

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-223

Filed: 1 November 2016

Forsyth County, Nos. 14 CRS 55214, 55216

STATE OF NORTH CAROLINA

v.

ANDRE LARON COLE

Appeal by defendant from judgments entered 10 June 2015 by Judge Michael D. Duncan in Forsyth County Superior Court. Heard in the Court of Appeals 24 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Michael E. Casterline for defendant-appellant.

TYSON, Judge.

Andre Laron Cole (“Defendant”), also identified in trial court documents as Andre Coles, appeals from judgments entered after a jury returned verdicts finding him guilty of felonious assault with a deadly weapon on a government official and felonious fleeing to elude arrest. We hold the trial court did not err in denying Defendant’s request to instruct the jury on the lesser-included offense of

STATE V. COLE

Opinion of the Court

misdeemeanor assault on a government official. We find no error in Defendant's jury convictions or the judgments entered thereon.

I. Background

The evidence at trial tended to show that on 28 May 2014, Winston-Salem Police Officers J.G. Gordon, Brian K. Ayers, and F.J. Resendes were on patrol in an unmarked minivan, while attempting to locate a person, who had an outstanding warrant. The officers observed a car illegally parked on the left side of the road, facing traffic. Defendant was seated inside on the driver's seat of the car. At that time the officers could not identify him because he had pulled the brim of his cap down to cover his eyes. The officers decided to talk to Defendant, activated their police lights, and pulled in front of Defendant's car with their minivan.

Officer Ayers exited the minivan, crossed the small strip of grass between the curb and sidewalk, and walked onto the edge of the sidewalk toward the car. As Officer Ayers approached the car, Defendant began to back the car up, but he was blocked by another car behind him. Officer Gordon positioned the minivan where Defendant could not drive out into the street and in an attempt to keep Defendant from driving away. However, Defendant quickly placed his car into drive, accelerated toward the curb, jumped up onto the curb, and drove directly toward Officer Ayers. Officer Ayers jumped out of the path of the car to avoid being hit. Defendant's car hit

STATE V. COLE

Opinion of the Court

the minivan, damaging both vehicles, and the force of the collision knocked Defendant's car entirely up onto the sidewalk.

Defendant briefly drove along the sidewalk. Upon reaching a nearby intersection, he drove back onto the street and traveled away from the officers. Defendant's car was making a grinding noise due to damage it had incurred when it hit the curb and struck the minivan. Officer Ayers noticed Defendant was having difficulty controlling and maneuvering the car. He also noticed that a woman and child were passengers inside the car. The officers pursued Defendant. Defendant coasted to a stop approximately 500 yards away, whereupon the officers took him into custody.

Defendant was charged with three counts of felony assault with a deadly weapon on a government official, felony fleeing to elude arrest, misdemeanor possession of marijuana, misdemeanor child abuse, misdemeanor aggressive driving, and two counts of failure to stop at a stop sign. At trial, the State only proceeded on the felony charges of assault with a deadly weapon on government officials and fleeing to avoid arrest, and dismissed the remaining charges.

Defendant requested a jury instruction on the lesser-included offense of misdemeanor assault on a government official, which the trial court allowed concerning the assaults on Officers Gordon and Resendes. The court denied the request regarding the assault on Officer Ayers, and concluded Defendant's car was a

STATE V. COLE

Opinion of the Court

deadly weapon as a matter of law with respect to the assault on Officer Ayers. The jury found Defendant guilty of felonious assault with a deadly weapon on Officer Ayers and felonious fleeing to elude arrest, but returned a not guilty verdict on assault on Officers Gordon or Resendes.

The trial court entered judgment upon the jury verdicts and sentenced Defendant to a term of 19 to 32 months imprisonment for his conviction for assault with a deadly weapon and 8 to 19 months imprisonment for his conviction for fleeing to elude arrest. The court suspended the sentence imposed for fleeing to elude arrest and placed Defendant on supervised probation for 24 months, with the period of probation to begin upon Defendant's release from incarceration. Defendant gave oral notice of appeal.

II. Issue

Defendant's sole argument on appeal asserts the trial court committed reversible error by failing to give his requested instruction on the lesser-included offense of misdemeanor assault on a government official concerning the assault upon Officer Ayers.

III. Standard of Review

"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) (citation omitted). “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*, 196 N.C. App. 56, 64, 674 S.E.2d 805, 811 (2009) (citation omitted). This Court reviews the trial court’s decision to deny a request for an instruction on a lesser-included offense *de novo*. *State v. Gettys*, 219 N.C. App. 93, 100, 724 S.E.2d 579, 585 (2012) “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

IV. Analysis

The misdemeanor offense of assault on a government official differs from the felony offense of assault on a governmental official with a deadly weapon, only in that the former does not require proof that a deadly weapon was used in the assault. *State v. Batchelor*, 167 N.C. App. 797, 799, 606 S.E.2d 422, 424 (2005). If the trial court found, as a matter of law, Defendant used a deadly weapon to assault Officer Ayers, Defendant was not entitled to have the jury consider the lesser misdemeanor offense. *See id.* at 800, 606 S.E.2d at 424.

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

STATE V. COLE

Opinion of the Court

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)).

Moreover,

“[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. . . . 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). “It is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner.” *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (citation omitted).

The evidence at trial tended to show that, unlike Officers Gordon and Resendes, who remained inside the minivan, Officer Ayers approached Defendant’s car on foot. He walked along the edge of the sidewalk, separated from the curb only by a narrow strip of grass. Upon realizing Officer Gordon had blocked his escape route with the minivan, Defendant placed his car into gear and quickly accelerated to jump the curb to pass the minivan. Defendant drove his car with such speed that his impact with the curb and the minivan damaged his car to the point that it was

making grinding noises and eventually coasted to a stop just 500 yards away from impact.

Defendant's actions put him on a direct path to hit Officer Ayers, who only avoided being struck and injured by jumping out of the way of Defendant's car. If he had been unable to avoid Defendant's car, Officer Ayers would have likely incurred great bodily harm, and possibly death. The mere fact that Officer Ayers was able to take action to avoid being struck by Defendant's car does not negate the fact that Defendant drove the car in a reckless and dangerous manner directly toward him. Defendant's argument is overruled.

V. Conclusion

Defendant operated his car in such a manner that it was, as a matter of law, a deadly weapon with respect to his assault upon Officer Ayers. Because Defendant's car was a deadly weapon used in the assault upon Officer Ayers, Defendant was not entitled for the jury to be instructed that it could convict him of the lesser included offense of misdemeanor assault on a government official for his assault on Officer Ayers. The trial court did not err in denying Defendant's requested instruction. Defendant does not otherwise argue the trial court erred at his trial or sentencing. We hold Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdicts or in the judgments entered thereon.

NO ERROR.

STATE V. COLE

Opinion of the Court

Judges STROUD and INMAN concur.

Report per Rule 30(e).