NO. COA01-240

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

STATE OF NORTH CAROLINA

v. Wake County
Nos. 98 CRS 87026, 60662

BELINDA FERGUSON HARRIS

Appeal by defendant from judgment entered 3 November 1999 by Judge Thomas W. Seay, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Adrian A. Phillips, for the State.

Law Offices of Paul A. Suhr, P.L.L.C., by Paul A. Suhr, for defendant-appellant.

TYSON, Judge.

I. Facts

Officer Steven Carlin ("Carlin"), with the Crabtree Special Police, received a call from Sears concerning an irate customer in their store on 25 August 1998. Carlin arrived at that location and saw Belinda Ferguson Harris ("defendant"). Carlin testified that when defendant saw him, she turned around and began blurting out profanities and threats at Sherri Brown, the loss prevention agent for Sears. Carlin attempted to intervene and to place defendant under arrest. Defendant began walking away and refused to stop. When Carlin attempted to detain her, defendant resisted arrest.

The jury acquitted defendant on the charge of public

disturbance and simple assault. The jury found defendant guilty of assault on a government officer and resisting, delaying, and obstructing a public officer in discharging or attempting to discharge a duty of his office. Defendant was sentenced to a minimum of forty-five and a maximum of sixty days. Defendant appeals. We find no error.

II. Issues

The issues presented are whether: (1) the trial court erred in denying defendant's motion to dismiss and motion to set aside the verdicts and (2) the trial court erred in denying defendant's request for a jury instruction on self-defense and accident.

Defendant's arguments in the body of her brief are not followed by references to the assignments of error in violation of N.C. R. App. P. 28(b)(5). Defendant's brief addresses her first, second, third, fourth, fifth, seventh, and ninth assignments of error. All other assignments of error are deemed abandoned. N.C. R. App. P. 28(b)(5) (1999).

III. Motion to Dismiss and Set Aside the Verdicts

Defendant argues that the trial court erred in denying her motion to dismiss at the close of all the evidence and motion to set aside the verdicts on the grounds of insufficient evidence.

"[T]he trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Evidence is substantial if it is relevant and adequate to convince

a reasonable mind to accept a conclusion. *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995). The trial court must also resolve any contradictions or discrepancies in the evidence in the State's favor. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). The trial court does not weigh the evidence or determine any witness' credibility. *Id.*

As with a motion to dismiss, a motion to set aside the verdict on the basis of insufficient evidence lies within the discretion of the trial court and is reviewable on appeal under an abuse of discretion standard. *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985); *see also Anderson v. Hollifield*, 345 N.C. 480, 482-83, 480 S.E.2d 661, 663 (1997).

1. Resisting, Delaying, and Obstructing a Public Officer

The elements to prove the offense of resisting, delaying and obstructing a public officer are: (1) that the victim was a public officer, (2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer, (3) that the victim was making or attempting to make a lawful arrest, (4) that the defendant resisted, delayed, or obstructed the victim in making or attempting to make a lawful arrest, and (5) that the defendant acted willfully and unlawfully, that is, intentionally and without justification or excuse. *See* N.C.P.I. Crim. 230.31.

Defendant first contends that there was insufficient evidence for the trial court to conclude and instruct the jury that an officer of the Crabtree Special Police is a public officer.

Carlin testified that he received Basic Law Enforcement Training at Wake Technical Community College and that he took an oath to become a certified police officer, which is the same standards that an officer with the City of Raleigh or City of Cary would complete. Carlin further testified that he had the power to arrest or charge individuals with crimes in or around Crabtree Valley Mall and that the State Attorney General's Office oversees the Crabtree Special Police Unit.

Defendant questioned Carlin, on cross-examination, whether he is an employee of Crabtree Valley Mall and is not paid by the State, City of Raleigh, or the Sheriff's Department.

The Attorney General has "the authority to certify an agency as a company police agency and to commission an individual as a company police officer," pursuant to the Company Police Act. N.C. Gen. Stat. § 74E-2(a) (1999). N.C.G.S. § 74E-6 provides that "[a]n individual who is commissioned as a company police officer must take the oath of office required of a law enforcement officer . . . ." N.C. Gen. Stat. § 74E-6(a) (1999). Carlin testified that he took this oath.

There are three categories of company police officers defined in N.C.G.S. § 7E-6. The Crabtree Special Police Unit falls within the Special Police Officers category, defined as: "[a]ll company police officers not designated as a campus police officer or

railroad police officer." N.C. Gen. Stat. § 74E-6(b)(3) (1999). Company police officers "have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions" on "real property owned by or in possession and control of their employer." N.C. Gen. Stat. § 74E-6(c)(1) (1999).

Based on the statute and testimony, we conclude that there was substantial evidence to support the trial court's instruction to the jury that an officer of the Crabtree Special Police Unit is a public officer.

Defendant next contends that there was insufficient evidence that Carlin was making or attempting to make a lawful arrest. Defendant argues that arresting an individual for uttering profanity in public can never be a lawful arrest because the First Amendment of the United States Constitution protects such speech. This argument is without merit.

The Supreme Court has held that the right of free speech is not absolute at all times and under all circumstances and that fighting words, "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are not expressions that are protected by the First Amendment. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 86 L. Ed. 1031, 1035 (1942); *In re Spivey*, 345 N.C. 404, 414, 480 S.E.2d 693, 698 (1997).

In the present case, the testimony showed that defendant turned and threatened the loss prevention agent for Sears in the

presence of Carlin. Carlin testified that he intervened, stepping between the two women in order to prevent an escalation. Defendant further argues that since she was acquitted of the charge of public disturbance that the arrest by Carlin was therefore unlawful as being without probable cause. We disagree.

This Court has held that "[t]he failure of the State to satisfy the jury beyond a reasonable doubt of defendant's guilt of the offense charged is a far cry from a failure to satisfy the jury beyond a reasonable doubt that the arresting officer had reasonable ground to believe defendant had committed the offense in the officer's presence." *State v. Jefferies*, 17 N.C. App. 195, 198, 193 S.E.2d 388, 391 (1972). It is only necessary that the officer has reasonable grounds to believe such offense has been committed. *Id.* (citing *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954)).

Here, Carlin testified that he believed that defendant had communicated a threat to the loss prevention agent and was causing a public disturbance. We hold that Carlin had reasonable grounds to believe that such offenses had been committed in his presence. These assignments of error are rejected.

2. Assault on a Government Officer

The elements to prove the offense of assault on a government officer are: (1) that defendant assaulted the victim intentionally, (2) that the victim was an officer or employee of the State or a political subdivision of the State, (3) that the victim was discharging or attempting to discharge a duty of his office, and (4) that defendant knew or had reasonable grounds to

know that the victim was an officer or employee of the State or a political subdivision of the State. *See* N.C.P.I. Crim. 208.82.

Defendant first contends that the instructions given by the trial court were conclusive, eliminating the need for deliberation by the jury. We disagree.

A review of the record reflects that the trial court correctly instructed the jury that the State must prove the four elements recited in N.C.P.I. Crim. 208.82 beyond a reasonable doubt. The only conclusive statement made by the trial court was that an officer of the Crabtree Special Police Unit is an officer of the State or of a political subdivision of the State. We concluded that sufficient evidence was presented to support this element and instruction.

Defendant next argues that there was insufficient evidence that she knew or had reasonable grounds to know that the victim, Carlin, was an officer of the State. We disagree.

Carlin testified that upon intervening between defendant and the loss prevention agent that he was wearing a badge, announced that he was "Officer Carlin," and was placing the defendant under arrest. Defendant uttered a profanity to Officer Carlin and walked away. Carlin further testified that during the repeated requests that defendant stop she replied "[y]ou are not arresting me, . . . [expletive deleted]." Defendant's sister, Marie Higdon, testified that as Carlin was following them he tried to arrest defendant again and that she jumped in and told Carlin "[n]o . . .[expletive deleted], you ain't going to arrest her today." We hold that there

was sufficient evidence presented that defendant knew or had reasonable grounds to know that Carlin was a police officer. There was no abuse of discretion by the trial court in denying defendant's motion to dismiss and motion to set aside the verdict. These assignments of error are overruled.

IV. Instruction on Self-Defense and Accident

In her final argument, defendant maintains that the trial court should have instructed the jury on self-defense and accident when submitting the charge of resisting, delaying or obstructing an officer. We disagree.

Defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that she acted in self-defense. *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) (citing *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977)).

The record reveals that defendant presented no such evidence. Rather, the majority of defendant's testimony was that she did not hit Carlin, did not bite another officer, and did not try to fight or resist arrest. This defense obviated the necessity for the court to instruct the jury on the issue of self-defense. *State v. Brewer*, 89 N.C. App. 431, 434-35, 366 S.E.2d 580, 582-83 (1988); *see also State v. Harding*, 22 N.C. App. 66, 68, 205 S.E.2d 544, 545 (1974) ("By denying the shooting, defendant rendered it unnecessary for the court to instruct the jury on self-defense."). This assignment of error is overruled.

No error.

Judges GREENE and HUNTER concur.

Report per Rule 30(e).