An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-534

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. | Union County Nos. 00 CRS 1211, 00 CRS 3021

JOHN HENRY STITT,
Defendant.

Appeal by defendant from judgment entered 14 December 2000 by Judge Sanford L. Steelman, Jr., in Union County Superior Court. Heard in the Court of Appeals 11 March 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Kathleen M. Waylett, for the State.*

*Bobby Khan, for defendant-appellant.*

BRYANT, Judge.

Defendant was convicted of habitual misdemeanor assault on a law enforcement officer, a Class H felony under N.C.G.S. § 14-33.2 (1999). Upon the jury's finding of defendant's habitual felon status, the trial court sentenced him to 144 to 182 months of imprisonment. Defendant gave timely notice of appeal.

Defendant stipulated to five prior misdemeanor convictions, two of which were assaults. Therefore, the trial proceeded on the charge of assault on a law enforcement officer pursuant to N.C.G.S. § 14-33(c)(4) (1999). Union County Deputy Sheriff David Linto

testified that he observed defendant standing with a female on Kerr Street. Linto knew of several warrants outstanding for defendant's arrest, but also wanted to ask defendant questions regarding an unrelated criminal investigation. Linto and defendant discussed the warrants. Linto explained his obligation to arrest defendant on sight, but also indicated he wanted defendant to look at some photographs. Defendant said he intended to turn himself in "at a later date." Linto told defendant it was in his best interest to turn himself in now, suggesting that the magistrate would set a more favorable bond on the warrants. Linto then asked defendant to sit down and look at the pictures. He drove defendant to the end of the street and talked with him about the photographs for a few minutes. Linto then told defendant he had to "take care of these warrants now[,]" and reached for his handcuffs. As Linto raised the handcuffs, defendant "struck [him] across the chest[,]" with his left arm knocking the handcuffs from Linto's hands. Defendant kicked and swung his arms, trying to get out of the locked car. He "shoved" Linto "two or three times" as Linto tried to hold onto him. Defendant kicked and broke the windshield before successfully opening the car door. Linto grabbed defendant's sweatshirt and was pulled out of the car with him. As they rolled on the ground, defendant struck Linto in the face with his elbow or forearm. Eventually, defendant slipped out of the sweatshirt and ran away. He was later apprehended by another officer.

On cross-examination, Linto acknowledged that on the citation he wrote immediately following the incident, he wrote that

defendant had shoved him but did not mention being struck or hit. He denied placing defendant in a headlock in the car.

Defendant testified that Linto promised not to arrest defendant if he looked at the photographs. Linto told him, "I know you have warrants but it's not my job to lock you up for it." When defendant finished looking at the photographs, however, Linto unexpectedly and without explanation reached over and grabbed defendant, placing him in a headlock. Defendant claimed he merely grabbed Linto's arm to remove it from his head before fleeing the car. He denied shoving or swinging at Linto at any time, stating, "The only physical time that I touched him was when I grabbed his arm to take it off my head." Defendant surmised that his elbow broke the windshield during the exchange, or that Linto broke the windshield in attempting to follow him out of the car.

The trial court instructed the jury that defendant committed an assault if he "intentionally and without justification or excuse str[uck] Linto." The court went on to instruct the jury that the prosecution had to prove that "Linto was a law enforcement officer and the defendant knew or had reasonable grounds to know" that fact. The court told the jury that defendant was obliged to submit to a lawful arrest but could defend himself if Linto "use[d] more force than reasonably appear[ed] necessary at the time to effect the arrest." The court fully instructed the jury on the doctrine of self-defense.

During deliberations, the jury submitted the following question to the judge regarding this element of the offense:

"[T]he guidelines given to the jury[] used the word 'strike' in reference to assault. Does shoving constitute an assault?" Over defendant's objection, the court gave a supplemental instruction to the jury as follows:

> [F]or purposes of this case, what we're talking about is the actual striking of one person by another person. Whether it is a shove or a strike or an elbow or a kick, the critical factor for this particular case is whether or not there was an actual physical touching. So I'm instructing you that -- that strike or shove, that's -- there's not a significant difference between that terminology.

After receiving this instruction, the jury returned a guilty verdict.

Defendant argues that the court erred in giving this supplemental instruction, which he characterizes as "an incorrect statement of law which resolved the case favorably for the State." Defendant claims the court erroneously relied upon the civil definition of battery, which does not require proof of an "intent to do some immediate physical injury" as does criminal assault. He further contends the instruction amounted to a statement of the judge's "opinion that an essential element of the crime had been proven, because a shove was equivalent to a strike, an elbow or a kick." Defendant casts the instruction as "remov[ing] from the province of the jury the determination of certain elements of the offense[.]"

Assault has been alternately defined as "a show of violence causing a reasonable apprehension of immediate bodily harm" or "an intentional offer or attempt by force or violence to do injury to

the person of another." *State v. Thompson*, 27 N.C. App. 576, 577, 219 S.E.2d 566-67, 568 (1975), *disc. review denied*, 289 N.C. 141, 220 S.E.2d 800 (1976) (citing *State v. Hefner*, 199 N.C. 778, 155 S.E. 879 (1930)). By contrast, battery is "the unlawful application of force to the person of another by the aggressor . . . ." *Id.* at 578, 219 S.E.2d at 568. A touching is "unlawful" when it is non-consensual or "offensive" and is not justified by principles such as privilege or self-defense. *See, e.g.*, *Redding v. Shelton's Harley Davidson, Inc.*, 139 N.C. App. 816, 821, 534 S.E.2d 656, 659 (2000), *disc. review denied*, 353 N.C. 380, 546 S.E.2d 606 (2001). Under the criminal law of this State, "every battery includes an assault . . . ." *Thompson*, at 577, 219 S.E.2d at 568.

As set forth above, defendant is mistaken in claiming that a battery does not constitute an assault unless it is performed with a specific "intent to so some immediate physical injury to the person of another." In *State v. Colson*, 194 N.C. 206, 208, 139 S.E. 230, 231 (1927), our Supreme Court upheld the trial court's instruction that if the jury did not find defendant assaulted the witness with a deadly weapon, but "'just shoved him off the running-board of [a stationary] automobile,'" he would be guilty of simple assault. Similarly, in *State v. Hill*, 181 N.C. 558, 559-60, 107 S.E. 140, 141 (1921), defendant placed his hands on a woman's forehead and hand while she slept. The trial court held there was insufficient evidence of specific intent to support a conviction for assault with intent to commit rape. However, the court denied

defendant's motion for nonsuit, finding the intentional, unwanted touching sufficient to support a conviction for assault. *Id.*

Because the act of shoving satisfies the offensive touching requirement for battery, and because every battery is also an assault, the trial court properly instructed the jury that the semantic distinction between "striking" and "shoving" did not affect defendant's culpability for assaulting Linto. Contrary to defendant's assertion, the court did not offer any opinion as to whether the prosecution proved that defendant shoved or struck Linto. It merely explained the legal consequence of the acts alleged. Moreover, the trial court did not err in tailoring its instruction to the evidence adduced at trial and to the specific allegations raised against defendant. *See State v. Robinson*, 40 N.C. App. 514, 520, 253 S.E.2d 311, 312 (1979).

Defendant next asserts that the trial court erred in failing to re-instruct the jury on self-defense when it gave its supplemental instruction. He asserts the trial court must give the self-defense and assault instruction together. He further notes the general proposition that the court must instruct the jury on self-defense if the evidence supports it, even absent a request from the defendant. However, defendant cites no authority to support his claim that the court was obligated to repeat its self-defense instruction when offering a supplemental instruction on an element of assault. *See* N.C. R. App. P. 28(b)(5).

The trial court properly instructed the jury on self-defense during its initial charge on the elements of assault on a law

enforcement officer. Thereafter, the jury asked the court to clarify a single word of the original charge, whether a shove constituted "striking" for purposes of assault. Although defendant objected to the court's supplemental instruction on assault, he never asked for a re-instruction or supplemental instruction on self-defense. *Cf. State v. Robinson*, 327 N.C. 346, 360, 395 S.E.2d 402, 410 (1990) (finding no abuse of discretion in court's failure to give a supplemental instruction where "[n]o request for supplemental instructions . . . was made"). Absent any indication that the jury was unclear on defendant's right to resist any unlawful applications of force by Linto, the trial court did not abuse its discretion in limiting its supplemental instruction to the specific issue of concern to the jury.

In his final argument, defendant claims the trial court erred in instructing the jury on the provisions of N.C.G.S. § 15A-401(a)(2) (1999), which permits an officer to arrest a person based on the officer's knowledge of an outstanding warrant against the person, even though the officer does not have physical possession of the warrant at the time of the arrest. Because the State did not request this instruction, defendant asserts the trial court "compromised its role as an impartial entity and may have inadvertently acted as an ally to the prosecution." Defendant cites no authority in support of this assignment of error. Accordingly, it is deemed abandoned. *See* N.C. R. App. P. 28(b)(5).

No error.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).