

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-31

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 07 CRS 82771
07 CRS 24378

DONNIE LEE PINSON

Court of Appeals

Appeal by defendant from judgment entered 13 September 2007 by Judge L. Todd Burke in Superior Court, Guilford County. Heard in the Court of Appeals 06 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Elder, for the State.

Slip Opinion

Daniel F. Read for defendant-appellant.

WYNN, Judge.

Whether a weapon is a deadly weapon is a question of law to be decided by the court “where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion[.]”¹ Here, Defendant Donnie Lee Pinson argues the trial court erred by peremptorily instructing the jury that an automobile is a dangerous weapon. Because the evidence leads to “but one

¹ *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 470 (citations and quotations omitted), *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986).

conclusion," the deadly nature of Defendant's use of the vehicle, we find no error.

At trial, Tasha Herbin testified that she was a passenger in a vehicle driven by Defendant at approximately 1:00 a.m. on 20 March 2007. Both of them had been drinking and sniffing cocaine earlier that evening, and they were arguing in the vehicle. While driving slowly after a traffic light, Defendant reached across Ms. Herbin, opened her door, and pushed her out of the vehicle. Ms. Herbin was on her stomach in the street when she saw the backup lights come on as Defendant put the vehicle into reverse, but she was unable to get up and run due to her intoxicated condition. At that point, Defendant drove slowly in reverse, while Ms. Herbin yelled for help and told Defendant to stop because he was "running [her] over with the car[.]" Defendant backed over Ms. Herbin's leg which resulted in her breaking her ankle. The injury required surgery, and Ms. Herbin was unable to walk for about three months.

Jerry Hayes, a public safety officer at a nearby college, saw Defendant and Ms. Herbin arguing. He testified that he saw Defendant push Ms. Herbin on the passenger side of the car, and she "ended on the street in the back of the car." Mr. Hayes then saw Defendant get into the vehicle and pull about three feet forward. Mr. Hayes heard Ms. Herbin yelling as Defendant began backing up in the vehicle, and he also yelled for Defendant to stop. He observed that Defendant's window was down. Defendant stopped and exited the vehicle after he backed over Ms. Herbin. Even after Defendant got out of the vehicle, he did not assist Ms. Herbin out of the street.

Officer Jerome Palmenteri was on patrol when he observed Ms. Herbin "in the middle of the intersection crawling on her hands and knees[.]" He noticed that Ms. Herbin was in a great deal of pain and that her ankle was severely injured. Defendant initially indicated to Officer Palmenteri that he had no involvement and did not know Ms. Herbin. He then said he had just picked Ms. Herbin up and implied that she was a prostitute. Ms. Herbin told Officer Palmenteri that Defendant had pushed her out of the vehicle and had run over her.

On 7 May 2007, Defendant was indicted on a charge of assault with a deadly weapon inflicting serious injury and of being an habitual felon. During the jury trial, at the close of the State's evidence, Defendant moved to dismiss the charge of assault with a deadly weapon inflicting serious injury due to insufficiency of the evidence. The trial court denied the motion. Defendant did not present any evidence, and he renewed his motion to dismiss. The trial court again denied the motion. During the charge conference, Defendant objected to the trial court's decision to instruct the jury that the vehicle was a deadly weapon. After the trial court instructed the jury, Defendant made no additional objections to the instructions. Following the jury's verdict of guilty to the charge of assault with a deadly weapon inflicting serious injury, Defendant admitted his habitual felon status. The trial court found one mitigating factor and imposed a mitigated-range sentence of 70 to 99 months' imprisonment.

On appeal, Defendant argues the trial court erred by: (I) peremptorily instructing the jury that an automobile is a dangerous weapon and (II) denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury due to insufficiency of the evidence.

I.

Defendant first contends the trial court erred by peremptorily instructing the jury that an automobile is a dangerous weapon. He argues that the issue was a question of fact for the jury and that the trial court's action was prejudicial because it eliminated the jury's consideration of a possible misdemeanor offense. We disagree.

"The deadly character of [a] 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. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924).

It has long been the law of this state that where 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 *is one of law, and the Court must take the responsibility of so declaring.*

State v. Torain, 316 N.C. 111, 119, 340 S.E.2d 465, 470 (citations and quotations omitted) (emphasis in original), *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986).

Here, the evidence shows that Defendant and Ms. Herbin had been arguing before Defendant pushed Ms. Herbin and caused her to fall in the street. Defendant got into the vehicle and pulled forward approximately three feet. He then stopped and backed over

Ms. Herbin, despite yells from Ms. Herbin and Mr. Hayes to stop. The evidence leads to "but one conclusion," *Torain*, 316 N.C. at 119, 340 S.E.2d at 470, which is the deadly nature of Defendant's use of the vehicle.

Further, our Supreme Court has clearly identified an automobile's potential to be used as a deadly weapon. See *State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 779 (1955) (finding that an automobile was a deadly weapon where the driver defendant willfully and intentionally used the automobile to throw a person from it). Additionally, this court has found an automobile to be a deadly weapon as a matter of law when driven at a high speed toward police officers. *State v. Batchelor*, 167 N.C. App. 797, 800, 606 S.E.2d 422, 424 (2005). Accordingly, we find the trial court did not err by instructing the jury that the vehicle was a deadly weapon.

II.

Defendant next contends the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury due to insufficiency of the evidence. He argues the "evidence did not demonstrate a formed and certain intent to use the automobile as a weapon to injure." We do not find Defendant's argument persuasive.

When ruling on a Defendant's motion to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied."

State v. Powell, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). This Court reviews the trial court's decision to deny a motion to dismiss taking the evidence in the light most favorable to the State and giving the State the benefit of all reasonable inferences. *Id.* at 99, 261 S.E.2d at 117. Evidence is sufficient to withstand a motion to dismiss when it gives "rise to a reasonable inference of defendant's guilt based on the circumstances." *State v. Styles*, 93 N.C. App. 596, 603, 379 S.E.2d 255, 260 (1989).

The elements of assault with a deadly weapon inflicting serious injury are: (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, and (4) not resulting in death. *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990); N.C. Gen. Stat. § 14-32(b) (2006).

Although Defendant asserts that the "evidence did not demonstrate a formed and certain intent to use the automobile as a weapon to injure," assault with a deadly weapon inflicting serious injury is not a specific intent crime. See *State v. Woods*, 126 N.C. App. 581, 587, 486 S.E.2d 255, 258 (1997). Instead, it is a general intent crime which only requires the doing of some act. *Id.*; see also *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). When viewed in the light most favorable to the State, the evidence shows that Defendant initially pulled forward in the vehicle and then stopped. As he began backing up, Ms. Herbin and Mr. Hayes yelled for him not to do so. He continued, however, and did not

stop until after his vehicle had backed over Ms. Herbin's leg. Defendant got out of the vehicle and did not attempt to assist Ms. Herbin. Sufficient evidence was adduced at trial of Defendant's general intent to commit the offense, and he did not challenge any of the specific elements of the offense. The trial court therefore properly denied Defendant's motion to dismiss the charge.

No error.

Judges ELMORE and GEER concur.

Report per Rule 30(e).