NO. COA05-1606

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v. Transylvania County
Nos. 04 CRS 50273, 1875, 1879

CHAD AARON JOHNSON

Appeal by Defendant from judgments entered 1 April 2005 by Judge Dennis J. Winner in Superior Court, Transylvania County. Heard in the Court of Appeals 13 September 2006.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi II, for the State.

Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for Defendant-Appellant.

McGEE, Judge.

Chad Aaron Johnson (Defendant) was convicted of one count of assault inflicting serious injury, two counts of assault with a deadly weapon inflicting serious bodily injury, and common law robbery. Defendant appeals.

Defendant moved for a continuance on the morning his trial was scheduled to begin. Defendant contended the State had not timely served notice of its intent to offer DNA evidence. Defendant argued the untimely notice violated his due process right to secure witnesses to testify on his behalf, specifically expert witnesses. The State argued that Defendant had proper notice since Defendant

had received State Bureau of Investigation (SBI) reports over six months earlier that recounted the DNA evidence to be offered. The trial court denied Defendant's motion to continue and found that Defendant "has had an abundance of time to hire experts in this case, to examine the blood and DNA and has not done so."

During jury selection, a prospective juror indicated that she knew Defendant because Defendant had assaulted her sister. T.38. On its own motion, the trial court excused the prospective juror for cause. The trial court instructed prospective jurors that the statement should not be considered in determining the facts of the case.

Later in *voir dire*, another prospective juror indicated that he did not know Defendant personally, but knew Defendant's family very well. The prospective juror stated several times that Defendant came from "good people." The trial court also excused this prospective juror for cause. The trial court again instructed the entire jury panel that the statements made during jury selection were not to be considered in determining the facts of the case. T.39. As a result of prospective jurors' statements, Defendant moved for a mistrial, or alternatively, for dismissal of the jury panel and for a continuance of the case so that the case could be tried before another jury panel. The trial court denied Defendant's motion and the case proceeded to trial.

The State's evidence tended to show that a violent assault occurred at Defendant's house on 20 February 2004, involving Defendant, Seth Morris (Morris), Trinity Osteen (Osteen), Aaron

Massey (Massey), Jimmy Lee Branks (Branks), and Travis Lee Swangim (Swangim).

Morris testified that he called Defendant and Defendant invited Morris to join a party at Defendant's house. Morris arrived at Defendant's house with his cousin, Adam Rector (Rector), at approximately 12:30 or 1:00 a.m. on 20 February 2004. Morris knocked on Defendant's door to ask Defendant whether Rector could also join the group. Defendant agreed, and Morris turned around to wave Rector in. Morris turned back toward Defendant and was struck in the face with an unknown object along his forehead. Morris began "bleeding into [his] eyes." Morris testified several people began hitting and kicking him and that he assumed a defensive position to protect his head.

Morris testified that more than two people beat him all over his back, head, and face. He testified that he was hit with a pistol and told to take off his pants. A dog also began biting him on one of his arms, on his face near his right eye, and on his stomach. He heard Defendant tell him to take his pants off and remembered Defendant pistol whipping him. Morris remembered Rector and Massey helping him back to the car.

Morris testified that at some point during the assault he realized that Osteen was present. Morris testified that Osteen did not like him. After the beating ended, Defendant said he would kill Morris, Rector, and Rector's family if they reported the attack to the police. Morris testified he had cigarettes, money, and pills in his pockets when he arrived, but when he put his pants

back on at the end of the assault, the items were missing and his shoes had been removed. As a result of the beating, Morris suffered extensive injuries, including right eye damage that required reconstructive surgery and the installation of a metal plate. He also suffered six skull fractures, loss of a thumb and part of an arm and hand, nerve damage, multiple dog scratches and bites, and impaired peripheral vision on one side. On cross-examination, Morris admitted that he and Osteen had not gotten along with one another for two or three months.

Rector testified that when he and Morris arrived at Defendant's house on 20 February 2004, Morris went to the front door. Rector then heard a yell and saw "sticks swinging, and a lot of commotion going on." Rector testified that he saw Defendant, Osteen, and Branks beating Morris, but by the time Rector got out of his car, six or seven people had come out of the house. Defendant, Osteen and Branks were assaulting Morris with their fists, sticks, or wood objects. Osteen told Rector to stay out of the fight and pushed Rector away. Three or four people continued to kick and hit Morris. Rector testified that Defendant and Osteen told Defendant's dog to "skit him[,]" and the dog attacked Morris. Defendant told Morris not to return to Defendant's property, and that if Morris or Rector called the police, Defendant would kill Morris, Rector, and Rector's family. Rector also stated that Defendant came out of the house with a pistol, which Defendant waved around while threatening to kill Morris and Rector if they went to the police.

Detective Eddie Gunter (Detective Gunter), an investigator with the Transylvania County Sheriff's Office, testified that he was called to Transylvania County Hospital on 20 February 2004 in response to the assault on Morris. Detective Gunter obtained a search warrant for Defendant's home the following day. Detective Gunter recovered a scaled replica of a Glock pistol (replica handgun) from a chest of drawers, which contained belongings of Defendant. Detective Gunter also recovered a 9-millimeter pistol bullet, a blood-soaked towel, blood-stained clothes, and a pair of Nike tennis shoes. Detective Gunter testified that Defendant and Osteen returned to Defendant's home while the officers were executing the search warrant. Defendant waived his *Miranda* rights and spoke with Detective Gunter about the incident. Defendant told Detective Gunter that Morris came to Defendant's house "looking for a fight" and would not leave. Defendant admitted using his fist to strike Morris in the head, but denied using any other object, and denied commanding his dog to attack Morris. Defendant was arrested for assault.

Detective Gunter testified that he spoke with Defendant again later that week. Detective Gunter was at the jail on another matter when Defendant initiated a conversation with Detective Gunter. During that conversation, Defendant admitted hitting Morris with the replica handgun, but said he only hit Morris once, splitting open Morris' eye. Defendant said he "bet [Morris] had some stitches on that eye." On cross-examination, Detective Gunter admitted that the replica handgun would not fire a 9-millimeter

bullet and that when viewed up close, the gun was obviously not a real gun.

Detective John Nicholson (Detective Nicholson), an investigator with the Transylvania County Sheriff's Office, testified that the replica handgun was a replica of a Glock handgun and that it "function[ed] like a typical semi-automatic pistol" and was "designed after a Glock handgun." He testified that, except for a stamp on the side of the weapon, "the design [was] relatively consistent with a Glock manufacturer."

Dr. Duane Shillinglaw (Dr. Shillinglaw) testified he treated Morris on 20 February 2004 for cerebral spinal fluid draining from Morris' nose and ears, which indicated a crack in the base of Morris' skull. Dr. Shillinglaw testified that Morris' head injuries created the possibility of swelling of the brain, which could be life threatening. Further, Dr. Shillinglaw testified that Morris' injuries were consistent with being hit by a blunt object, such as a 2x4, a baseball bat, or the butt or barrel of a gun.

SBI Special Agent Suzi Barker (Agent Barker) testified as an expert witness for the State. Agent Barker testified that there were visible blood stains on the replica handgun and on the clothing recovered from the scene of the assault. SBI Special Agent Amanda Fox testified that she analyzed the blood samples and concluded that the blood recovered from the clothing did not match the DNA profile of Morris or Defendant. However, the blood on the replica handgun matched Morris' DNA profile, but did not match Defendant's DNA profile.

Jennifer Chapman (Chapman) testified that she was present at Defendant's house on 20 February 2004, when Defendant and Osteen said Morris would be coming over. She testified that when Morris' car drove up, Defendant walked outside first, followed a minute later by Osteen and Massey. The rest of the group, including Chapman, then followed. Chapman testified that when she walked outside, she saw Defendant, Osteen, and Massey hitting Morris with their fists. Later, Chapman saw Massey hit Morris with a 2x4 more than once. Massey also forced Morris to empty his pockets and take off his shoes. Chapman testified that when Defendant's dog attacked Morris, Defendant took the dog back into the house. Massey then hit Morris with a stick. Chapman also testified that she saw "a BB gun or some small gun" with blood on it on a table in Defendant's house the morning after the assault, but that she did not see a gun used in the assault.

On cross-examination, Chapman testified that Massey used a flashlight to search Morris' pockets, and that Massey also hit Morris with the flashlight. She testified that after putting the dog in the house, Defendant and Osteen came back outside and tried to stop Massey from hitting Morris. Defendant helped Morris put on his pants. Chapman indicated that no one in the group, including Defendant, encouraged Massey to rob Morris.

Swangim testified that he and Branks went to Defendant's house to "hang out" and drink on 20 February 2004. Swangim testified that when he and Branks arrived, Defendant, Osteen, Massey, Chapman, Lindsey Galloway (Galloway), Defendant's cousin, and a

girl named Alisha, were present. Swangim said Defendant told the group he had "some company coming up," that "the boy that [Osteen] had a beef with was coming up," and "[i]f [Osteen] wanted to take care of it there, he could, whatever." When Morris arrived, Defendant went outside, the two exchanged words, and a fight broke out. Swangim testified that he saw Defendant throw the first punch. Massey and Branks then went outside, jumped on Morris, and began hitting him. Swangim and Osteen followed, and also began striking Morris. Swangim saw Massey hit Morris in the back of the head with a 2x4 twice. Swangim and Osteen tried to grab the board from Massey. Defendant, Massey, and Osteen continued to strike Morris in the head. Swangim also testified that an object was waved around Morris' face and was put in Morris' mouth, but Swangim could not tell whether it was a gun or a flashlight. Swangim testified that as Morris was leaving, Defendant told Morris to "[g]et off [his] property[,]" and that Defendant then said, "I'm Chad M----- F------ Johnson[.]"

At the close of the State's evidence, Defendant moved to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury, based on use of the replica handgun. The trial court found there was evidence the replica handgun had been used to hit the victim, and stated that "whether or not that's enough to make it a deadly weapon would be a jury question." Defendant also moved to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury, based on use of a piece of wood. Defendant argued there was

insufficient evidence presented that Defendant and Massey had acted in concert. The trial court found that "there's evidence that [Defendant] and Massey participated in this affray" and that it was "enough to get acting in concert to the jury." The trial court denied each of Defendant's motions.

Defendant presented evidence and testified on his own behalf. Defendant testified he was aware there were problems between Osteen and Morris because Defendant had witnessed an argument between Morris and Osteen outside the courthouse several days prior to the assault on Morris. Defendant said Morris indicated he would not fight at the courthouse, but that Morris would "get [Osteen] later." Defendant testified that on 20 February 2004, he received a telephone call from Morris around 10:05 p.m. asking whether Osteen was at Defendant's house. Defendant said Osteen was present, and Morris said he wanted to come and "finish the problem that [Osteen] and me have." Defendant told Morris not to come, and the call abruptly ended.

Defendant testified that Morris appeared at Defendant's house at about 1:40 a.m. Before Defendant went outside, he went to his bedroom and retrieved the replica handgun in case he needed something with which to defend himself. He put the gun in the back of his pants, underneath his shirt. Defendant went outside the house and told Morris to leave. Morris refused, and tried to enter the house, at which point Defendant pushed Morris. According to Defendant, Morris pulled out a knife and started walking toward Defendant. Defendant pulled out the replica handgun, and Morris

stopped walking toward Defendant. Morris laughed, and indicated he knew the gun was not real. Fearing he would be stabbed, Defendant held the replica handgun by the barrel, and threw it at Morris. The replica handgun hit Morris in the face, and Morris dropped the knife. Defendant and Morris began to wrestle around on the porch of the house. Osteen, Branks, Swangim, and Massey came out of the house and starting hitting Morris on the back with their fists. Defendant testified that he told them to stop because the fight was between Morris and Defendant. According to Defendant, Osteen, Branks, and Swangim stopped, but Massey continued to hit Morris. Chapman and Galloway came outside, and the dog escaped from the house. Defendant saw his dog bite Morris and tried to prevent the dog from biting again. Defendant got the dog away from Morris and noticed Massey hitting Morris in the back with a 2x4. Defendant saw Osteen grab the 2x4 from Massey. Defendant testified he did not call anyone to help him with the fight with Morris, and that he did not tell anyone where the 2x4 was located. Defendant and Osteen then returned the dog to its cage inside the house. When Defendant returned outside, he saw Massey striking Morris with a stick and a flashlight. Defendant pushed Massey and told him to leave Morris alone. Defendant then helped Morris put his pants back on. According to Defendant, Rector said he and Morris had been drinking, and that Morris wanted to go to Defendant's house. Defendant denied waving any object around Morris' head. Defendant testified he went back into his house and went to sleep after Rector and Morris left.

Defendant testified that the next day he retrieved the knife and the replica handgun from outside and brought them back into the house. Defendant also saw Massey later in the day, and Massey bragged about hitting Morris with a 2x4 and stealing Morris' cigarettes and pills. Defendant denied encouraging anyone to strike Morris with a stick or a 2x4, and denied stealing any item of value from Morris, or encouraging anyone else to steal from Morris. Defendant admitted throwing the replica handgun at Morris but denied pistol-whipping him with it. Defendant maintained that he threw the replica handgun because Morris was advancing toward him with a knife. Defendant denied threatening to kill Morris or Rector if they went to the police and denied stating his name at the end of the assault.

Galloway testified she was present at Defendant's house the night of the assault, and that she saw Morris walking toward Defendant with a small metal object in his hand, although she could not identify it as a knife. She then saw Branks, Swangim, and Osteen leave the house. She testified that when she and Chapman went outside, the dog ran out of the house. She saw the dog bite Morris. She testified that the males were all taking turns hitting Morris with their fists. Later in the fight, she saw Massey strike Morris with a black, heavy object that she believed was a flashlight.

Defendant also offered the testimony of Osteen, who stated that he assumed the gun used in the assault was a pellet gun that he and Defendant had previously shot off the porch of Defendant's

house.

Margaret Brock testified for Defendant that she knew Morris carried a knife because she and Morris had used the knife "to cut up crystal meth."

At the close of all the evidence, Defendant renewed his motions to dismiss, which the trial court again denied.

I.

Defendant first argues the trial court violated Defendant's due process rights by denying his motion to continue. Defendant argues that the State provided Defendant insufficient notice of the State's intent to present expert evidence regarding the DNA analysis performed on the replica handgun. Defendant contends the delayed notice prevented him from securing his own expert.

The standard of review for a trial court's ruling on a motion to continue is abuse of discretion. *State v. Morgan*, 359 N.C. 131, 143, 604 S.E.2d 886, 894 (2004), *cert. denied*, *Morgan v. North Carolina*, __ U.S. __, 163 L. Ed. 2d 79 (2005). However, when a motion to continue involves a constitutional right, the trial court's ruling "is fully reviewable by an examination of the particular circumstances presented by the record on appeal[.]" *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). Even so, a new trial is only required when the defendant can establish that "the denial was erroneous and also that [the defendant's] case was prejudiced as a result of the error." *Id.* "If the error amounts to a violation of [the] defendant's constitutional rights, it is prejudicial unless the State shows the

error was harmless beyond a reasonable doubt." *State v. Barlowe*, 157 N.C. App. 249, 253, 578 S.E.2d 660, 662-63, *disc. review denied*, 357 N.C. 462, 586 S.E.2d 100 (2003).

In *Barlowe*, the defendant was granted a new trial based upon the trial court's denial of her motion to continue. *Id.* at 252, 578 S.E.2d at 666. The defendant in *Barlowe* sought a continuance to secure a blood spatter expert to rebut the State's blood pattern evidence. *Id.* at 255, 578 S.E.2d at 664. Importantly, the defendant argued that there were only three such experts identified in North Carolina, and the testimony would be crucial to the defendant because the State's evidence contradicted her own statement about her involvement in the murder. *Id.* at 256-57, 578 S.E.2d at 664-65. None of the experts the defendant contacted were available for the defendant's trial because the State had not served the defendant with its expert's report until approximately three weeks before trial, despite the defendant's discovery requests. *Id.* Further, in *Barlowe*, the defendant's motion to continue included the names of the expert witnesses the defendant had contacted, and affidavits regarding their availability. *Id.* This Court found that "[g]iven the materiality of the issue on which [the] defendant sought expert advice and testimony and the potential penalty faced by [the] defendant if convicted, we can find no sound reason within the record for the denial of her motion for a continuance[.]" *Id.* at 258, 578 S.E.2d at 665.

We find the present case distinguishable from *Barlowe*. In this case, Defendant admitted that he threw the replica handgun at

Morris outside the house. Morris' testimony also connected Defendant to the replica handgun. Morris testified that Defendant hit him with an unknown object outside the house shortly after Morris arrived. Later in his testimony, Morris testified that he was "hit with a pistol in the face," and that he remembered Defendant pistol-whipping him. Additionally, while the defendant in *Barlowe* pointed to the importance of expert testimony to her case, in this case, Defendant has not demonstrated to this Court, nor did he articulate to the trial court, what expert testimony he sought to secure and why it was material to his case. *See Branch*, 306 N.C. at 105, 291 S.E.2d at 657 (noting that the defendant failed to inform "the trial court of the name of a single witness the defendant allegedly sought to bring before the court" or "of any indication as to what the defendant expected to attempt to prove through these witnesses"). The testimony of the State's SBI witnesses appeared to play a minor role in the evidence presented in this case. Defendant has not demonstrated any error in the trial court's denial of his motion to continue, nor prejudice, assuming *arguendo*, that the denial was erroneous.

Additionally, the defendant in *Barlowe* moved for a continuance approximately one week prior to trial and supported her motion with affidavits demonstrating the steps taken by counsel to secure experts and reasons why efforts had failed. Defendant in the present case waited until the morning trial was scheduled to begin, in violation of N.C. Gen. Stat. § 15A-952(c), thereby constituting a waiver of the motion. N.C. Gen. Stat. § 15A-952(e) (2005). The

> rule requiring the defendant to make a showing of abuse by the trial court in denying his motion for a continuance should be applied with even greater vigor in cases . . . in which the defendant has waived his right to make a motion to continue by failing to file the motion within the time prescribed by G.S. 15A-952.

Branch, 306 N.C. at 104, 291 S.E.2d at 656. Finally, the record does not contain any affidavits filed by Defendant in support of the motion. "[A] motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." *State v. Kuplen*, 316 N.C. 387, 403, 343 S.E.2d 793, 802 (1986). This assignment of error is overruled.

II.

Defendant next argues the trial court erred when it failed to declare a mistrial or dismiss the jury panel after a prospective juror stated that Defendant had assaulted her sister. We disagree.

The State contends that Defendant has failed to adequately preserve this argument for our review by not including in the record a transcript of jury *voir dire*. We disagree. This Court has declined to review such an issue where nothing in the record, the transcript or any other document, has reconstructed the relevant portions of jury selection. *See, e.g., State v. Shelman*, 159 N.C. App. 300, 311, 584 S.E.2d 88, 96, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003). However, where "the record of the trial court's consideration of [the] defendant's motion shows that the parties and the [trial] court were generally agreed as to what transpired[,]" we have reached the issue. *State v. McKinney*, 88 N.C. App. 659, 661, 364 S.E.2d 743, 745 (1988). We find that the

trial court's recitation of the events which occurred during jury selection adequately preserved this issue for our review. Although the entire *voir dire* proceeding is not included in the record, the trial court recounted the allegedly improper events which Defendant challenges, outside the presence of the jury. After its recitation, the trial court also inquired whether either party had anything to add. The trial court's description provides an adequate basis for appellate review of this issue.

When a defendant moves for a mistrial, the trial court "must declare a mistrial . . . if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2005). We review a trial court's decision to grant or deny a mistrial for an abuse of discretion. *State v. Hurst*, 360 N.C. 181, 188, 624 S.E.2d 309, 316 (2006), *cert. denied*, __ U.S. __, 166 L. Ed. 2d 131 (2006). "[A] mistrial should not be allowed unless there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *Id.* (citation omitted).

Defendant relies on *State v. Mobley*, 86 N.C. App. 528, 358 S.E.2d 689 (1987), to support his argument that the trial court erred by denying his motion for a mistrial. In *Mobley*, the defendant contended that the trial court committed prejudicial error when it failed to dismiss all the jurors "because one juror,

who identified himself as a police officer, stated that he had 'dealings with the defendant on similar charges.'" *Id.* at 532, 358 S.E.2d at 691. The trial court dismissed the police officer-juror and instructed the jury to disregard the statement made by the officer. This Court concluded that "[a] statement by a police officer-juror that he knows the defendant from 'similar charges' is likely to have a substantial effect on other jurors" and that under the circumstances, the curative instruction was insufficient. *Id.* at 533, 358 S.E.2d at 692. Thus, the defendant was entitled to a new trial. *Id.* at 534, 358 S.E.2d at 692.

We find *Mobley* distinguishable from the present case. The trial court reported that the prospective juror stated she knew Defendant because he had assaulted her sister. The trial court instructed the jury not to consider her remark. The record is silent as to whether Defendant chose to inquire about any effect the remark had on the other prospective jurors, or whether their ability to render an impartial verdict had been compromised. However, Defendant has not indicated that he was prevented from doing so. Further, the improper remark was not made by a law enforcement officer, as it was in *Mobley*, nor did the remark reference multiple "charges." In the present case, Defendant admitted on the stand to prior multiple assault convictions, including a conviction for assault with a deadly weapon. Finally, positive comments were also made about Defendant's family during *voir dire*. Not every prejudicial statement by a prospective juror entitles a defendant to a new trial. *State v. McAdoo*, 35 N.C.

App. 364, 366, 241 S.E.2d 336, 337-38, *cert. denied*, 295 N.C. 93, 244 S.E.2d 262 (1978) (holding that a statement made by a prospective juror that the defendant had tried to steal a chain saw did not require a new trial). Defendant has not shown prejudice resulting from the *voir dire* statements. This assignment of error is overruled.

III.

Defendant next contends the replica handgun is not a deadly weapon as a matter of law. Defendant argues the trial court should have granted his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury, based upon use of the replica handgun. Defendant argues that the weapon used in the case was "not capable . . . of striking a blow that could cause death or great bodily harm." We disagree and hold that the issue was properly submitted to the jury.

"A deadly weapon is 'any instrument which is likely to produce death or great bodily harm, under the circumstances of its use[.] The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself.'" *State v. Palmer*, 293 N.C. 633, 642-43, 239 S.E.2d 406, 412-13 (1977) (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924)). Further,

> [w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so

> declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury.

Smith, 187 N.C. at 470, 121 S.E. at 737 (internal citation omitted). Finally,

> [i]f there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must, of course, resolve the conflict.

Palmer, 293 N.C. at 643, 239 S.E.2d at 413.

The evidence presented in the present case as to the nature of the weapon did not "admit of but one conclusion" and was properly sent to the jury. Morris testified that he remembered being "hit with a pistol[,]" and that he remembered Defendant "pistol whipping [him]." Morris testified that he was ordered by Defendant to remove his pants and afterwards "was hit with a pistol in the face." Detective Nicholson testified that the weapon recovered from Defendant's house appeared to be "a black . . . semi-automatic handgun" that "function[ed] like a typical semi-automatic pistol." He testified that other than a stamp on its side, "the design [was] relatively consistent with a Glock manufacturer." Defendant's witness, Osteen, testified that he assumed that the handgun involved in the assault on Morris was a pellet gun. Defendant admitted that he guessed Morris required some stitches in his eye from being hit with the replica handgun, and the evidence showed

that Morris indeed suffered significant injury to his eye, requiring reconstructive surgery and the installation of a metal plate where he was struck with the replica handgun.

The nature of this weapon, and the manner in which it was used during the assault, were recurring issues throughout Defendant's trial, and conflicting evidence was presented. Therefore, resolution of the issue was properly for the jury. We overrule this assignment of error.

IV.

Defendant's final argument references his eighth assignment of error, which alleges the trial court erred when it denied Defendant's motion to dismiss for insufficient evidence of acting in concert, the charge of assault with a deadly weapon with intent to kill inflicting serious injury, based upon use of a piece of wood. In his brief, however, Defendant argues the trial court improperly instructed the jury on acting in concert. Thus, Defendant's brief does not correspond to his assignment of error, and therefore this argument is deemed abandoned. *State v. Purdie*, 93 N.C. App. 269, 278, 377 S.E.2d 789, 794 (1989) ("When, as here, the argument in the brief does not correspond to the assignment of error, that assignment should be deemed abandoned under Rule 28 of the Rules of Appellate Procedure."). Further, Defendant did not object at the charge conference when the State requested the acting in concert instruction, nor when the trial court agreed to give that instruction. Defendant also did not object to the acting in concert instruction after the jury was charged and the trial court

inquired about any necessary corrections. "A party may not assign as error any portion of the jury charge . . . unless he objects thereto before the jury retires to consider its verdict[.]" N.C.R. App. P. 10(b)(2). Defendant also does not allege or argue the instruction amounts to plain error. *See State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998) ("[W]here a defendant fails to assert plain error in his assignments of error . . . he has waived even plain error review."). Thus, this argument must fail.

Defendant does not set forth arguments pertaining to his remaining assignments of error. We deem those assignments of error abandoned pursuant to N.C.R. App. P. 28(b)(6).

No error.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).