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NO. COA09-1336

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

Gaston County  
No. 07 CRS 068093

SHANIKA ELONDA COMPTON

Appeal by defendant from judgment entered 16 April 2009 by Judge Richard D. Boner in Gaston County Superior Court. Heard in the Court of Appeals 24 March 2010.

*Attorney General Roy Cooper, by Special Deputy Attorney General, Elizabeth Leonard McKay, for the State.*

*Michele Goldman for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Shanika Elonda Compton ("defendant") appeals from a conviction of assault with a deadly weapon inflicting serious injury. On appeal, she contends (1) that the trial court erred in instructing the jury that a bat is a deadly weapon *per se* where the weapon was not described by a witness and fatal injuries were not inflicted, and (2) that the trial court committed plain error by failing to instruct the jury on the lesser included offenses - simple assault and assault inflicting serious injury. After review, we disagree and hold that the trial court did not err.

#### I. FACTUAL BACKGROUND

On 18 November 2007, defendant struck Alexis Gaffney ("Gaffney") in her head with a bat causing Gaffney to suffer a broken nose and black eye. Defendant was indicted for assault with a deadly weapon inflicting serious injury on 10 December 2007. Defendant pled not guilty and was tried before a jury during the 13 April 2009 term.

At trial, the State's evidence tended to show the following: On the evening of 18 November 2007, Gaffney attended a party at the home of her stepsister, Sheretta Wilson. During the party, Sheretta Wilson and defendant's sister, Ticiara Hughes ("Hughes"), got into an argument which later turned into a physical altercation after Reggeria Nichols ("Nichols"), another of Gaffney's stepsisters, began to hit Hughes. This altercation began in Sheretta Wilson's home and moved outside the home when the fight began to escalate. The physical altercation originally ensued due to a dispute between Hughes and Nichols regarding a man whom both women had been dating. The fight escalated when Nichols's sisters began to chase and hit Hughes with belts. All fighting ceased after a gunshot was heard outside.

During trial, Gaffney testified that she followed the crowd outside Sheretta Wilson's home, but that she was not involved in the fight. In addition, she testified that she hid behind a car which was parked on the street after hearing the gunshot. Gaffney further testified that, while standing behind the car, she noticed a red car with tinted windows driving down the street. Defendant and her mother got out of the red car, and defendant hit Gaffney on

the right side of her face beside her nose with "a wooden bat." Although the State did not present the weapon used by defendant during the assault as physical evidence at trial, Gaffney and Sheretta Wilson both described the weapon as "a wooden bat" to the jury. Gaffney also testified that she passed out for a short period of time and her face began to swell and bleed after being hit. After Gaffney regained consciousness, Jeanette Bryce, Gaffney's aunt, took Gaffney to the hospital.

At the hospital, emergency room personnel determined that Gaffney sustained bruises around her eye, a cut on the right side of her face, and a broken nose as a result of being hit by defendant. Gaffney was treated for her broken nose, and the cut on her face required stitches. Gaffney testified that she has permanent scarring and side effects, including headaches, impaired vision in her right eye, and continuing nightmares. Hospital personnel took pictures of Gaffney's face, which were published to the jury during the State's case. The State rested its case after publishing the exhibits to the jury. After the State rested, defense counsel made a motion to dismiss, which was denied by the trial court.

Defense witnesses testified to the following: On 18 November 2007, defendant received a phone call from D'Angela Racard, a young lady who attended the party at Sheretta Wilson's home with defendant's sister, Ticiara Hughes. Racard testified that she called defendant to tell her that a group of girls were chasing Hughes and were about to fight the two women.

After receiving this phone call, defendant notified her mother and the two women left their home and began to run in the direction of the party. As they exited the home, defendant grabbed "a bat," which they normally use to secure a sliding glass door in their home. Defendant testified that she grabbed a baseball bat in order to fend off neighborhood stray dogs.

Defendant and her mother were picked up by a mutual friend who was driving in the direction of the party. After arriving at the party, defendant and her mother exited the vehicle and began to look for Hughes. At this time, defendant and her mother observed a large group of individuals running after Hughes and D'Angela Recard and attempting to hit the women with belts.

Defendant testified that Gaffney ran ahead of the crowd and that Gaffney attempted to hit her with a belt as she approached defendant. In order to defend herself, defendant testified that she swung and hit Gaffney in her face with the bat. Defendant admitted that she was not hit with the belt and received no injuries in the confrontation. Defendant further testified that Gaffney fell to the ground after being hit, but got up and walked away immediately thereafter. After hitting Gaffney, defendant and her mother both testified that they ran back to their home. At the conclusion of all the evidence, defense counsel renewed the motion to dismiss, which was again denied by the trial court.

During the charge conference, defense counsel requested that the trial court refrain from instructing the jury that the "bat" used during the altercation was a deadly weapon as a matter of law.

Defense counsel contended only that the jury should be allowed to determine whether the "bat" was a deadly weapon. Defense counsel did not object to any other instructions.

The trial court rejected defense counsel's request and instructed the jury that "[a] bat is a deadly weapon" as a matter of law. The trial court further instructed the jury regarding self-defense as a complete defense to the charge of assault with a deadly weapon inflicting serious injury. However, the court did not instruct the jury on the lesser included offense of assault inflicting serious injury. After being instructed, the jury found defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant was subsequently sentenced to 20 to 33 months' imprisonment; however, the trial court immediately suspended her sentence, and defendant was placed on supervised probation for a period of 30 months.

Defendant timely filed notice of appeal as of right from the trial court's entry of final judgment pursuant to N.C. Gen. Stat. § 15A-1444 (2009). On appeal, defendant assigns error to (1) the trial court's instruction to the jury that the bat used in the assault was a deadly weapon as a matter of law and (2) the trial court's failure to instruct the jury on the lesser included offenses of simple assault and assault inflicting serious injury. This Court has jurisdiction to review defendant's appeal pursuant to N.C. Gen. Stat. § 15A-1444.

## **II. JURY INSTRUCTION THAT A BAT IS A DEADLY WEAPON *PER SE***

Defendant first argues that the trial court erred by

instructing the jury that a bat is a deadly weapon *per se*. We disagree.

As defendant raised a timely objection before the trial court on this issue, we review defendant's assignment of error challenging the trial court's jury instruction *de novo*. *State v. Osorio*, \_\_ N.C. App. \_\_, \_\_, 675 S.E.2d 144, 149 (2009). With regard to defendant's assignment of error, our North Carolina Supreme Court has previously held that,

[a] dangerous or deadly weapon "is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." Only "where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury."

*State v. Torain*, 316 N.C. 111, 120, 340 S.E.2d 465, 470 (1986) (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)). In determining whether the trial court erred, we review the overall jury instruction and not portions in isolation. *State v. Davis*, 349 N.C. 1, 58, 506 S.E.2d 455, 487 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

Here, the challenged portion of the jury instruction provided the following:

In this case the defendant has been charged with assault with a deadly weapon inflicting serious injury. For you to find the defendant guilty of this offense the state must prove three things beyond a reasonable doubt:

First, that the defendant assaulted Alexis Gaffney by intentionally, and without justification or excuse, striking her in the

head with a bat;

Second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. A bat is a deadly weapon;

And, third, that the defendant inflicted serious injury upon Alexis Gaffney. Serious injury is such physical injury as causes great pain and suffering.

"It has long been the law of this state that '[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 . . . is one of law, and the Court must take the responsibility of so declaring.'" *Torain*, 316 N.C. at 119, 340 S.E.2d at 470 (1986) (emphasis omitted) (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924)); see *State v. Roper*, 39 N.C. App. 256, 249 S.E.2d 870 (1978).

There is no "mechanical definition" for "the distinction between a weapon which is deadly or dangerous per se and one which may or may not be deadly or dangerous depending upon the circumstances[.]" *Torain*, 316 N.C. at 121, 340 S.E.2d at 471. "[T]he evidence in each case determines whether a certain kind of [weapon] is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death.'" *Id.*

Here, the uncontroverted evidence showed that defendant struck Gaffney on the right side of her head with what was described by both State and defense witnesses as "a wooden bat." In fact, defendant testified that she "grabbed the bat out of [her] back

door" and stated that she hit Gaffney as Gaffney was running toward her. Defendant cites *State v. Beal*, 170 N.C. 764, 87 S.E. 416 (1915) (providing that the size and strength of the person using the weapon should be considered when determining whether the weapon should be characterized as deadly *per se*), and asks this Court to take defendant's size and stature into consideration. Based on *Beal*, defendant contends that defendant, a seventeen-year-old, four-foot-eleven-inch female weighing 118 pounds, could not have inflicted a deadly injury upon Gaffney with the "bat." However, even taking defense counsel's contention into consideration, we note that defendant struck Gaffney with such force that Gaffney momentarily passed out, began to bleed from her face, and suffered a broken nose, swollen face, and a bruised and blackened eye. Although the State did not offer the object used to commit the assault into evidence, defendant does not dispute that she hit Gaffney with an object which inflicted serious injury to Gaffney's face.

Based on the aforementioned, we hold that the evidence amply supported the trial court's instruction that a "bat" is a dangerous and deadly weapon as a matter of law, because "[i]n the circumstances of its use by defendant here, it was 'likely to produce death or great bodily harm.'" *Torain*, 316 N.C. at 121-22, 340 S.E.2d at 471 (quoting *Sturdivant*, 304 N.C. at 301, 283 S.E.2d at 725; see also *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924) (providing that a baseball bat should be denominated as a deadly weapon if it is viciously used).

**III. FAILURE TO INCLUDE THE LESSER INCLUDED  
OFFENSE IN THE JURY INSTRUCTION**

Defendant next contends that the trial court committed plain error by failing to instruct the jury on the lesser included offenses of simple assault and assault inflicting serious injury. We disagree.

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant." *State v. Ryder*, \_\_ N.C. App. \_\_, \_\_, 674 S.E.2d 805, 811 (2009).

As defendant did not raise this issue before the trial court, we review defendant's assignment of error for plain error.

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and internal quotation marks omitted). "It is axiomatic

that '[a] prerequisite to . . . engaging in a 'plain error' analysis is the determination that the [action] complained of constitutes 'error' at all.'" *State v. Bailey*, 97 N.C. App. 472, 478, 389 S.E.2d 131, 134 (1990) (quoting *State v. Johnson*, 320 N.C. 746, 750, 360 S.E.2d 676, 799-800 (1987)).

The trial court is not required to submit the lesser included offense of simple assault or assault inflicting serious injury to the jury where the trial court has properly determined that the instrument used to commit the assault was a deadly weapon *per se*. *State v. Batchelor*, 167 N.C. App. 797, 800-01, 606 S.E.2d 422, 424 (2005) (providing that "the question of 'whether simple assault should have been submitted as an alternative verdict depends upon whether the [instrument] was a deadly weapon . . . as a matter of law. If it was, simple assault need not have been submitted.'"). The trial court was not required to submit the lesser included offenses of simple assault and assault inflicting serious injury to the jury. Accordingly, we overrule defendant's assignment of error and hold that the trial court did not commit error, much less plain error.

#### IV. CONCLUSION

For the reasons stated herein, we hold that the trial court did not err by concluding and so instructing the jury that the "wooden bat" used by defendant during the commission of the assault was a deadly weapon as a matter of law. Moreover, because the trial court properly instructed the jury regarding the deadly weapon element of the offense charged and there was no

contradictory evidence as to any element, the court was not required to instruct the jury on any lesser included offenses. Accordingly, we hold that the trial court did not err.

No error.

Judges HUNTER, Robert C., and CALABRIA concur.

Report per Rule 30(e).