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NO. COA01-241

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v.

MICHAEL RAY TRULL

Cabarrus County  
No. 99-CRS-11458  
99-CRS-11495  
99-CRS-11496  
00-CRS-4950

Appeal by defendant from judgment entered 11 September 2000 by Judge C. Preston Cornelius in Cabarrus County Superior Court. Heard in the Court of Appeals 5 December 2001.

*Attorney General Roy A. Cooper, by Assistant Attorney General Steven A. Armstrong, for the State.*

*Andresen & Associates, by Kenneth P. Andresen & Christopher M. Vann, for defendant-appellant.*

TIMMONS-GOODSON, Judge.

Michael Ray Trull ("defendant") appeals from a conviction of assault with a deadly weapon inflicting serious injury.

The State's evidence tended to show the following: On 7 July 1999, defendant entered the Black Pearle Restaurant and Bar located in Concord, North Carolina at approximately 9:00 p.m. Over the next four hours, defendant became intoxicated and began to bother bar patrons. Observing defendant's intoxication, Linda Cefalo ("Cefalo"), the bar owner, approached defendant. After several verbal exchanges, defendant took money from his pocket and threw it

at Cefalo. Cefalo subsequently removed defendant's beer from the bar. Becoming angered, defendant used his hand to knock all remaining items from the bar in the direction of Cefalo.

Cefalo retrieved a baseball bat from behind the bar and asked defendant to leave several times. Michelle Morrison ("Morrison") a bar co-owner, heard the commotion and appeared from the kitchen holding an eighteen-inch police "mag" flashlight. Defendant then removed a pocketknife with a three-inch blade from the pocket of his pants. Defendant's sister, Deborah McCoy ("McCoy") grabbed defendant and tried to pull him from the bar. As McCoy and defendant were exiting the bar, Cefalo remarks, "[b]ye don't come back." Defendant suddenly turned around, charged at Cefalo, and tackled her to the ground. Upon impact, defendant and Cefalo "slammed" into a bannister and a table. At some point during the altercation, defendant cut Cefalo's right forearm with his knife. Morrison managed to pull defendant off of Cefalo. Defendant then began to punch Morrison about the face and body. Cefalo grabbed her bat and struck defendant. Morrison and Cefalo struck defendant several times as the fight continued. Morrison "pinned" defendant to the ground in order to keep him from hitting her again; however, she began to bleed profusely as a result of the cut to her face. Defendant then took this opportunity to exit the bar. Neither Cefalo nor Morrison could testify with certainty that their wounds were caused by defendant's knife.

Police arrived at the scene and recovered defendant's knife from inside the bar. Defendant was handcuffed and placed in a

police car whereupon he shattered a window with his foot. Defendant was subsequently convicted of assault with a deadly weapon inflicting serious injury and the misdemeanor of injury to personal property. Defendant pled guilty to being an habitual felon and was sentenced accordingly. Defendant appeals.

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In his first assignment of error, defendant contends that the trial court erred by refusing to instruct the jury on the issue of self-defense. We disagree.

"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). "The right of self-defense is only available, however 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.'" *Id.* (quoting, *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977)). In determining whether the trial court should have submitted an instruction to the jury on self-defense, all evidence is considered in the light most favorable to defendant. *Id.*

In the instant case, the evidence reveals that defendant voluntarily and willingly entered into the fight. After Cefalo informed defendant not to return to the bar, he charged at her with a pocketknife and tackled her to the ground. Serious injuries were

inflicted to Cefalo's right forearm and Morrison's face. Defendant presented no evidence tending to show that he attempted to abandon the fight. Even when viewed in the light most favorable to defendant, the evidence does not support an instruction on self-defense because defendant initiated the altercation. We therefore conclude that defendant, as the aggressor, was not entitled to an instruction on self-defense. This assignment of error is overruled.

In his next assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. We disagree.

When reviewing a motion to dismiss, we must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Gainey*, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996). "The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn therefrom, and the test is the same whether the evidence is direct or circumstantial." *Id.* "When a defendant moves for dismissal, the trial court is to 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. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v.*

*Lucas*, 353 N.C. 568, 580-81, 548 S.E.2d 712, 721 (2001). If there is substantial evidence of each element of the charged offense and of the defendant being the perpetrator of the offense, the case is for the jury and the motion to dismiss should therefore be denied. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

The elements of the charge of assault with a deadly weapon with intent to kill inflicting serious injury under N.C. Gen. Stat. § 14-32(a) (1999) are: (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury and (5) not resulting in death. See *State v. Wampler*, 145 N.C. App. 127, 132, 549 S.E.2d 563, 566 (2001).

Defendant contends that because the State failed to present substantial evidence that would associate the knife with the commission of the offense, his motion to dismiss should have been granted. However, contrary to defendant's contention, several of the State's witnesses testified that they in fact, saw defendant with a knife moments before the incident occurred. Both Morrison and Cefalo testified that they sustained severe cuts during the altercation with defendant. Additionally, the pocketknife was also found in a location where the altercation occurred. At trial, the State offered medical evidence tending to show that the lacerations sustained by each victim were made by a sharp object consistent with a knife. We therefore conclude that substantial evidence was presented from which a jury could find that the pocketknife was the deadly weapon that inflicted serious injury and that defendant perpetrated the offense. Thus, the motion to dismiss was properly

denied. This assignment of error is overruled.

Defendant next contends that the trial court erred in admitting the pocketknife into evidence. Defendant argues that the pocketknife recovered from the bar and identified at trial had undergone a material change because the blade was closed and had no bloodstains. We disagree.

As a general rule, "weapons may be admitted in evidence, where there is evidence tending to show that they were used in the commission of a crime." *State v. Wilson*, 280 N.C. 674, 678, 187 S.E.2d 22, 24 (1972). Before the weapon is admitted into evidence, it must be (1) identified as the same object involved in the incident, and (2) shown that the object has not undergone a material change. *State v. Brown*, 101 N.C. App. 71, 75, 398 S.E.2d 905, 907 (1990). The trial court has sound discretion in determining the "standard of certainty required to show that the evidence offered is the same as the one involved in the incident and has not been changed materially." *Id.*

Defendant's contention that the pocketknife had materially changed because the blade was closed is without merit. The State's witnesses identified the pocketknife as the same pocketknife they witnessed in defendant's hand in the bar. Officer Vince Nash of the Concord Police Department testified that upon completion of his test for fingerprints on the pocketknife, he closed the blade, which Officer Nash testified, is not an unusual procedure.

Defendant further contends that the pocketknife had undergone a material change because the blade presented at trial had no

visible bloodstains. This argument is also without merit. While there may have been discrepancies in the State's evidence regarding the existence of bloodstains on the pocketknife, the presence or absence of bloodstains merely affects the weight or probative value of the evidence, not its admissibility and is thus, a matter for the jury. See *State v. Grooms*, 353 N.C. 50, 72, 540 S.E.2d 713, 727 (2000), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 151 L. Ed. 2d 54 (2001). This assignment of error is therefore overruled.

In his next assignment of error, defendant contends that the trial court erred by not allowing defendant to cross-examine Cefalo regarding a pre-trial tape-recorded statement she made to law enforcement officers. We note that defendant cites no authority in support of this contention in violation of our Rules of Appellate Procedure. See N.C.R. App. P. 28(b)(5) (2002). Furthermore, a review of the transcript reveals that the trial court never indicated that defendant could not cross-examine Cefalo regarding her tape-recorded pre-trial statement, but merely stated that "the proper foundation had not been laid at [that] point." Defendant was free to continue laying a foundation for the eventual admission of the tape but chose not to do so. This assignment of error is overruled.

In his last assignment of error, defendant contends that the trial court erred in: (1) determining that one aggravating factor outweighed six mitigating factors and (2) sentencing him in the aggravated range of punishment.

Defendant first argues that the trial court erroneously

concluded that the one aggravating factor found by the trial court outweighed seven mitigating factors. We reject this argument.

The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender . . . . The sentencing judge's discretion to impose a sentence within the statutory limits, but greater or lesser than the presumptive term, is carefully guarded by the requirement that he make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence; that is, by the greater weight of the evidence.

*State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502 (1985) (quoting *State v. Ahearn*, 307 N.C. 584, 596, 300 S.E.2d 689, 696-97 (1983)).

"A sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa." *Id.* A trial court's weighing of aggravating and mitigating factors will not be disturbed on appeal absent an abuse of discretion. *Id.* Furthermore, the balance struck by the trial judge in "weighing the aggravating factors against the mitigating factors . . . will not be disturbed unless it is 'manifestly unsupported by reason[.]'" *Id.* at 258, 337 S.E.2d at 503 (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

In the instant case, the sole aggravating factor determined by the trial court was that "defendant committed the offense while on pretrial release on another charge." The sentencing minutes



indicated that defendant had a pending charge of discharging a weapon into occupied property and possession of a firearm by a felon at the time he was charged with assault with a deadly weapon with intent to kill inflicting serious injury. After weighing the factors, the trial court concluded that this aggravating factor outweighed the mitigating factors and there is no evidence in the record to suggest that the trial court abused its discretion by this finding.

As to his second contention, defendant argues that while the written judgment of the trial court reflects that the mitigating factors outweighed the aggravating factors, it imposed a sentence in the aggravated range.

Our review of the transcript clearly reflects that the trial judge announced in open court that the aggravating factor outweighed the mitigating factors and imposed a sentence in the aggravated range. The fact that the mitigation box was checked is an obvious clerical error, because it is inconsistent with the trial court's oral statements. We therefore remand this matter to the trial court for the limited purpose of correcting the clerical error in the determination section of the Findings of Aggravating and Mitigating Factors form to reflect its conclusion that the aggravating factors outweighed the mitigating factors for case no. 99-CRS-11496.

No error; remanded for correction of clerical error.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).