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NO. COA01-1603

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

IN THE MATTER OF:

FOYSTER LAWSON, IV

Alamance County
No. 00 J 205

Appeal by juvenile from adjudication and disposition orders entered 25 June 2001 by Judge James K. Roberson in Alamance County District Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Roberta Ouellette, for the State.

Rebecca Harris for respondent-appellant.

THOMAS, Judge.

Respondent, Foyster Lawson, IV, was adjudicated delinquent based on a finding that he committed the offense of assault with a deadly weapon inflicting serious injury in violation of N.C. Gen. Stat. § 14-32(b). He appeals and, based on the reasons discussed herein, we reverse.

The State presented evidence at the hearing which tends to show the following: On 18 May 2001, the respondent, as well as Blake Rodriguez, Randy Hawkins, and Rayshard Moses, were playing behind Rodriguez's home in Burlington, North Carolina. Respondent

took a BB gun from Rodriguez and walked into the middle of a creek. He shot the gun, and the four boys heard someone yell "ow" from the direction in which respondent had aimed. Respondent dropped the gun, started to run away and told his friends to do the same. A short time later, Officer Kenneth Barker of the Burlington Police Department was called to the De Sales Trading Company where he met with David Yandell. Yandell had been shot and was bleeding from his upper right thigh.

On 25 June 2001, respondent was adjudicated a delinquent juvenile for having shot Yandell. Respondent was committed to the Department of Juvenile Justice and Delinquency Prevention for placement in a youth academy for an indefinite term of not less than six months.

Respondent contends there was insufficient evidence to sustain the adjudication, but respondent did not move for a dismissal at the close of the evidence. He is therefore ordinarily precluded from raising this issue on appeal. *In re Clapp*, 137 N.C. App. 14, 19, 526 S.E.2d 689, 693 (2000); *In re Davis*, 126 N.C. App. 64, 66, 483 S.E.2d 440, 441-42 (1997); N.C. R. App. 10(b)(3). Nevertheless, we exercise our discretion under Rule 2 and review the merits of this case. N.C. R. App. P. 2.

In reviewing the denial of defendant's motion to dismiss, this Court must determine whether the evidence, when viewed in the light most favorable to the State, is sufficient to allow a reasonable juror to find defendant guilty of the essential elements of the offense beyond a reasonable doubt. *See State v. Jones*, 147 N.C.

App. 527, 545, 556 S.E.2d 644, 655 (2001), *disc. rev. denied*, 355 N.C. 351, 562 S.E.2d 427 (2002). The State is entitled to all favorable inferences reasonably drawn from the evidence. *State v. Tucker*, 347 N.C. 235, 243, 490 S.E.2d 559, 563 (1997), *cert. denied*, 523 U.S. 1061, 140 L. Ed. 2d 649 (1998). Although the evidence supporting a finding of the defendant's guilt must be substantial, it need not exclude every reasonable hypothesis of innocence to survive a motion to dismiss. See *State v. Riddick*, 315 N.C. 749, 759, 340 S.E.2d 55, 61 (1986).

The essential elements of the offense in the instant case require a showing that there was an (1) assault; (2) with a deadly weapon; (3) inflicting serious injury; (4) not resulting in death. *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997). Respondent, in his sole assignment of error, argues there was insufficient evidence to support a finding of the first three elements of the offense.

Respondent contends that insufficient evidence was presented to establish an assault. Respondent admits that his statement to Officer Barker, acknowledging he knew about the man who was shot and would talk about it at trial, approached an admission of knowledge of the alleged shooting. However, he argues this was insufficient to establish assault because the state failed to present evidence of the *corpus delicti*. "The naked extra-judicial confession of guilt by a defendant must be supported by evidence *aliunde* which establishes the *corpus delicti*. The *corpus delicti* may be established by direct or circumstantial evidence." *State v.*

Bishop, 272 N.C. 283, 299, 158 S.E.2d 511, 522 (1968) (internal citations omitted).

Testimony at trial established that respondent fired the gun, an exclamation was heard from the direction toward which the shot was fired and the victim was found in that direction bleeding from his upper thigh after being shot. This evidence is sufficient to establish the element of assault when viewed in the light most favorable to the State.

Defendant next claims insufficient evidence was presented to establish that a serious injury occurred.

Cases that have addressed the issue of the sufficiency of evidence of serious injury appear to stand for the proposition that as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious.

State v. Alexander, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994).

In the instant case, the evidence tends to show the victim's wound was bleeding at the time the investigating officer arrived. The trial court viewed photographs of the wound. Finally, Officer Barker testified that he advised the victim to seek medical treatment for the injury. This evidence of bodily injury is sufficient to support the trial court's finding of a serious injury.

Defendant finally contends there was insufficient evidence to establish that the BB gun was a deadly weapon. A deadly weapon for the purposes of this offense is any instrument which is likely to

produce death or great bodily harm, under the circumstances of its use. *State v. Parker*, 7 N.C. App. 191, 195, 171 S.E.2d 665, 667 (1970). "The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself." *Id.*

Determination of whether a BB gun is a dangerous weapon is specific to the facts of the case. "For a jury to find that a BB gun *is* a dangerous weapon, there must be evidence in the record of the BB gun's capability to inflict death or great bodily injury." *State v. Fleming*, 148 N.C. App. 16, 25, 557 S.E.2d 560, 565 (2001). BB guns have been found to be deadly weapons under certain circumstances. In *State v. Pettiford*, this Court found a BB gun to be a dangerous weapon as a matter of law where evidence showed that the victim was shot at close range and the metal slug lodged in his skull. 60 N.C. App. 92, 99, 298 S.E.2d 389, 393 (1982). In *State v. Westall*, this Court allowed jury consideration of a charge of robbery with a dangerous weapon when evidence showed defendant held a pellet gun pressed to a clerk's back in line with her kidneys, and the investigating officer testified that such a weapon fired at point-black range was life-threatening. 116 N.C. App. 534, 537, 543, 449 S.E.2d 24, 26, 30, *disc. rev. denied*, 338 N.C. 671, 453 S.E.2d 185 (1994).

Officer Barker, the investigating officer in the instant case, was questioned concerning the weapon at trial. He indicated he was not an expert regarding such weapons, had "shot them when he was

younger," and was aware that the more times such a rifle was pumped the more powerful the shot became. No further evidence was presented as to the deadly nature of the weapon. Furthermore, testimony indicated defendant was in a creek behind a house at the time of the shooting and the victim was outside a factory which was also behind the house. Unlike in *Pettiford* and *Westall*, defendant was not within close range of the victim.

The evidence presented regarding the manner in which the BB gun was used and the condition of the victim in this case is insufficient to support a finding that the weapon was deadly, even when viewed in the light most favorable to the State. Therefore, we reverse the adjudication of delinquency based on the offense of assault with a deadly weapon inflicting serious injury and remand for both entry of an adjudication based on assault inflicting serious injury and for a new dispositional hearing.

REVERSED AND REMANDED.

Judge WALKER concurs.

Judge BIGGS concurs in result only.

Report per Rule 30(e).