NO. COA09-284

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 07 CRS 244215, 244217
DWAYNE ANTHONY JACKSON 08 CRS 7607

Appeal by defendant from judgment entered 3 September 2008 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 7 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Hartsell & Williams, P.A., by *Christy E. Wilhelm, for Defendant-Appellant.*

WYNN, Judge.

Defendant Dwayne Anthony Jackson appeals from a conviction by jury of assault on a female. He argues the trial court erred by denying his motion to dismiss and for giving the jury an "*Allen* charge" when it was hung on one of two charges. After carefully reviewing the record, we find no error.

The State's evidence tends to show that Danielle Bell and Defendant had been dating for nearly one year when an altercation took place on 19 September 2007. On that day, they were breaking up and Defendant was moving out of Ms. Bell's home. That evening, Defendant returned to the house and knocked on the door. Ms. Bell

did not answer, but looked outside and saw Defendant stabbing all four tires on her car with a knife. She opened the door to say something, and he ran inside. Defendant yelled at her, pulled her hair, and hit her in the face. Ms. Bell tried to exit the house, but Defendant began slamming the door shut on her arm. Finally, a neighbor yelled at Defendant, and he left the scene.

Officer Shane Lawrence responded to a domestic disturbance call made shortly after the incident. He arrived at Ms. Bell's residence and saw the car with four flat tires in the driveway. He spoke with Ms. Bell about the encounter with Defendant. Officer Lawrence observed that Ms. Bell was upset and that she had a small mark above her left eye. He testified that Ms. Bell identified a clump of hair on the floor that was pulled out during the struggle. He could not identify where on Ms. Bell's head the clump of hair came from, and he did not see any bruising on her arm; however, he testified that bruising may appear one or two days after an injury. Officer Lawrence took pictures of the crime scene and pictures were also taken of Ms. Bell's injuries later that same day. Ms. Bell's statement to the magistrate on the night of 19 September 2007 indicated that Defendant stabbed holes in her tires, grabbed her by the neck, hit her in the face with his fist, pulled her hair, and closed her fist in the door.

Ms. Bell and Defendant continued to date after the incident until March 2008 because Defendant apologized and told Ms. Bell that he would "do better." On 11 January 2008, Ms. Bell wrote a letter recanting the statements she made on 19 September 2007 and

stating that she did not consider Defendant a threat, nor was she afraid of him. She had the letter notarized and sent it to Defendant's attorney. She testified that she wrote the letter because she and Defendant were back together, and she did not want him to get in trouble. Ms. Bell added that Defendant asked her to write the letter, though she did not feel threatened into doing so.

At the close of the State's evidence, Defendant moved to dismiss the charges, and the court denied the motion. Defendant did not present any evidence. Out of the presence of the jury, Defendant admitted to two prior convictions for assault that were less than fifteen years old for purposes of a habitual misdemeanor assault charge.

After the trial court instructed the jury, deliberations commenced. The jury deliberated for about fifty-five minutes until the trial court dismissed them for the day. The following morning, the jury deliberated approximately forty minutes before sending a note to the judge stating that it had reached a verdict on one charge, but was "hung up" on the other charge. The judge informed counsel that he would give the jury an *Allen* charge and proceeded to give an instruction consistent with N.C. Gen. Stat. §15A-1235 (2008). When the judge asked if there were any objections to the instruction, defense counsel stated, "[n]o, your Honor." The jury was then allowed to resume its deliberations.

The jury returned verdicts of guilty of assault on a female inflicting physical injury and of injury to personal property. Defendant subsequently admitted to habitual felon status, and the

trial court conducted a plea colloquy, consolidating the offenses of habitual misdemeanor assault, injury to personal property, and habitual felon status into one judgment. Defendant stipulated to prior record level II offender status, and the trial court sentenced him to one active term of 92 to 120 months imprisonment with credit for time served.

We note that Defendant did not give oral notice of appeal in the trial court, and the record on appeal does not contain a written notice of appeal. *See* N.C.R. App. P. 4(a) (2007). Moreover, the record on appeal in a criminal action shall contain "a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally..." N.C.R. App. P. 9(a)(3)(h). "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (citations omitted), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). However, "Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner." *Anderson v. Hollifield,* 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997). Accordingly, we grant certiorari and reach the merits of Defendant's appeal. *See id.; State v. Sexton*, 141 N.C. App. 344, 346, 539 S.E.2d 675, 676 (2000).

Defendant argues the trial court erred by: (I) denying his motion to dismiss the charge of assault on a female because the State presented insufficient evidence; and (II) giving the jury an

"*Allen* charge" when the jury was deadlocked on one of two charges of assault and injury to personal property.

I.

In his first argument, Defendant contends the trial court erred by denying his motion to dismiss for lack of sufficient evidence that he committed assault on a female. We disagree.

In reviewing the denial of a motion to dismiss, this Court must view the evidence in the light most favorable to the State, giving the State all reasonable inferences to be drawn from the evidence. *State v. Taylor*, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994). Any discrepancies or contradictions in the evidence must be resolved in favor of the State. *Id.* Substantial evidence must be presented as to each essential element of each offense charged. *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted). Evidence may be direct or circumstantial. *State v. Jenkins*, 167 N.C. App. 696, 699, 606 S.E.2d 430, 432, *aff'd per curiam*, 359 N.C. 423, 611 S.E.2d 833 (2005).

The elements of assault on a female are: "(1) an assault (2) upon a female person (3) by a male person (4) who is at least eighteen years old." *State v. Wortham*, 318 N.C. 669, 671, 351 S.E.2d 294, 296 (1987); N.C. Gen. Stat. § 14-33(c)(2) (2007). Assault on a female may be proven by finding either an assault or a battery of the victim. *State v. Britt*, 270 N.C. 416, 418, 154 S.E.2d 519, 521 (1967). "'[A]n assault is an intentional attempt,

by violence, to do injury to the person of another." *Id.* at 419, 154 S.E.2d at 521 (citation omitted). Battery "is an assault whereby any force is applied, directly or indirectly, to the person of another." *Id.* at 418, 154 S.E.2d at 521.

Here, evidence was presented that Defendant, a male over eighteen years old, hit Ms. Bell in the face, pulled her hair out, and slammed her arm in a door in a manner to effect injury. The evidence included photographs of Ms. Bell taken after the incident, a statement made to the magistrate, Ms. Bell's testimony, and the testimony of a police officer who arrived at the scene shortly after the incident. Taken in the light most favorable to the State, the evidence is sufficient to survive a motion to dismiss. Any issues regarding a witness's credibility are for the jury to resolve. *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). Accordingly, we hold that the State presented substantial evidence that Defendant committed assault on a female. The trial court did not err in denying Defendant's motion to dismiss.

II.

In his second argument, Defendant contends the trial court erred by giving the jury an "*Allen* charge" upon being informed the jury had reached a verdict on one of the counts, but was hung on the other count. We disagree.

Defendant neither objected nor moved for a mistrial after the jury announced that it was deadlocked or after the trial court gave

the *Allen* charge. Defendant therefore asks us to review this issue for plain error. However, we note that a panel of this Court recently held that plain error review is not available to review a trial court's decision to give an *Allen* charge instead of declaring a mistrial. *See State v. Holmes*, __ N.C. App. __, __, __ S.E.2d __ (filed 3 March 2009) (unpublished) (citing *State v. Replogle*, 181 N.C. App. 579, 582, 640 S.E.2d 757, 760 (2007)). *But see State v. Boston*, _____N.C. App._____, 663 S.E.2d 886, 891 (2008) (reviewing the same issue under the plain error standard).

Although Defendant contends that plain error review is available pursuant to *State v. Fowler*, 312 N.C. 304, 322 S.E.2d 389 (1984), we need not decide that question in this case because we have reviewed the record and we conclude that the trial court did not err by giving the *Allen* charge. This Court has held that an *Allen* charge pursuant to N.C. Gen. Stat. § 15A-1235(c) does not require an affirmative indication from the jury that it is having difficulty reaching a verdict or that the jury deliberate for a lengthy period of time before the trial court may give the instruction. *Boston*, __ N.C. App. at __, 663 S.E.2d at 891. Rather, the statute provides that the trial court may give the *Allen* charge "[i]f it appears to the judge" that the jury is unable to reach a verdict. *Id.*

Here, the judge had ample reason to believe that the jury was having difficulty reaching a verdict. The jury deliberated for approximately one and a half hours before the jury sent notice that it was "hung up." The judge gave the *Allen* charge in a manner

consistent with N.C. Gen. Stat. § 15A-1235(c), and no evidence of coercion appears in the record. Moreover, the judge gave only one *Allen* charge in this case before the jury reached its verdict, whereas this Court has found that as many as three *Allen* charges did not result in coercion. *See Boston*, __ N.C. App. at __, 663 S.E.2d at 891. Accordingly, we hold that the trial court did not err by giving the jury the *Allen* charge.

No error.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).