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NO. COA08-134

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 05 CRS 229134

JASON DANIEL MOODY

Appeal by Defendant from judgment entered 6 June 2007 by Judge J. Gentry Caudill in Superior Court, Mecklenburg County. Heard in the Court of Appeals on 26 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Wilkins, for the State.

Parish, Cooks & Conklin, by James R. Parish, for Defendant-Appellant.

McGEE, Judge.

Jason Daniel Moody (Defendant) and his girlfriend, Haley Wilkes (Ms. Wilkes), went on a date on the evening of 16 February 2005. During the evening, they visited a bar where Defendant had an altercation. Defendant and Ms. Wilkes left the bar at approximately 2:00 a.m. on 17 February 2005, and as Ms. Wilkes was driving Defendant home, Defendant became violent. Ms. Wilkes and Defendant arrived at Defendant's residence and shortly thereafter, Defendant left his residence through a window and drove away.

Szymon Dzierbun (Dzierbun) and his girlfriend also went out on the evening of 16 February 2005. While at a bar, Dzierbun and his

girlfriend had an argument. Dzierbun left the bar on foot around 2:00 a.m. on 17 February 2005.

At approximately 2:30 a.m. on 17 February 2005, Sara Technik (Ms. Technik) was driving home when a maroon pickup truck pulled out in front of her from a vacant house. Later that morning around 8:45 a.m., Jerry Pressley (Pressley), the owner of the vacant house, went to the house to check its condition. Pressley found Dzierbun lying on the ground near the back of the house. Dzierbun was bloody but still alive. The police were notified and arrived at the house where, during the course of their investigation, they discovered an automotive battery that was split open.

Ms. Technik drove past the vacant house again around 3:00 p.m. on 17 February 2005. She saw several police cars there, and stopped. The officers told Ms. Technik that something had happened at the house. Ms. Technik then told the police officers about the maroon pickup truck she had seen leaving the vacant house earlier that morning.

Ms. Wilkes next saw Defendant on 19 February 2005. Defendant had a swollen black eye and his hands were swollen and badly beaten. Ms. Wilkes asked Defendant what had happened to him. Defendant told her that after she had dropped him off at his residence on the morning of 17 February 2005, he went for a ride and picked up a hitchhiker, later identified as Dzierbun. Defendant told Ms. Wilkes that the hitchhiker hit Defendant and then got out of Defendant's truck. Defendant also told Ms. Wilkes that he chased the hitchhiker, got out of the truck, and fought

with the hitchhiker. Defendant told Ms. Wilkes that he hit the hitchhiker in the head with a car battery. Defendant told Ms. Wilkes he attempted to pick up the hitchhiker and put him in the back of the truck, but Defendant was too tired to do so and he left the hitchhiker there. Defendant also told Ms. Wilkes that he left the car battery behind. Ms. Wilkes and Defendant went to a car wash where Defendant washed blood off of his truck and told Ms. Wilkes the blood was the hitchhiker's blood.

Defendant visited his friend, Greg Sigmond (Sigmond), on 20 February 2005 and told Sigmond that he picked up a guy walking alongside the highway at around 2:00 or 3:00 a.m. on the morning of 17 February 2005. Defendant told Sigmond that Defendant and the hitchhiker got into a fight when the hitchhiker no longer wanted to ride. Defendant told Sigmond that the next thing Defendant knew, Defendant was choking the hitchhiker and that Defendant then got a battery out of the back of Defendant's truck and hit the hitchhiker in the head with the battery about five times. Defendant told Sigmond he attempted to pick up the hitchhiker and put him in the back of Defendant's truck, but could not, and he left the hitchhiker there.

Sometime later, Sigmond called the Matthews Police Department and told police they needed to investigate Defendant for an assault. The North Carolina State Bureau of Investigation (SBI) and the Matthews police interviewed Sigmond on 15 June 2005. During the interview, Sigmond told the investigators what Defendant had told him about assaulting a hitchhiker.

SBI agents also interviewed Ms. Wilkes on 21 June 2005. According to Ms. Wilkes, the SBI agents told her that if she did not cooperate with their investigation she could be charged as an accessory, which the agents denied saying.

Defendant was arrested on or about 24 June 2005 and charged with assault with a deadly weapon with intent to kill inflicting serious injury on Dzierbun. Defendant was indicted on the same charge on 12 September 2005.

At trial, defense counsel contended that there was an agreement between the State and Ms. Wilkes that in exchange for Ms. Wilkes' testimony against Defendant, the State would not charge Ms. Wilkes as an accessory. Defense counsel also alleged that the State failed to disclose said agreement, thereby violating the rules of discovery. Defense counsel moved for a mistrial. The trial court found that the State failed to notify Defendant and his counsel of the conversations between Ms. Wilkes and the SBI agents and determined that the State's failure to do so amounted to a discovery violation.

The trial court allowed defense counsel to conduct *voir dire* examinations of the SBI agents. The trial court offered Defendant the opportunity to further question Ms. Wilkes; however, Defendant declined to do so. The trial court also granted a two-hour recess to allow defense counsel time to conduct further research. The trial court, having granted these remedies and having determined that Defendant was not prejudiced as a result of the discovery violation, denied Defendant's motion for a mistrial.

At the charge conference, Defendant requested that the trial court instruct the jury on self-defense, to which the State objected. The trial court denied Defendant's request to instruct the jury on self-defense. During closing argument, defense counsel stated, in part, "you can't show the assault, period, because it wasn't without justification or excuse." The trial court interrupted defense counsel and told the jury that counsel's argument was improper under the law.

The jury found Defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant appeals.

I.

Defendant argues that the trial court committed reversible error when it denied Defendant's motion for mistrial. Defendant argues the trial court abused its discretion in denying Defendant's motion for mistrial after the trial court had found that the State's failure to reveal conversations between Ms. Wilkes and SBI agents prior to trial was a discovery violation. We disagree.

"A ruling on a motion for a mistrial is 'addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed on appeal absent a gross abuse of that discretion.'" *State v. Malone*, 65 N.C. App. 782, 785, 310 S.E.2d 385, 387, *disc. review denied*, 311 N.C. 405, 319 S.E.2d 277 (1984) (citation omitted) (quoting *State v. Allen*, 50 N.C. App. 173, 176, 272 S.E.2d 785, 787 (1980), *appeal dismissed*, 302 N.C. 399, 279 S.E.2d 353 (1981)) (citations omitted). N.C. Gen. Stat. § 15A-910 addresses regulation of discovery and the failure to comply with

discovery rules:

- (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article [Discovery in the Superior Court] or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may
 - (1) Order the party to permit the discovery or inspection, or
 - (2) Grant a continuance or recess, or
 - (3) Prohibit the party from introducing evidence not disclosed, or
 - (3a) Declare a mistrial, or
 - (3b) Dismiss the charge, with or without prejudice, or
 - (4) Enter other appropriate orders.
- (b) Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article.

N.C. Gen. Stat. § 15A-910 (2007).

It is important to note that while the statute [N.C. Gen. Stat. § 15A-910] sets out possible curative actions, it does not require the court to impose any sanction. Which sanction, if any, is the appropriate response to a party's failure to comply with a discovery order is entirely within the sound discretion of the trial court.

State v. Alston, 307 N.C. 321, 330, 298 S.E.2d 631, 639 (1983) (citation omitted). In the case before us, the trial court considered the materiality of the subject matter and the totality of the circumstances surrounding the discovery violation and

imposed the following sanctions: (1) the trial court allowed Defendant to conduct a *voir dire* examination of the SBI agents; (2) the trial court allowed Defendant to question Ms. Wilkes further, which Defendant declined to do; and (3) the trial court granted Defendant a recess to conduct research. The trial court did not err in ruling that the totality of the circumstances surrounding the discovery violation did not warrant a mistrial. The State presented additional evidence that corroborated Ms. Wilkes' testimony, including Sigmond's testimony and testimony concerning an automotive battery that was found at the scene. We conclude therefore that the trial court's decision to impose other sanctions for the discovery violation, rather than granting Defendant's motion for mistrial, was not an abuse of discretion.

In support of Defendant's argument that the trial court erred in failing to grant his motion for mistrial, Defendant also argues that the SBI agents used Ms. Wilkes as an informant in violation of Defendant's constitutional right to counsel. However, in determining whether to grant Defendant's motion for mistrial, the only conversations at issue between Ms. Wilkes and the SBI agents were those that occurred prior to Defendant's arrest. Thus, Defendant's Sixth Amendment right to counsel had not yet attached and, therefore, Defendant's right to counsel could not have been violated. Defendant's argument is without merit.

II.

Defendant next argues that the trial court erred in denying Defendant's request for an instruction on self-defense as an excuse

or justification for the assault, when the law and facts of the case supported a self-defense instruction. We disagree.

If one is without fault in provoking, or engaging in, or continuing a difficulty with another, he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other[.]

State v. Anderson, 230 N.C. 54, 56, 51 S.E.2d 895, 897 (1949) (citations omitted). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to [the] defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted).

Defendant argues that the State's own evidence tended to show that Dzierbun hit Defendant first and therefore was the initial aggressor. However, even if Dzierbun was the initial aggressor, Defendant pursued Dzierbun after Dzierbun left Defendant's vehicle, thus choosing to continue the fight. Moreover, even if Dzierbun started the fight by hitting Defendant first, Defendant used more force than was reasonably necessary in choking Dzierbun and hitting him with a car battery in the head approximately five times. Because the evidence presented did not support an instruction on self-defense, we conclude that the trial court did not err in denying Defendant's request to instruct the jury on self-defense.

III.

Lastly, Defendant argues that the trial court erred when it *ex mero motu* stopped defense counsel during defense counsel's closing

argument. We disagree.

During Defendant's closing argument, defense counsel stated in part, "[s]o, we would say that based on that you can't even, and this is why we say not guilty right off the bat although we have to go through all of these, that you can't show the assault, period, because it wasn't without justification or excuse." The trial court then interrupted defense counsel's closing argument and stated, "[e]xcuse me. Let me interrupt you. Do not consider the last statement by counsel. That is an improper argument under the law."

N.C. Gen. Stat. § 15A-1230(a) (2007) states in pertinent part that "[d]uring a closing argument to the jury an attorney may not . . . make arguments on the basis of matters outside the record[.]" As we stated earlier, the evidence did not show circumstances surrounding the assault that warranted an instruction on self-defense. We conclude that the trial court did not err when it interrupted defense counsel during Defendant's closing argument because there was no evidence presented during the trial to support defense counsel's argument.

No error.

Judges McCULLOUGH and STROUD concur.

Report per Rule 30(e).