

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA02-288

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v.

Rutherford County
No. 95 CRS 3097

MELVIN KEITH SMITH

Appeal by defendant from judgment entered 28 August 2001 by Judge James U. Downs in Rutherford County Superior Court. Heard in the Court of Appeals 21 October 2002.

Attorney General Roy Cooper, by Director of Victims and Citizens Services William M. Polk, for the State.

James L. Goldsmith, Jr. for defendant-appellant.

CAMPBELL, Judge.

A jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced him to an active prison term of seventy-five to ninety-nine months. Defendant gave timely notice of appeal.

Viewed in the light most favorable to the State, the evidence at trial tended to establish the following: On the evening of 4 May 1995, Joe Mitchell Simmons was driving down Whitesides Road in Rutherford County. When Simmons reached the intersection of Whitesides and Pea Ridge Roads, he saw defendant, who was driving

north. As their paths crossed, defendant made an obscene gesture at Simmons, who then followed defendant to a trash dump in order to confront him. Simmons had no weapons in the car. At the trash dump, Simmons pulled his car parallel to defendant's car and accused him of "terrorizing" Simmons' wife. Defendant replied that he would "beat [Simmons'] ass." Defendant approached Simmons' car, drew a twenty-five caliber pistol and fired at least four times into the driver's side window, striking Simmons in the head, shoulder and lower back. Simmons asked defendant, "Why are you killing me?" Defendant laughed and said, "You're not dead, you're still talking." Simmons crawled out of his car through the passenger side door and "kind of staggered and walked down to the bottom of the hill." Defendant got into his car and came after Simmons, who hid behind a tree in a wooded embankment next to the road. After looking for Simmons in the woods for a few minutes, defendant drove back to the dump by Simmons' car before driving away. Defendant subsequently called 911 and reported a homicide at the dump. Police found that the keys had been removed from the ignition of Simmons' car. Although defendant later told police that Simmons had pulled a gun on him, they found no evidence of a second weapon at the crime scene.

As a result of his injuries, Simmons experienced pain and bleeding and was hospitalized overnight. At the time of trial, the three bullets remained in his body. In addition, one of the gunshots went through Simmons' collarbone and severed the nerves in his arm, resulting in permanent disfigurement and a twenty-five-

percent loss of use of his arm and hand.

Defendant's lone argument on appeal is that the trial court erred in denying his motion to dismiss for insufficient evidence. In order to withstand a motion to dismiss, the State must offer substantial evidence of each essential element of the offense and of defendant's identity as the perpetrator. See *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Morgan*, 111 N.C. App. 662, 665, 432 S.E.2d 877, 879 (1993). In our review of the trial court's ruling, we construe the evidence in the light most favorable to the State. See *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993) (citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971)).

The trial court properly denied defendant's motion to dismiss. The elements of the crime at issue are as follows: (1) an assault; (2) the use of a deadly weapon; (3) an intent to kill; and (4) the infliction of a serious injury short of death. See *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990); N.C. Gen. Stat. § 14-32(a) (1999). The State adduced substantial evidence that Simmons sustained three gunshot wounds at the hands of defendant, resulting in painful and permanently disfiguring injuries to his hand and arm. These facts were sufficient to establish an assault with a deadly weapon inflicting serious injury. See *State v. Hedgepeth*, 330 N.C. 38, 52-3, 409 S.E.2d 309, 317-18 (1991), cert. denied, 529 U.S. 1006, 146 L. Ed. 2d 223

(2000). The evidence further showed that defendant stood at Simmons' car door with a handgun and shot at him at least four times through his open window, conduct permitting a reasonable inference of defendant's intent to kill. See *State v. Cain*, 79 N.C. App. 35, 47, 338 S.E.2d 898, 905 (citing *State v. Musselwhite*, 59 N.C. App. 477, 480, 297 S.E.2d 181, 184 (1982)), *disc. review denied*, 316 N.C. 380, 342 S.E.2d 899 (1986). Although defendant correctly notes the State bears the burden of proving that he did not act in self-defense, see *State v. Price*, 118 N.C. App. 212, 219, 454 S.E.2d 820, 824, *disc. review denied*, 341 N.C. 423, 461 S.E.2d 766 (1995), the prosecution's evidence, if believed, showed that defendant was the aggressor, shooting Simmons multiple times while he sat unarmed in a confined space.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).