IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-61

Filed 05 September 2023

Lincoln County, Nos. 20 CRS 657, 52458

STATE OF NORTH CAROLINA

v.

FREDDIE KEITH THOMPSON, JR.

Appeal by defendant from judgments entered 13 June 2022 by Judge George Cooper Bell in Lincoln County Superior Court. Heard in the Court of Appeals 22 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kerry M. Boehm, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

ARROWOOD, Judge.

Freddie Thompson, Jr. ("defendant"), appeals from judgments entered upon his convictions for felony assault on an individual with a disability, misdemeanor assault with a deadly weapon, and attaining the status of habitual felon. On appeal, defendant argues the trial court erred by not allowing his motion to dismiss as to one of the assault charges, since both charges stemmed from the same attack without a

distinct interruption. For the following reasons, we affirm.

I. Background

On 29 August 2020 at about 10:00 p.m., Sergeant James Allen ("Sergeant Allen") with the Lincoln County Sheriff's Office was dispatched to a 911 call reporting an assault. Upon arrival, Sergeant Allen met with the victim of the assault, Caroll David Hendricks ("Mr. Hendricks"), who was wheelchair bound and a double leg amputee. Mr. Hendricks told Sergeant Allen that he had let his dog outside to use the bathroom, and because the "dog was in heat," he was watching her.

Mr. Hendricks explained to Sergeant Allen that when he "noticed other dogs from the neighborhood come onto his property" he shot a BB gun in "the direction of the other dogs" to keep them away, per his "regular practice[.]" After Mr. Hendricks shot the BB gun at the other dogs, defendant came out and began yelling and cursing at Mr. Hendricks. Mr. Hendricks told Sergeant Allen that defendant then "pick[ed] up a board[,]" which was approximately one to four inches wide and about ten feet long, and swung it at Mr. Hendricks, who put his hands up to protect his head. Mr. Hendricks "was struck with the board on his arm."

"[T]he blow from the wooden board knocked [Mr. Hendricks] out of his wheelchair[,]" and while Mr. Hendricks was attempting to get back into his wheelchair, defendant "grabbed a metal flag pole"[1] and "hit Mr. [Hendricks]

[1] Sergeant Allen described the item used to assault Mr. Hendricks as a "flagpole," but Mr. Hendricks described it as a "pipe." The terms are used interchangeably.

approximately three to four times." Sergeant Allen documented Mr. Hendricks's injuries, which included a swollen forearm and an "approximately two inches by two inches wide [cut on his arm] . . . where the skin was peeled back and it was bleeding." At that time, Mr. Hendricks did not want to press charges because he was afraid "of retaliation[.]"

Mr. Hendricks was subsequently seen at the hospital and diagnosed with "a compound fracture in his right forearm" where the arm "was broke[n] in at least two to three places." Mr. Hendricks's arm had to be placed in a hard cast, and he was unable to use his wrist and had no "mobility with his right arm." Mr. Hendricks also developed some bruising on his abdomen and informed Sergeant Allen that it was from being "hit with the metal pipe[.]" At that point, on 2 September 2020, Mr. Hendricks decided to press charges.

Thereafter, Sergeant Allen attempted to locate defendant, but was unable to do so until 21 September, when he learned where defendant was staying. When Sergeant Allen spoke with defendant, defendant admitted that when he heard Mr. Hendricks yell and "shoot a BB gun towards [his] dog[,]" he "threw [a] board on top of the ramp towards Mr. [Hendricks,]" and "the board landed on Mr. [Hendricks's] arm." Defendant "did not mention the flagpole." Defendant's dog was not injured during the incident.

On 10 October 2020, a warrant for defendant's arrest was issued for felony assault on an individual with a disability, and the warrant was served on defendant

the following day. On 14 December 2020, defendant was indicted for felony aggravated assault on an individual with a disability, misdemeanor assault with a deadly weapon inflicting serious injury, and attaining the status of habitual felon.

The matter came on for trial in Lincoln County Superior Court on 16 February 2022, Judge Bell presiding. At the trial, Mr. Hendricks and Sergeant Allen testified for the State. Mr. Hendricks testified that after he shot the BB gun, defendant came out from behind a building, cursed at him, and threw a board towards Mr. Hendricks while he was attempting to go back inside his residence, knocking him out of his wheelchair. Mr. Hendricks testified defendant then started hitting him with a metal pipe, and he "held up [his] arm to keep [the pipe] from hitting" his head, resulting in his broken arm.

Defendant did not show up to court for the second day of trial. The State requested to, and was allowed to, continue in absentia, over defense counsel's objection. Additionally, the trial court issued an order for defendant's arrest, revoked his bond, and entered an order that defendant would be "held without bond" when located. At the close of the State's evidence, defense counsel made a motion to dismiss. The motion was denied, and defense counsel did not present any evidence.

On 17 February 2022, defendant was found guilty of felony assault on an individual with a disability and misdemeanor assault with a deadly weapon. The trial court suspended the habitual felon phase of the trial and sentencing, due to defendant's absence. Furthermore, the trial court found that "defendant ha[d]

forfeited his constitutional right to be present in the courtroom and . . . defendant and his counsel ha[d] the burden of proof to show why [defendant] could not be" in court, but "defendant ha[d] failed to meet his burden."

Defendant was eventually located and brought to court for sentencing and the habitual felon phase of the trial on 13 June 2022. Defendant pleaded guilty to attaining the status of habitual felon. Pursuant to a plea agreement, defendant was sentenced in the mitigated range of 58 to 82 months confinement. Defendant gave oral "notice of appeal on the underlying conviction" in open court following the judgment.

II. Discussion

On appeal, defendant argues the trial court erred by not dismissing one of the assault charges, since both charges stemmed from the same attack without a distinct interruption. We disagree.

A. Standard of Review

Our "Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). In ruling on a motion to dismiss, the trial court must "determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation and internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation and internal quotation marks omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, 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, 192-93, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

"In order to be submitted to the jury for determination of defendant's guilt, the 'evidence need only give rise to a reasonable inference of guilt.' " *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citation omitted). If the trial court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation, internal quotation marks, and emphasis omitted). However, if the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citation omitted).

B. Motion to Dismiss

"There is no statutory definition of assault in North Carolina, and the crime of

assault is governed by common law rules." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). Our Courts define "the common law offense of assault as an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *Id.* (citation and internal quotation marks omitted). However, every strike by the perpetrator does not count as a separate assault. *State v. Dew*, 379 N.C. 64, 70, 72, 864 S.E.2d 268, 274-75 (2021). Rather, "the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults." *Id.* at 72, 864 S.E.2d at 275.

Recently, our Supreme Court "provide[d] examples[,] but not an exclusive list[,]" of "what can qualify as a distinct interruption[.]" *Id.* Some circumstances which give rise to "a distinct interruption" include: "an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.* Although "the fact that a victim has multiple, distinct injuries alone is not sufficient evidence of a distinct interruption[,]" a "defendant us[ing] different methods of attack[,]" can be evidence of a "distinct interruption depending on the totality of the circumstances." *Id.*

Here, in the light most favorable to the State, there was evidence that the

attack on Mr. Hendricks had a distinct interruption, allowing defendant to be sentenced for both assault charges. Mr. Hendricks testified that defendant initially threw a board towards Mr. Hendricks while he was attempting to go back inside his residence, knocking him out of his wheelchair. Then, defendant went to get another weapon, the pipe, and "started hitting [Mr. Hendricks] with it." Sergeant Allen testified that on the night of the assault, Mr. Hendricks told him that after defendant hit him with the board, knocking him out of his wheelchair, defendant "walked up the ramp and grabbed a metal flagpole . . . and began to hit Mr. [Hendricks] approximately three to four times." These facts are distinguishable from cases where no distinct interruption was found.

For example, in *State v. Robinson*, our Supreme Court affirmed this Court's holding that the State "fail[ed] to establish evidence of a distinct interruption in the assault to support multiple assault convictions and sentences." *State v. Robinson*, 381 N.C. 207, 219, 872 S.E.2d 28, 37 (2002). In *Robinson*, our Supreme Court found the evidence presented "describe[d] a confined and continuous attack in which defendant choked and punched [the victim] in rapid succession and without pause or interruption[,]" even though the victim described the attack as having occurred over a three-day period. *Id.*

Robinson is distinguishable from this case since, here, there was a "pause or interruption" when defendant had to go to the porch to find another weapon after throwing the board. *Id.* Furthermore, defendant did utilize "different methods of

attack" by using two separate weapons. *Dew*, 379 N.C. at 72, 864 S.E.2d at 275. Therefore, based "on the totality of the circumstances[,]" in the light most favorable to the State, there was evidence of a distinct interruption. *See id.* Accordingly, we hold that the trial court did not err in sentencing defendant on both assault charges.

III. Conclusion

For the foregoing reasons, we hold the trial court did not err in entering judgment against defendant for two separate assault charges since there was evidence of a distinct interruption. Accordingly, we affirm.

AFFIRMED.

Judges COLLINS and CARPENTER concur.

Report per Rule 30(e).