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NO. COA01-1438

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2002

STATE OF NORTH CAROLINA

v.

Forsyth County  
No. 01CRS000013

EBONY RACINA HICKS

Appeal by defendant from judgment entered 13 July 2001 by Judge Clarence W. Carter in Forsyth County Superior Court. Heard in the Court of Appeals 9 September 2002.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.*

*Russell J. Hollers III for defendant-appellant.*

HUNTER, Judge.

Ebony Racina Hicks ("defendant") appeals from a judgment convicting her of assault with a deadly weapon inflicting serious injury and sentencing her to a minimum term of thirty-six months and a maximum term of fifty-three months. For the reasons set forth herein, we find no error.

The relevant facts are briefly summarized as follows: The State's evidence tended to show that on the afternoon of 4 January 2001, as Gabriel Burns ("Burns") was removing groceries from her car to carry inside her apartment located in Burke Village apartments on New Hope Lane, defendant came out of a downstairs

apartment and walked towards her. According to Burns, defendant approached her carrying a box cutter and stating, "[w]hat now, bitch." Defendant swung the box cutter and cut Burns' face. Thereafter, Lenora Speech ("Speech") and Lamonica Banks ("Banks") entered into the fight. According to Burns, defendant, Speech, and Banks had Burns on the ground kicking her and striking her with a stick that Banks had brought to the altercation. Subsequently, defendant, Speech, and Banks jumped into their car and left the crime scene. Defendant and Burns each had a young child fathered by Nathaniel Bullard ("Bullard") which caused animosity between the two women. Burns sustained from defendant a long cut to her left cheek, requiring twenty-seven stitches, and a cut to the back of her scalp, requiring five staples. Burns also received a black eye from Speech kicking her. Banks received lacerations on her fingers from the affray. The State admitted into evidence a photograph which showed a stick and a braid of Burns' hair that had been cut off during the fight laying beside the stairs leading up to Burns' apartment.

Lamuel Moody ("Moody") and Meredith Hatton ("Hatton"), who lived next door to Burns, testified that they witnessed defendant, Speech, and Banks rush out of a downstairs apartment and attack Burns in the parking lot of Burke Village apartments when she returned home from the grocery store on the afternoon of 4 January 2001. Moody heard Burns tell one of the women to put down her weapon and that she would fight her one-on-one. Moody further testified that on the afternoon of 4 January 2001, prior to the

attack, defendant and her two companions told him when he saw them at the apartment complex that they planned to beat up Burns.

Defendant testified on her own behalf and provided a different sequence of events. According to defendant, on the afternoon of 4 January 2001, Burns bumped her car three times from behind and she and Burns eventually parked their cars and exited their vehicles on Cleveland Avenue. Thereafter, Burns grabbed defendant's sweater and removed an item from her purse which defendant believed to be a box cutter. Burns swung at defendant in an effort to cut her and defendant's two friends intervened in an attempt to protect defendant. Defendant denied cutting Burns and denied ever having a box cutter in her possession during the altercation. Defendant did not receive any lacerations.

Defendant's two companions, Speech and Banks, also testified that the fight occurred on Cleveland Avenue instead of the parking lot of the Burke Village apartments. In fact, all three women denied ever being at Burns' apartment complex on 4 January 2001.

The State called the investigating police officer, M.V. Buccino, on rebuttal. Officer Buccino testified that a few hours after the altercation occurred, defendant had provided him with a different account. Defendant told Officer Buccino that Burns' vehicle was in front of defendant on Cleveland Avenue, and Burns stopped her vehicle in the moving lane of traffic so that defendant could not pass. Defendant also told Officer Buccino that Burns got out of her vehicle with a box cutter and attempted to slash defendant's tires; the fight then ensued.

I.

On cross-examination, the State elicited testimony that defendant and Banks had attempted to take out warrants for assault against Burns on 5 January 2001, the day after the altercation occurred, but that the magistrate only issued a warrant for defendant's arrest. Defendant contends the trial court committed plain error in admitting this testimony. We disagree.

The trial court sustained the only two objections made to the testimony regarding the magistrate's failure to issue a warrant for Burns' arrest. However, defendant failed to object to most of this line of questioning. We may only review defendant's argument for plain error since defendant failed to object to the testimony to which she assigns error. See N.C.R. App. P. 10(c)(4). Therefore, defendant has the burden of showing that the error was "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987). "The plain error rule applies only in truly exceptional cases." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Given the strong evidence against defendant, including testimony from the victim and two eyewitnesses, we cannot conclude that it was probable that the jury would have reached a different verdict had the testimony at issue not been admitted. Therefore, we conclude that defendant's argument lacks merit.

II.

Defendant next contends the trial court erred in failing to instruct the jury on self-defense. Defendant acknowledges that there is nothing in the record indicating that defendant requested an instruction on self-defense or evidence that defendant objected to the instruction's omission. Therefore, defendant requests that we review this assignment of error for plain error. See N.C.R. App. P. 10(c)(4).

"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).

However, the right of 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. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). In determining whether the trial court should have instructed the jury on self-defense, we are required to view the facts in the light most favorable to the defendant. *State v. Moore*, 111 N.C. App. 649, 432 S.E.2d 887 (1993).

Defendant asserts that because defendant, Banks, and Speech testified that Burns was the aggressor, defendant was entitled to an instruction on self-defense. The testimony of Banks and Speech indicates that defendant and Burns voluntarily entered into a fight. There is no indication from this testimony that defendant attempted to abandon or withdraw from the fight nor was there

evidence that Burns' injuries were inflicted by defendant in an effort to protect herself. Therefore, based on this testimony, defendant was not entitled to an instruction on self-defense. Defendant's testimony indicated that Burns was the aggressor since according to defendant, Burns grabbed her sweater and swung a box cutter at her multiple times. However, defendant also testified that she never had possession of the box cutter during the incident and denied cutting Burns. Therefore, there is no evidence that Burns' injuries were incurred due to defendant's alleged acts of self-defense. Accordingly, the trial court's failure to instruct the jury on self-defense was not error, much less plain error.

III.

Defendant also assigns error to the trial court's withdrawal from the jury's consideration the lesser-included offense of misdemeanor assault inflicting serious injury after instructing the jury on the misdemeanor offense. This assignment of error must be reviewed for plain error since defendant failed to object to the withdrawal of the instruction. See N.C.R. App. P. 10(c)(4).

Misdemeanor assault inflicting serious injury is a lesser included offense of assault with a deadly weapon inflicting serious injury. *State v. Lowe*, \_\_\_\_ N.C. App. \_\_\_\_, \_\_\_\_, 564 S.E.2d 313, 315 (2002). The primary distinction between the two is that a conviction of felonious assault requires a showing that a deadly weapon was used *and* serious injury resulted, whereas if the evidence supports only one of these elements, the offense is punishable only as a misdemeanor. *State v. Owens*, 65 N.C. App.

107, 110-11, 308 S.E.2d 494, 498 (1983). Under North Carolina law, "a trial judge must submit lesser included offenses as possible verdicts, even in the absence of a request by the defendant, where sufficient evidence of the lesser offense is presented at trial." *Id.* at 110, 308 S.E.2d at 497.

In the case *sub judice*, the State alleged that defendant had cut Burns with a box cutter across the face and on the back of her scalp. The evidence showed that Burns' injuries included a cut across the left side of her face, requiring twenty-seven stitches, and a cut to the back of her scalp, requiring five staples. Thus, Burns clearly incurred serious injury. Furthermore, the evidence shows that a dangerous weapon (a box cutter) was used. See *State v. Wiggins*, 78 N.C. App. 405, 337 S.E.2d 198 (1985). Therefore, the evidence shows that defendant either was guilty of assault with a deadly weapon inflicting serious injury or not guilty of this charge. Accordingly, the trial court correctly withdrew from the jury's consideration the lesser-included offense of misdemeanor assault because no evidence was presented supporting this offense.

#### IV.

Finally, defendant argues the trial court erred in finding two statutory aggravating sentencing factors which the trial court concluded outweighed the mitigating factors, thereby justifying an aggravated sentence. The trial court found the following statutory aggravating factors: "(1) The defendant induced others to participate in the commission of the offense . . ." and "(2) [t]he defendant joined with more than one other person in committing the

offense and was not charged with committing a conspiracy.” N.C. Gen. Stat. § 15A-1340.16(d) (1) and (2) (2001). “The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists . . . .” N.C. Gen. Stat. § 15A-1340.16(a) (2001).

Upon reviewing the record, we conclude that the State met its burden of proving by the preponderance of the evidence that both aggravating factors exist. With regard to the first factor, the evidence shows that the assault took place due to defendant’s ill will toward Burns because defendant and Burns each had a young child fathered by the same man. Additionally, the State presented evidence showing that defendant initially challenged Burns and started the fight before defendant’s friends joined in the altercation and assisted defendant in assaulting Burns. Further, there was evidence which tended to show that the other two women who participated in the altercation were defendant’s friends and defendant had driven them to and from the crime scene. Therefore, there was ample evidence that defendant induced her two friends to participate in the assault.

We conclude there was also sufficient evidence supporting the second aggravating factor. The State’s evidence showed that defendant and her two friends drove to Burns’ apartment complex, waited for Burns to return home, beat, kicked and cut Burns, and fled the crime scene. Moody testified that prior to the attack on the afternoon of 4 January 2001, defendant and two other girls told him they planned to beat Burns up. Further, defendant was not



charged with committing a conspiracy. Thus, there was ample evidence supporting the second aggravating factor. This assignment of error is overruled.

Defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge MARTIN concur.

Report per Rule 30(e).