

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-1081
NORTH CAROLINA COURT OF APPEALS

Filed: 3 May 2011

STATE OF NORTH CAROLINA

v.

Cabarrus County
File No. 08 CRS 52457

ABREY MAXWELL, JR.

Appeal by defendant from judgment entered 4 March 2010 by Judge Joseph N. Crosswhite in Cabarrus County Superior Court. Heard in the Court of Appeals 25 April 2011.

Attorney General Roy Cooper, by Assistant Attorney General G. Mark Teague, for the State.

Kimberly P. Hoppin for defendant-appellant.

ERVIN, Judge.

Defendant Abrey Maxwell, Jr., appeals from a judgment imposing a suspended sentence upon him and placing him on supervised probation for 36 months based upon a jury verdict convicting him of assault with a deadly weapon upon a government official and resisting a public officer. On appeal, Defendant contends that the trial court erred by refusing to submit the issue of his guilt of the lesser included offense of assault upon a governmental official to the jury. After careful consideration of Defendant's challenge to the trial court's

judgment in light of the record and the applicable law, we conclude that Defendant is entitled to a new trial in connection with the assault charge and to a new sentencing hearing in connection with his conviction for resisting a public officer.

I. Factual Background

A. Substantive Facts

In the early morning hours of 6 July 2008, the Kannapolis Police Department received a 911 call from Crystal Campbell, who reported that she had been hit by her boyfriend, Defendant. Officers Joseph P. Yurco and Eric T. Shaver were dispatched to Ms. Campbell's residence in response to her call. The two officers arrived in separate vehicles at approximately 2:37 a.m. At the time of their arrival, Ms. Campbell was standing on the porch. When Officer Yurco inquired about Defendant's whereabouts, Ms. Campbell indicated that he was in a Cadillac sitting in the driveway, that he had been drinking, and that he was suicidal.

Officer Yurco approached the Cadillac from the front, while Officer Shaver positioned himself approximately four feet from the rear of the car on the driver's side. Although Officer Shaver ordered Defendant to get out of the car, Defendant failed to comply with this command. Instead, Defendant turned his head, looked at Officer Shaver, put the car in reverse, and began backing towards Officer Shaver, causing Officer Shaver to run to get out of the way.

Defendant did not hit Officer Shaver. At the time that he backed the Cadillac toward Officer Shaver, Defendant did not spin the car's tires.

After stopping the car where Officer Shaver had been standing, Defendant pulled forward. As Defendant did so, Officer Shaver retrieved a set of stop sticks from his patrol vehicle, placed the stop sticks behind the Cadillac, and reiterated his instruction that Defendant should exit the vehicle. Instead of complying with Officer Shaver's order, Defendant put the car in reverse, backed over the stop sticks, drove forward over the stop sticks, and came to a stop. At this point, Officer Shaver was able to reach into the open driver's side window and remove the keys from the ignition.

At some point, Officer Yurco assumed responsibility for the struggle with Defendant while Officer Shaver went to his vehicle to retrieve his police dog. Although Defendant initially resisted the officers' efforts to remove him from the car, he eventually agreed to get out of the Cadillac when the officers threatened to "spray" him and release Officer Shaver's dog. Even so, Officers Shaver and Yurco had to struggle with Defendant again when they attempted to handcuff him and put him in Officer Yurco's patrol vehicle. Subsequently, the officers had to remove Defendant from Officer Yurco's vehicle and place him in a restraining belt after Defendant managed to move his cuffed hands from behind his back and began

beating his head on the window. At the magistrate's office, Defendant was so unruly that the magistrate was unable to complete the initial appearance process.

B. Procedural History

On 6 July 2008, a Warrant for Arrest charging Defendant with assault with a deadly weapon on a governmental official was issued. On 28 July 2008, the Cabarrus County grand jury returned a bill of indictment charging Defendant with assaulting a governmental official with a deadly weapon and resisting a public officer. The charges against Defendant came on for trial before the trial court and a jury at the 2 March 2010 criminal session of the Cabarrus County Superior Court. On 4 March 2010, the jury returned verdicts finding Defendant guilty as charged. At the ensuing sentencing hearing, the trial court found that Defendant had no prior record points and should be sentenced as a Level I offender. Based upon these determinations, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to a minimum term of sixteen months and a maximum term of twenty months in the custody of the North Carolina Department of Correction. However, the trial court suspended Defendant's sentence and placed him on supervised probation for 36 months on the condition that he pay a \$500.00 fine and the costs, pay \$8,327.49 in attorney's fees, serve an active term of 90 days imprisonment in the custody of the North Carolina Department of

Correction, comply with the usual terms and conditions of probation, and comply with the special terms and conditions of probation relating to consent to warrantless searches, the use or possession of controlled substances, the provision of a sample for controlled substance and alcohol testing purposes, and the obtaining of a mental health evaluation and compliance with any recommended treatment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

In his sole challenge to the trial court's judgment, Defendant argues that the trial court erred by refusing to allow the jury to consider the issue of whether Defendant was guilty of the lesser included offense of assault on a government official. We conclude that Defendant's contention has merit.

"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). In determining whether the evidence is sufficient to require the submission of the issue of a defendant's guilt of a lesser offense to the jury, we view the evidence in the light most favorable to the defendant. *State v. Barlowe*, 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994).

"[A]n individual is guilty of assault with a deadly weapon on a government official where the individual: (I) commits an assault; (II) with a firearm or other deadly weapon; (III) on a government official; (IV) who is performing a duty of the official's office." *State v. Spellman*, 167 N.C. App. 374, 380, 605 S.E.2d 696, 701 (2004), *disc. review denied*, 359 N.C. 325, 611 S.E.2d 845 (2005). The misdemeanor of assault on a government official differs from the felony of assault on a governmental official with a deadly weapon by virtue of the fact that a finding of guilt with respect to the misdemeanor offense does not require proof that a deadly weapon was used in the assault upon the governmental official. *State v. Batchelor*, 167 N.C. App. 797, 799, 606 S.E.2d 422, 424 (2005). A deadly weapon is defined as

"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)).

According to the Supreme Court:

"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. . . . 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."

Id. at 643, 239 S.E.2d at 413 (quoting *Smith*, 187 N.C. at 470, 121 S.E. at 737).

In this case, the trial court did not instruct the jury that the Cadillac that Defendant drove was a deadly weapon as a matter of law. Instead, the trial court instructed the jury that, "[i]n determining whether a motor vehicle is a deadly weapon, you should consider the nature of the motor vehicle, the manner in which it was used and the size and strength of the defendant as compared to the victim." In view of the fact that the evidentiary record, which contained no indication that Defendant backed the Cadillac toward Officer Shaver at a high rate of speed or that Officer Shaver was injured as a result of Defendant's conduct, the trial court correctly refrained from instructing the jury that the Cadillac that Defendant was driving was a deadly weapon as a matter of law. *State v. Clark*, __ N.C. App. __, __, 689 S.E.2d 553, 559 (2009). "[S]ince the trial court, in this case, did not conclude that the [car] was, as a matter of law, a deadly weapon, but rather [correctly] left the question to be decided by the jury, the trial court should have instructed the jury on the lesser included offense of assault on a government

official." *Clark*, __ N.C. App. at __, 689 S.E.2d at 558. Thus, we hold that the trial court's failure to instruct the jury on the lesser included offense of assault on a governmental officer was "prejudicial error that [was not] cured by defendant's subsequent conviction for felony assault with a deadly weapon on a government official," *State v. Smith*, 186 N.C. App. 57, 66, 650 S.E.2d 29, 36 (2007) (citations omitted), so that Defendant's conviction for assault with a deadly weapon on a government official should be reversed and this case remanded to the Superior Court of Cabarrus County for a new trial with respect to the assault on a governmental official charge. In addition, since the trial court consolidated Defendant's resisting a public officer conviction for judgment with his assault on a public officer conviction, we must remand Defendant's conviction for resisting a public officer for resentencing as well.

NEW TRIAL IN PART; REMANDED FOR RESENTENCING IN PART.

Judges STEPHENS and BEASLEY concur.

Report per Rule 30(e).