NO. COA02-184

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v. New Hanover County
No. 00 CRS 18452

SETH LAWS

Appeal by defendant from judgment entered 1 June 2001 by Judge Russell J. Lanier, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 29 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Anderson & Hogston, L.L.P., by A. Griffin Anderson, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from a judgment entered upon his conviction by a jury of simple assault, a Class 2 misdemeanor, upon Michael Allred ("Allred"). The evidence at trial tended to show that defendant and Allred lived on McCullock Lane, a narrow unpaved road in Wilmington, N.C., which provided access to three residences. In order to reach his residence, it was necessary for defendant to pass in front of Allred's residence. Prior to 26 August 2000, Allred had complained to defendant, and to defendant's landlord, on several occasions concerning the speed at which defendant and his guests drove on McCullock Lane. There was also evidence that, on

previous occasions, Allred had threatened defendant and some of his family members and had used his automobile to block McCullock Lane in an effort to get them to slow their speed.

On the evening of 26 August and the early morning hours of 27 August 2000, Allred hosted a party at his home, during which he consumed several beers. At approximately 3:00 a.m., Allred and several other people were in the front yard of Allred's residence when defendant, returning to his home, drove past in a white Chevrolet Tahoe. Defendant had two friends in the Tahoe; he was followed by two more friends in another vehicle. As defendant drove past the Allred residence, one of the men in the Allred yard yelled, "Slow the f___ down!" Defendant stopped the Tahoe, and the following car also stopped.

The State offered evidence tending to show that defendant got out of the Tahoe, went directly to Allred, and punched him in the face, causing him to fall. The evidence also tended to show that defendant and two others then punched Allred in the back of the head and kept him on the ground, while the other members of defendant's group kept Allred's family members and guest from assisting him.

In contrast, defendant's evidence tended to show that after he got out of the Tahoe, Allred came across his yard toward defendant yelling, "What the f___ is going on here?" Defendant testified that he remained on McCullock Lane and that Allred came into the road. As Allred got very close to him, defendant told him, "[p]lease do not get in my face," and took a step back and raised

his hand to keep defendant from running into his body. Allred ran into his hands and, due to his intoxication, fell to the ground. Defendants' friends prevented Allred from getting back to his feet.

The police were called and arrived after the physical altercation had ended. No arrests were made. The following morning, Allred obtained a warrant charging defendant with simple assault.

By his only assignment of error, defendant contends the trial court committed reversible error by denying his motion to instruct the jury with respect to self-defense. The trial court denied the request, noting:

> The Court denied that motion because [sic] the fact that the clear evidence from the Defendant himself showed that he was the aggressor. He voluntarily entered into the situation. And there was no evidence he attempted to abandon the fight or notify the opponent that he was doing so.

A defendant is entitled to an instruction on self-defense if there is evidence that would support an inference that he acted in self-defense. *See State v. Allred*, 129 N.C. App. 232, 498 S.E.2d 204 (1998). In considering a motion to include instructions on a particular defense, the trial court must view the facts in the light most favorable to defendant, resolving any contradictions in the evidence in his favor. *See State v. Moore*, 111 N.C. App. 649, 432 S.E.2d 887 (1993); *State v. Blackmon*, 38 N.C. App. 620, 248 S.E.2d 456 (1978).

In terms of the substantive law, a person may use physical

force to defend himself from bodily harm or offensive physical contact. *See Moore,* 111 N.C. App. at 653, 432 S.E.2d at 889. However, in the case of a non-felonious assault, he must attempt to exit the situation if at all possible. *See Allred,* 129 N.C. App. at 235, 498 S.E.2d at 206. A defendant may claim the affirmative defense of self-defense only if he is without fault with respect to the encounter. *See State v. Marsh*, 293 N.C. 353, 237 S.E.2d 745 (1977). Where a defendant voluntarily enters into the situation with the alleged victim, and does not abandon the fight, withdraw from it, and give notice to the other party that he is doing so, the doctrine of self-defense will not be available to him. *See id.*

In this case, as there is no evidence that defendant attempted to abandon the altercation or give notice to Allred of such an intention, the outcome of his appeal depends on whether he presented evidence that he was neither the aggressor nor even a voluntary participant in the altercation.

In *State v. Moore*, *supra*, the Court held that a defendant was entitled to an instruction on self-defense where he was attempting to get in his car and leave the victim's home when the victim charged at him. In *State v. Tann*, 57 N.C. App. 527, 291 S.E.2d 824 (1982), where the victim and defendant had an altercation earlier in the evening that had ended, and the victim later came up to him in a public place and grabbed and pushed him, defendant was said not to have provoked the later altercation.

On the other hand, in cases where the evidence indicated that the defendant came to the victim, such that there would have been

no altercation had he stayed away or left the area, it has generally been held that the defendant is not entitled to an instruction on self-defense. In *State v. Brooks*, 37 N.C. App. 206, 245 S.E.2d 564 (1978), where the defendant affirmatively placed himself in the path of the victim, knowing that either he or the victim were likely to end up using physical force, the court affirmed the trial court's denial of defendant's motion for an instruction on self-defense. In *State v. Hall*, 89 N.C. App. 491, 366 S.E.2d 527 (1988), the court held that defendant was not entitled to an instruction on self-defense where he had reason to believe that violence would occur if he approached the victim, but he nevertheless did not retreat and even armed himself before going to confront the victim.

In the present case, the evidence, even when considered in the light most favorable to defendant, shows that defendant was not without fault in creating the situation from which the charge against him arises. With knowledge of Allred's previous complaints and threats concerning the speed at which he drove on McCullock Lane, as well as the circumstances then extant, defendant chose to stop his car and address in person the obscenities which were shouted at him, rather than continue on to his home and deal with the issue when emotions had cooled. Thus, he voluntarily entered into the situation and made no attempt to leave it or indicate to Allred that he was doing so. The trial court did not err in denying defendant's motion for an instruction on self-defense.

No error.

Judges GREENE and BRYANT concur.

Report per Rule 30(e).