NO. COA05-1538

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

STATE OF NORTH CAROLINA

v. New Hanover County
No. 04 CRS 66724

WILLIAM CARTER FRANKLIN

Appeal by defendant from judgment entered 30 August 2005 by Judge Russell J. Lanier, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 16 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

James M. Bell for defendant-appellant.

CALABRIA, Judge.

William Carter Franklin ("defendant") appeals from judgment entered upon a jury verdict finding him guilty of simple assault. We find no error.

At trial, Brian Watkins ("Watkins"), a financial advisor for Wachovia Securities, testified for the State that he volunteered to officiate as President of the New Hanover County Fair. On 28 October 2004, at approximately 5:45 p.m., Watkins heard defendant state "she called me a queer." Watkins proceeded to defendant's booth and "asked all parties to relax [and] go back in your booths[.] . . . I'll deal with it in a few minutes." Defendant

then said to Watkins that a woman in an adjacent booth "called me a queer; what are you going to do about it?" Defendant repeated the above statement several times, which led Watkins, who feared the situation would only escalate, to tell defendant "[i]t's time to go." At that point, Watkins placed "[his] left hand on [defendant's] left wrist [and simultaneously placed his] right hand on [defendant's] left shoulder . . . and escorted him to leave." As defendant began to leave, he told Watkins he wanted to retrieve his pumpkin. While doing so, defendant exchanged heated words with the same woman who alleged had called him "a queer." Watkins testified that as he escorted defendant out of the Fair a second time, defendant attempted to kick him with his right foot. Watkins testified he "caught [defendant's] foot . . . and . . . turned it to [the] right." Defendant then fell to the ground. Police officers then ran to the scene and told defendant "to stay down."

Lieutenant Taylor ("Lieutenant Taylor") of the Wilmington International Airport Public Safety Office provided law enforcement support to the New Hanover County Fair on 28 October 2004. Lieutenant Taylor testified he was advised that "Mr. Watkins was escorting a subject out, and [the subject] was fighting with him." Once Lieutenant Taylor arrived at the scene, he "saw [defendant] turn, pivot on his left foot[,] and kick Mr. Watkins in the stomach." Lieutenant Taylor further testified that "Mr. Watkins was able to grab hold to [defendant's] foot[.]" Lieutenant Taylor then "approached [defendant] and told him to stay on the ground." The defendant refused. Lieutenant Taylor told defendant he was

under arrest; however, defendant continued to pull away from Lieutenant Taylor who then, along with Officer Cook ("Officer Cook"), forced defendant to the ground and restrained him with handcuffs.

Defendant testified that "on the night in question . . . I was required to be at the fair for my job," and while working, a woman at an adjacent booth called him a queer. Although defendant complained, Watkins "was extremely disinterested." Defendant further testified that Watkins pushed him while escorting him out and that his foot "was never grabbed and twisted by [Watkins]." Defendant also testified Lieutenant Taylor never identified himself; rather he grabbed defendant's arm and "roughed [him] up[.]"

On 16 June 2005, defendant was convicted of simple assault and resisting a public officer in New Hanover County District Court. Defendant appealed to the New Hanover Superior Court for a trial *de novo*. At the close of all the evidence, the trial court dismissed the charge of resisting a public officer. On 30 August 2005, a jury found defendant guilty of simple assault. The trial court then sentenced defendant to 45 days in the custody of the North Carolina Department of Correction, suspended his sentence and placed him on supervised probation for 18 months. Defendant appeals.

I. *Appointment of Counsel*:

Defendant initially argues the trial court erred by not granting his motion for appointment of counsel. We disagree.

"A waiver of counsel or decision to proceed *pro se* is good and sufficient until the trial [is] finally terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver and makes a showing that the change of mind to proceed (with or without an attorney) was for *some good cause*." *State v. Hoover*, __ N.C. App. __, __, 621 S.E.2d 303, 304 (2005) (citations and internal quotation marks omitted) (emphasis added). The purpose behind the requirement of showing good cause to withdraw a waiver of counsel is that, in the absence of good cause, a defendant would be "permitted to control the course of litigation and sidetrack the trial." *State v. Smith*, 27 N.C. App. 379, 381, 219 S.E.2d 277, 279 (1975). "The burden of showing the change in the desire of the defendant *for counsel* rests upon the defendant." *State v. Kinlock*, 152 N.C. App. 84, 88, 566 S.E.2d 738, 741 (2002) (emphasis added) (citations and internal quotations omitted).

In the case *sub judice*, on 11 July 2005, defendant signed a "Waiver of Counsel," and the trial court certified the waiver form the same day. By signing the waiver form, defendant waived "[his] right to all assistance of counsel . . . includ[ing] [his] right to assigned counsel and [his] right to assistance of counsel. The trial court then calendared this matter to be heard in New Hanover County Superior Court on 29 August 2005. After the case was called for a hearing, defendant first requested a change of venue, and after the trial court denied that motion, defendant requested to withdraw his waiver of counsel. Specifically, defendant stated he had initially waived counsel because he was indigent and could not

afford to pay any counsel fees. However, defendant failed to establish any change in circumstances that amounted to good cause for his change of mind and offered no explanation why he waited until the district attorney called his case for trial before making a motion requesting counsel. Accordingly, defendant has failed to meet his burden of proof, *see Hoover*, __ N.C. App. at __, 621 S.E.2d at 304. To allow defendant's motion on these facts would be to allow him to control the course of litigation. *Smith*, 27 N.C. App. at 381, 219 S.E.2d at 279. Thus, this assignment of error is overruled.

II. *Limiting Instruction*:

Defendant next argues the trial court erred by failing to instruct the jury to disregard the state's question regarding whether defendant was convicted of disorderly conduct. We hold this argument has not been properly preserved for appellate review.

In the instant case, defendant was asked by the district attorney, "Were you found guilty of disorderly conduct on February 19th, 2004?" The defendant answered in the negative, then objected to the question on the grounds that the state had brought up a charge for which he had not been convicted. The defendant contended that this question was unfairly prejudicial. The trial judge overruled the objection, stating, "On cross-examination, they are allowed to inquire into the criminal history of a defendant. You are a defendant, and you are a witness. She is allowed to inquire. You may answer the question, either yes or no; and then, if you need to explain your answer, you may do so." Defendant never

requested a limiting instruction from the trial court. Consequently, defendant has failed to preserve this question for appellate review. *See* N.C. R. App. P. 10(b)(1) (2006) ("In order to preserve a question for appellate review, a party must have presented to the trial court *a timely request* . . . stating the specific grounds for the ruling the party desired the court to make[.]"). *See also State v. Matthews*, __ N.C. App. __, __, 623 S.E.2d 815, 819 (2006) (stating "[t]o the extent defendant contends he was prejudiced by the lack of limiting instructions, his failure to request such instructions precludes review of that issue on appeal." (citation omitted)).

III. *Motion to Dismiss*:

Defendant also argues the trial court erred in failing to dismiss the simple assault charge at the close of the evidence. We hold that defendant has failed to properly preserve this issue.

At trial, defendant did not make a motion to dismiss the simple assault charge. Thus, defendant may not raise this issue on appeal pursuant to N.C. R. App. P. 10(b)(3) (2006), which states "[a] defendant in a criminal case *may not assign as error* the insufficiency of the evidence to prove the crime charged *unless he moves to dismiss* the action[.]" (Emphasis added). Furthermore, defendant's third assignment of error, which states, "[t]he trial court committed reversible error by failing to dismiss the simple assault charge against the appellant at the close of all evidence," does not provide a legal rationale upon which the assigned error is predicated. Therefore, the assignment of error is in violation of

N.C. R. App. P. 10(c)(1) (2006). *See May v. Down East Homes of Beulaville, Inc.*, __ N.C. App. __, __, 623 S.E.2d 345, 346 (2006). For the foregoing reasons, we do not address this argument.

No error.

Judges GEER and JACKSON concur.

Report per Rule 30(e).