) (stating that "plain error analysis applies only to instructions to the jury and evidentiary matters"); N.C.R. App. P. 10(b)(3) (providing failure to preserve the issue of the sufficiency of the evidence precludes appellate review of the issue on appeal). The standard of review on a motion to dismiss based upon insufficiency of the evidence is well settled:

> [I]n ruling on a motion to dismiss for insufficiency of the evidence, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom . . . If there is substantial evidence, either direct or circumstantial, that the defendant committed the offense charged, then a motion to dismiss is properly denied.

State v. Gainey, 355 N.C. 73, 89, 558 S.E.2d 463, 474 (2002) (citations omitted). Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citations omitted). "Contradictions and discrepancies [in the evidence] are for the jury to resolve and do not warrant [dismissal]." *State v. Pallas*, 144 N.C. App. 277, 286, 548 S.E.2d 773, 780 (2001).

By his first assignment of error, defendant argues that there was insufficient evidence to support the instant assault charge since he established that he acted in self-defense as a matter of law. We disagree.

Our Court recently reiterated, "'The theory of self-defense entitles an individual to use such force as is necessary or

apparently necessary to save himself from death or great bodily harm.'" *State v. Poland*, ___ N.C. App. ___, ___, 560 S.E.2d 186, 192 (2002) (citations and quotations omitted). A defendant is entitled to perfect self-defense if:

> (1) it appeared to defendant and he believed it to be necessary to kill . . . in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person or ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray . . .; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. McAvoy, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)). In the event that the defendant was the aggressor, and did not first abandon the fight and give notice to his adversary of his intent to abandon the fray, or used excessive force in defending himself, the law of imperfect self-defense (and not perfect self-defense) is to be applied. "The State has the burden of proving that a defendant is not entitled to the defense." *Poland*, ___ N.C. App. at ___, 560 S.E.2d at 192.

In the case *sub judice*, the State presented evidence from which a reasonable finder of fact could find that defendant used excessive force in defending himself in the 13 February 2001

altercation with Michael Sherrod. All of the evidence shows that Sherrod was the aggressor in the affray. Indeed, the evidence tends to show that initially the altercation between defendant and Sherrod consisted of only a heated verbal exchange. As the argument escalated, Sherrod threatened to "stick a gun" in defendant's mouth. Although Sherrod denied doing so, defendant testified that Sherrod told him that he would kill him. According to defendant, he thought that Sherrod was going to retrieve a weapon when he turned and went into his bedroom after threatening to "stick a gun" in defendant's mouth. Defendant, therefore, assumed that Sherrod had a weapon when Sherrod exited his bedroom and began to move into the kitchen towards defendant. Assuming that this were all true, it became readily apparent that Sherrod was not armed after defendant stabbed him for the first time below his ear, and Sherrod turned with both hands raised to block another blow. However, the evidence shows that defendant continued to stab Sherrod at least some five or six more times. Such action by defendant was surely excessive in light of the fact that Sherrod was unarmed, and defended himself from defendant's knife attack by grabbing defendant and slamming him against the refrigerator.

In light most favorable to the State, there was sufficient evidence to support a conclusion that defendant did not act in reasonable self-defense, because of the excessive force utilized. Accordingly, the trial court did not err in denying defendant's motion to dismiss. This assignment of error is, then, overruled.

By his second assignment of error, defendant argues that the

evidence was insufficient to show that he intended to kill the victim, so as to support a charge of assault with a deadly weapon with intent to kill inflicting serious injury. We, however, conclude that defendant cannot show prejudicial error in the trial court's denying his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury, in that defendant was convicted of the lesser included offense of assault with a deadly weapon inflicting serious injury, an offense which does not require a showing of an intent to kill. *See e.g., State v. Bryant*, 282 N.C. 92, 101, 191 S.E.2d 745, 751 (1972) (holding the denial of the defendant's motion to dismiss the charge of second degree murder harmless, where the jury returned a verdict finding the defendant guilty of the lesser offense of manslaughter); *State v. Williamson*, 122 N.C. App. 229, 468 S.E.2d 840 (1996) (holding that the trial court's instruction as to specific intent on the charge of assault with a deadly weapon with intent to kill inflicting serious injury was harmless error, where the defendant was convicted of the lesser offense of assault with a deadly weapon inflicting serious injury). This assignment of error is, therefore, summarily overruled.

Having so concluded, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges McGEE and CAMPBELL concur.

Report per Rule 30(e).