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NO. COA12-221
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 09 CRS 63700

TYRONE JOHNSON

Appeal by Defendant from judgment entered 4 May 2011 by
Judge F. Lane Williamson in Superior Court, Mecklenburg County.

Heard in the Court of Appeals 25 September 2012.

*Attorney General Roy Cooper, by Special Deputy Attorney
General David J. Adinolfi II, for the State.*

Anne Bleyman for Defendant.

McGEE, Judge.

Tyrone Johnson (Defendant) was driving around Charlotte looking for someone to buy cocaine for him in the early morning hours of 29 May 2000. Defendant saw Johnnie Mae Shine (Ms. Shine) and stopped. Defendant asked Ms. Shine if she could get him some cocaine. Ms. Shine said that she could, and invited Defendant to her house. Ms. Shine left Defendant at her house while she went to purchase the cocaine. Defendant was

approximately 5' 10" tall and weighed between 195 and 200 pounds. Ms. Shine was about 4' 6" tall and weighed between 70 and 75 pounds.

According to Defendant's testimony, Ms. Shine obtained cocaine with Defendant's money and she and Defendant then shared the cocaine. Defendant suspected that Ms. Shine was hiding some of the cocaine and he confronted her. Ms. Shine became upset and asked Defendant to leave her house. Defendant refused to leave, and Ms. Shine ran out the front door. According to Defendant, Ms. Shine returned with a knife in her hand and attempted to pull Defendant out of her house by his shirt. Defendant testified he feared that Ms. Shine was going to stab him, so he attempted to take the knife away from her. In the ensuing struggle, Defendant managed to take the knife from Ms. Shine and he then began stabbing her multiple times. Defendant fled from the scene of the stabbing.

Two of Ms. Shine's neighbors, who lived together, testified they heard a loud knock on their front door, and someone screamed: "[S]top, I'll give it back." The neighbors found Ms. Shine badly injured on their front porch. The neighbors called 911, and Ms. Shine was taken to the hospital, where she died during emergency surgery.

Defendant was indicted for first-degree murder on 21 September 2009, and tried non-capitally the week of 25 April 2011. A jury found Defendant guilty of first-degree murder on 4 May 2011, and Defendant was sentenced to life imprisonment without parole. Defendant appeals.

I.

The two issues on appeal are (1) whether the trial court committed plain error by instructing the jury that the knife used in the killing was a deadly weapon as a matter of law, and (2) whether the indictment in this case was fatally defective. We find no error.

II.

Defendant first argues that the trial court committed plain error in its charge to the jury by failing to define "deadly weapon." We disagree.

The trial court instructed the jury that the knife used to kill Ms. Shine was a deadly weapon as a matter of law. Defendant did not object to this instruction at trial, but argues on appeal that this instruction constituted error rising to the level of plain error. Because we find no error, we do not address Defendant's plain error argument.

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." [I]n *State v. Collins*, 30 N.C. 407 (8 Ired.) (1848), the trial judge left it to the jury to decide whether a knife with a two and one-half inch blade was a deadly weapon. This Court stated that, although the trial judge correctly defined "deadly weapon,"

the error of his Honor consisted in leaving that to the jury as a question of fact which is strictly one of law Whether the instrument used was such as is described by the witnesses, where it is not produced, or, if produced, whether it was the one used, are questions of fact; but, these ascertained, its character is pronounced by law.

See also *State v. Perry*, 226 N.C. 530, 39 S.E.2d 460 (1946) (trial court could properly have found brick was deadly weapon as a matter of law; defendant cannot complain that trial judge left question to jury); *State v. McLaurin*, 12 N.C. App. 23, 182 S.E.2d 280 (1971) (same; board); *State v. Cox*, 11 N.C. App. 377, 181 S.E.2d 205 (1971) (same; knife with three-inch blade is deadly weapon per se). Cf. *State v. McKinnon*, 54 N.C. App. 475, 283 S.E.2d 555 (1981) (where evidence uncontradicted that defendant's blow with a small pocketknife caused victim's lung to collapse, trial court should have instructed that pocketknife was a deadly weapon as a matter of law; no error in failing to instruct on misdemeanor assault); accord *State v. Daniels*, 38 N.C. App. 382, 247 S.E.2d 770 (1978) (blackjack).

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."

. . . .

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 is not one that lends itself to mechanical definition.

Nevertheless, the 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.

State v. Torain, 316 N.C. 111, 119-21, 340 S.E.2d 465, 470-71 (1986) (some citations omitted).

In the present case, Defendant admits to stabbing Ms. Shine with a knife. Defendant described the knife as "a kitchen knife[,] " and stated that the handle was approximately four inches long and the blade was approximately three inches long. Ms. Shine received stab wounds to her upper and lower left chest, her right chest, her abdomen, her upper left arm, her right forearm, and her left upper back. The State's medical witness testified that a wound to Ms. Shine's abdomen, which perforated Ms. Shine's abdominal aorta, was the probable cause of death.

We hold that the kitchen knife, with a three-inch blade, used to repeatedly stab Ms. Shine in the chest, abdomen, and back was a deadly weapon *per se*. *Id.* The trial court did not err in so instructing the jury. We also note that Defendant argued at trial that he stabbed Ms. Shine with the kitchen knife because he was "scared" of Ms. Shine wielding this very same knife. Defendant's argument at trial was that he killed Ms. Shine in self-defense because he "believed it to be necessary to kill [Ms. Shine] in order to save [himself] from death or great bodily harm." We find no error in the trial court's charge, much less plain error. Defendant's argument is without merit.

III.

Defendant next argues that the "short-form" indictment used to charge him with first-degree murder did not sufficiently allege the elements of the crime. We disagree.

As Defendant acknowledges, our Supreme Court has previously held that the type of "short-form" indictment used in the present case is not defective. *State v. Braxton*, 352 N.C. 158, 175, 531 S.E.2d 428, 437-38 (2000). Defendant's argument is without merit.

No error.

Judges BEASLEY and THIGPEN concur.

Report per Rule 30(e).