IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-859

Filed 19 March 2024

New Hanover County, No. 21CRS50140

STATE OF NORTH CAROLINA

v.

JERRY ONASIS MELVIN, Defendant.

Appeal by defendant from judgment entered on or about 22 March 2022 by Judge Joshua W. Willey, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 22 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Hunter Fritz, for the State.

Anne Bleyman for defendant-appellant.

STROUD, Judge.

Defendant appeals his judgment convicting him of assault with a deadly weapon inflicting serious injury. For the following reasons, we conclude there was no error.

I. Background

The State's evidence tended to show that in early January 2021, Defendant

and Mr. Niquel Barnhill were "hanging out and drinking[.]" According to Mr. Barnhill, he was rapping when Defendant hit him "full force" in the head with a "pretty full" 40-ounce glass beer bottle. Defendant then "threw, like, four or five shots to [Mr. Barnhill's] ribs[.]" At trial, Defendant claimed he acted in self-defense. According to Defendant, he and Mr. Barnhill exchanged profanities; Mr. Barnhill reached for his pocket and said he was going to "hit [Defendant] with a stick[;]" which Defendant took to mean Mr. Barnhill was "going to shoot" him. Defendant acknowledged he then struck Mr. Barnhill with the bottle and testified he then left.

Mr. Barnhill suffered from a concussion and several lacerations on his head requiring stitches. Mr. Barnhill was unable to work for about six or seven months, and even more than a year after the assault he continued to suffer from pain, scarring, tenderness, dizziness, lightheadedness, and memory loss. Mr. Barnhill testified at the time of the trial the area was still tender, and he still got dizzy.

Defendant was indicted for assault with a deadly weapon inflicting serious injury ("AWDWISI"). Defendant had a bench trial; the trial judge found him guilty of AWDWISI and entered judgment. Defendant appeals.

II. Deadly Weapon

Defendant's arguments on appeal address the element of use of a deadly weapon for his conviction of AWDWISI. "Any person who [(1)] assaults another person [(2)] with a deadly weapon and [(3)] inflicts serious injury shall be punished

as a Class E felon." N.C. Gen. Stat. 14-32(b) (2021)[1]; *see State v. Smith*, 267 N.C. App. 364, 369, 832 S.E.2d 921, 926 (2019) ("[T]he charge of A[W]DWISI is classified as a Class E Felony with the following elements: (1) an assault; (2) with a deadly weapon; (3) inflicting serious injury.").

Defendant contends the trial court erred in failing to consider (1) whether the bottle was a deadly weapon as a matter of fact instead of as a matter of law and (2) the lesser-included offense of assault inflicting serious injury ("AISI"). Defendant did not raise these arguments at trial.

At trial, Defendant moved to dismiss at the close of the State's evidence based on alleged *Brady* violations; the trial court denied this motion, and Defendant did not challenge this ruling on appeal. Defendant did not move to dismiss the charge of AWDWISI for insufficiency of the evidence. Defendant also did not make any legal argument before the trial court regarding how the trial court should consider the beer bottle's use or how it should determine whether the beer bottle was a deadly weapon *per se* or as a matter of fact. In fact, Defendant did not argue the beer bottle was *not* used as a deadly weapon; before the trial court, Defendant relied on his claim of self-defense.

Bench trials are different from jury trials, as this Court explained in *State v. Jones*,

[1] North Carolina General Statute Section 14-32 was amended in 2023; the effect of the amendment was to add subsections (d), (e), and (f). *See* N.C. Gen. Stat. § 14-32 (Effect of Amendments).

> Bench trials differ from jury trials since there are no jury instructions and no verdict sheet to show exactly what the trial court considered, but we also presume that the trial court knows and follows the applicable law unless an appellant shows otherwise. We follow this presumption in many contexts.

260 N.C. App. 104, 108, 816 S.E.2d 921, 924 (2018) (citation omitted).

Here, Defendant has raised arguments regarding the use of the beer bottle, contending the evidence raised "a factual issue about its potential for producing death" and the type of applicable assault, *i.e.*, AWDWISI or AISI. Defendant is correct that a beer bottle is typically not treated as a deadly weapon *per se*, *see, e.g.*, *State v. McNeill*, 243 N.C. App. 762, 769-70, 778 S.E.2d 457, 462-63 (2015) (determining the jury could decide as a matter of fact whether a beer bottle was a deadly weapon), as a gun may be. *See State v. McCree*, 160 N.C. App. 200, 206, 584 S.E.2d 861, 865 (2003) ("[T]his Court has previously held that a handgun is a deadly weapon *per se*.").

But Defendant has not demonstrated any error in the trial court's verdict, and we presume the trial court is aware of the distinction between a deadly weapon *per se* and a deadly weapon as a matter of fact. *See Jones*, 260 N.C. App. at 108, 816 S.E.2d at 924. Defendant has not noted anything in the record tending to indicate otherwise. In *Jones*, "The trial judge made no statement regarding her reasoning . . . . We do not make assumptions of error where none is shown." *Id.* at 109, 816 S.E.2d at 925. The same is true here. Defendant has failed to demonstrate any error, much

less plain error.

III. Conclusion

We conclude there was no error.

NO ERROR.

Judges FLOOD and STADING concur.

Report per Rule 30(e).