NO. COA08-641

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2009

STATE OF NORTH CAROLINA

v. Graham County
No. 07 CRS 50088

MARVIN DALE HARRIS

Appeal by defendant from judgment entered 6 December 2007 by Judge Laura J. Bridges in Graham County Superior Court. Heard in the Court of Appeals 17 November 2008.

Roy Cooper, Attorney General, by Kathryn J. Thomas, Assistant Attorney General, for the State.

William D. Auman for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment imposing an active sentence entered upon his conviction by a jury for felonious assault with a deadly weapon inflicting serious injury.

The evidence presented by the State at trial tended to show that in the evening of 16 February 2007, Kaleb Chekelee, his brother Gabe, and several other friends returned to Robbinsville after attending a basketball game in Bryson City. They parked in the lot of the Ingles Market and were talking with friends who were in another vehicle driven by Kyle Woods. Two passengers, Taylor Wachacha and Travis Garrison, got out of Kaleb Chekelee's vehicle

and were "goofing off and playing around" in the parking lot.

At the same time, defendant was walking his dogs, pit bulls, in the parking lot and apparently took them off their leashes. The dogs began running across the lot toward the Chekelee and Woods vehicles and Kaleb Chekelee told Taylor and Travis to get back in the car. When they did so, the dogs turned around and walked back toward defendant.

About ten to fifteen minutes later, defendant approached Kaleb Chekelee's car and asked him if he had kicked and yelled at the dogs. Chekelee replied that he had not, but defendant threatened to beat him and punched Chekelee through the open car window. Chekelee got out of the car and defendant said "sic 'em," at which time one of the dogs grabbed Chekelee's trousers and the other dog jumped up and bit Chekelee in the face. The injuries required medical treatment, including approximately fifteen stitches, and left a scar on Chekelee's face.

Defendant testified on his own behalf that he was walking his dogs in the parking lot after the store closed and let them off the leash to run. According to defendant, two of the boys at the other end of the parking lot were "whooping and hollering" and the dogs ran in their direction. One of the boys kicked one of defendant's dogs and then the two boys jumped back in the car. Defendant walked up to the car and asked the driver, Kaleb Chekelee, why he had kicked the dog. Chekelee cursed defendant and defendant punched Chekelee in the mouth. Defendant then backed up and all of the boys got out of the car and surrounded him. He denied telling

the dogs to "sic 'em," but instead said "watch 'em." Chekelee then moved toward defendant and one of the dogs grabbed Chekelee's coat. Chekelee kicked at him and the dog snapped at his face, catching his lip. When defendant told the dog "down," the dog came back to him.

Defendant's motions to dismiss at the close of the State's evidence and the close of all the evidence were denied. On the following morning, defendant was not present when court convened. Before proceeding with the conference on jury instructions, the court inquired of defense counsel: "Do you want to wait for your client to get here?" Counsel replied: "He's in the office, your Honor, I'm ready to go ahead." The court proceeded with the conference in defendant's absence.

Defendant has asserted three assignments of error relating to the trial court's (I) decision to conduct the jury charge conference in defendant's absence; (II) failure to instruct the jury on self-defense; and (III) failure to grant the defense's motion to dismiss for insufficiency of evidence.

I.

Defendant first argues that the trial court erred by proceeding with the jury charge conference outside the presence of the defendant. We disagree.

Defendant assigns this error pursuant to the Confrontation Clause in Article I, Section 23 of the North Carolina Constitution, which "guarantees an accused the right to be present in person at

every stage of his trial." *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987). Defendant relies on cases holding that capital defendants may not waive their right to be present in person at every stage of their trial. *See id.* (granting new trial because trial court admonished jury outside presence of court reporter, counsel, and defendant charged with rape and murder); *See also State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001) (concluding trial court committed no error in conducting pretrial venue and venire hearings in presence of defense counsel, but outside presence of capital defendants).

In noncapital felony trials, however, the right to be present may be waived by a defendant. *See State v. Skipper*, 146 N.C. App. 532, 535, 553 S.E.2d 690, 692 (2001). The voluntary and unexplained absence of a defendant from court after the beginning of trial constitutes such a waiver. *See id.* Furthermore, our Supreme Court has held that where a defendant's absence from a jury charge conference is voluntary and unexplained, any error of proceeding in defendant's absence is harmless if defense counsel is present and does not object to proceeding in his client's absence. *See State v. Wise*, 326 N.C. 421, 433, 390 S.E.2d 142, 149-50 (1990).

Here, defendant had notice of the charge conference but did not appear when the conference was scheduled. Defendant was not excluded from the conference, and his counsel was present. Defense counsel did not object to beginning the jury charge conference in

defendant's absence. Moreover, defense counsel participated actively during the conference. Accordingly, we hold there was no error in the trial court's conducting the jury charge conference in defendant's absence.

II.

Defendant next argues that the trial court erred by not instructing the jury on self-defense. Defendant did not request a jury instruction on self-defense but, citing *State v. Anderson*, 40 N.C. App. 318, 253 S.E.2d 48 (1979), defendant argues that he was nevertheless entitled to one. We disagree.

In *Anderson*, the Court stated that a trial court must "instruct the jury on the issue of self-defense when that question is raised by the evidence, even in the absence of a request to do so." *See id.* at 321, 253 S.E.2d at 50. Thus, when a defendant's evidence raises the issue, the trial court must instruct the jury on self-defense even if the State shows there is contradictory evidence or discrepancies in the defendant's evidence. *See id.*

> The right of self-defense is only available, however, to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.

State v. Allred, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1988) (citations omitted); *See also State v. Owen*, 111 N.C. App. 300, 307, 432 S.E.2d 378, 383 (1993). When a person is confronted with a nonfelonious assault, he must retreat "if there is any way of escape open to him," rather than escalate the incident through the

use of a weapon. *See Allred*, 129 N.C. App. at 235, 498 S.E.2d at 206.

Here, defendant was neither without fault nor did he abandon the fight, withdraw from it, or give notice to his adversaries that he would do so. Rather, defendant aggressively and willingly entered the fight. Defendant approached the parked vehicle and verbally confronted the passengers. Defendant struck the first blow, punching Chekelee through the open car window. Defendant backed away from the car in order to continue fighting outside. According to defendant, all of the passengers exited the vehicles and stood around defendant, but none attacked or threatened him. According to defendant, he told his dogs, "watch 'em," and told the passengers three times to "back up and get in the car," but defendant himself did not attempt to leave. Although defendant could have abandoned the confrontation or retreated once the passengers exited the vehicles, defendant did not. He remained in the parking lot to fight, and escalated the confrontation by using his dog as a weapon.

On defendant's evidence alone, defendant was the initial aggressor in the conflict and he did not attempt to withdraw from the fight, nor did he attempt to communicate his desire to withdraw. Therefore, the trial court correctly did not instruct the jury on self-defense.

III.

Finally, defendant argues that the trial court erred in denying his motion to dismiss for insufficiency of the evidence.

A defendant's motion to dismiss is properly denied when the State has shown "substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator." *State v. Boyd*, 177 N.C. App. 165, 175, 628 S.E.2d 796, 804 (2006). The State bears the burden of showing "relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In ruling on a motion to dismiss, the trial court must consider the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

In order to convict a defendant of assault with a deadly weapon inflicting serious injury under N.C.G.S. § 14-32(b), the State must show: (1) an assault; (2) with a deadly weapon; (3) inflicting serious injury; (4) not resulting in death. *See State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990). Defendant contends the State failed to meet the evidentiary standard required for the "deadly weapon" element of the charge. A deadly weapon is "any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981). With the exception of firearms, any article, instrument or substance may be a deadly weapon in light of "the nature of the instrument, the manner which defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use."

State v. Cook, 164 N.C. App. 139, 142, 594 S.E.2d 819, 821-22 (2004). We have previously held that under certain circumstances a dog may constitute such an instrument. *See id.*

In the case at bar, the State submitted substantial evidence that defendant used his dogs as a deadly weapon. Defendant unleashed his dogs, and when they approached the passengers, the passengers yelled to each other to get back into the vehicles. The passengers knew the dogs were pit bull dogs and by returning to the cars demonstrated that they wanted to avoid the dogs. When defendant approached the passengers who were still in the vehicles, defendant manifested his aggression verbally and then physically by punching Chekelee in the face through one vehicle's open window. After defendant punched Chekelee, some passengers exited the vehicles but then returned to the vehicles to avoid the dogs after one of them began attacking Chekelee. Defendant conceded that he never put his dogs back on a leash and that the passengers were defenseless. The State offered evidence to show that defendant "sicced" his dogs on the passengers, all of whom related essentially identical accounts of the incident. One of defendant's dogs bit Chekelee, lacerating his lip, nose, and left eye. The dog bite resulted in bleeding and swelling, requiring stitches and pain medication. Chekelee's injuries took about a month to heal.

Viewing this evidence in the light most favorable to the State, there was substantial evidence presented as to the nature of the dogs, and defendant's use of them for a reasonable mind to conclude that defendant used his dogs as a deadly weapon.

Therefore, the trial court did not err in denying defendant's motion to dismiss.

No error.

Judges WYNN and STEPHENS concur.

Report per Rule 30(e).