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NO. COA03-66

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

STATE OF NORTH CAROLINA

v.

Moore County
No. 00 CRS 10284

TERRY ATLAS ENGLE,
Defendant.

Appeal by defendant from judgment entered 17 May 2002 by Judge John R. Jolly, Jr., in Superior Court, Moore County. Heard in the Court of Appeals 12 November 2003.

Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver, for the State.

Russell J. Hollers, III, for the defendant-appellant.

WYNN, Judge.

Following his conviction on the charge of feloniously engaging in a riot, Defendant Terry A. Engle appeals contending that the evidence was insufficient to show that he willfully engaged in a riot. We agree and therefore reverse his convictions.

The evidence presented at trial tended to show that at approximately 7:00 p.m. on 7 September 2000, the Special Response Team of the Southern Pines Police Department were prepared to execute a search warrant at an apartment and for a red Chevrolet Blazer registered to Winsey Engle Blue. After securing the apartment and failing to locate either Ms. Blue or the vehicle at

the residence, the Special Response Team continued the search in the area of South Mechanic Street, apparently on the notion that members of Ms. Blue's family were often seen in that location. At approximately 7:40 p.m., the Special Response Team arrived at the 800 block of South Mechanic Street.

The record describes South Mechanic Street as a residential area consisting of closely-located-rented-duplex houses with very little yard space between the houses and the street. In the area, the Special Response Team found Ms. Blue's Chevrolet Blazer parked along the side of the street in front of a Ford Thunderbird, later determined to be owned by Defendant who is Ms. Blue's brother. The officers saw one person sitting in the Blazer and about six to ten people standing near the Thunderbird. The officers stopped their unmarked gray van beside the Blazer and the Thunderbird, exited the van dressed in black military style attire with weapons drawn, ordered the people in the vicinity of the two parked cars to get on the ground, searched them for weapons, removed the individual from the Blazer and searched the Blazer.

Thereafter, Ms. Blue began yelling as she walked towards the officers searching her vehicle. After being told the officers were conducting a search pursuant to a warrant, Ms. Blue remained near the vehicle maintaining that she had a right to observe the officers conduct their search. Incident to their search, the officers found a substance they believed to be crack cocaine in the vehicle. Thereafter, they arrested Ms. Blue and the individual that had been sitting in the driver's seat. However, Ms. Blue

became further agitated, louder, and resisted the officers' attempts to place her in the patrol car. After being placed in the patrol car, she continued to yell and attempted to get out of the car several times. The other individual cooperated with the arrest.

In the meantime, during the search of the Blazer, Defendant, who was one of the individuals initially searched, approached the officers to determine what was happening. The officers ordered him to stay back. After seeing his sister arrested, Defendant loudly complained that the officers were harassing his family (several cousins, brothers, sisters, nieces, nephews, and children lived in this area or were visiting at the time of this incident). After being warned by the officers to calm down, the people around Defendant tried to calm him down; however, after Defendant hit the hood of his car with his hand, Lieutenant Klingenschmidt ordered his arrest. After approaching Defendant to arrest him, when Defendant resisted, the officers sprayed pepper spray into his face. At that time, there were approximately six to ten individuals around Defendant, including the same group of people that were there at the time of Special Response Team's arrival and a few individuals that had tried to calm Defendant. The officers were able to maneuver through this group of people without any resistance from the group. As Officer Brian Edwards approached Defendant, Carlos Blue, Defendant's son put up his hand and indicated that it was unnecessary to arrest Defendant because he had calmed his father down. Upon seeing Carlos Blue put up his

hand, Sergeant Nick Polidori grabbed him, threw him to the ground and arrested him for obstructing the officers' arrest of his father.

During Defendant's arrest, someone kicked and injured Officer Edwards' knee which later required orthopedic surgery. Additionally, people in the crowd became upset and started shouting. Thereafter, the officers created a perimeter around the scene to keep people away from the vehicles and the officers. Other law enforcement personnel arrived to provide assistance. The entire incident encompassed twenty minutes and the officers remained at the scene for approximately an hour.

As to the number people on the street during the incident, the members of the Special Response Team apparently focused on the two vehicles and the six to ten individuals surrounding it. According to other testimony, there were at least eighteen children playing in the area. There were also people sitting on their porches, standing in their yards or walking along the sidewalk. All of the witnesses, including police officers familiar with the neighborhood, testified that it was common to see the residents on their porches, in their yards or on the sidewalks. Moreover, the police officers testified that it was not unusual for the residents to come out and see "what was going on" when there was police activity; however, the officers testified that the crowd was unusually hostile on this particular evening. Although one officer testified there were between 70 and 100 people on the sidewalk and in the street, the majority of the officers said the crowd did not

get larger than 40 to 50 people.

Defendant was indicted for feloniously engaging in a riot and inciting a riot. After being found guilty of engaging in a riot, Defendant received a sentence of a minimum of 10 months to a maximum of 12 months, suspended for 36 months conditioned upon various requirements. Defendant appeals.

On appeal, Defendant contends the trial court erred in denying his motion to dismiss because there was insufficient evidence to prove he willfully engaged in a riot. We agree.

"On a motion to dismiss the trial court must determine the sufficiency of the evidence. If the State offers substantial evidence of each essential element of the offense charged, the motion must be denied. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In making its determination, the trial court may consider all of the evidence actually admitted, both competent and incompetent. The evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom." *State v. Mitchell*, 110 N.C. App. 250, 253, 429 S.E.2d 580, 582 (1993).

Under N.C. Gen. Stat. § 14-288.2 (2001),

(a) A riot is a public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

(b) Any person who willfully engages in a riot is guilty of a Class 1 misdemeanor.

(c) Any person who willfully engages in a riot is guilty of a Class H felony, if:

(1) In the course and as a result of the riot there is property damage in excess of fifteen hundred dollars (\$1,500) or serious bodily injury; or

(2) Such participant in the riot has in his possession any dangerous weapon or substance.

Thus, to prove Defendant's guilt of feloniously engaging in a riot, the State was required to establish (1) a riot occurred; (2) willful engagement in the riot by Defendant; and (3) either property damage in excess of fifteen hundred dollars or serious bodily injury.

In *State v. Mitchell*, this Court stated that in using the phrase willfully engages in, "the legislature contemplated active participation by the defendant in the riotous activity." *Mitchell*, 110 N.C. App. at 254, 429 S.E.2d at 582. In analyzing whether the defendant in *Mitchell* willfully engaged in a riot, this Court distinguished pre-riot and riot behavior.

In *Mitchell*, the teenage defendant was part of a large group of teenagers, between 100 and 150, that had congregated in the parking lot outside of an activity center where a teen dance was being held. The dance sponsor called the police to help with crowd control and asked for assistance in dispersing the crowd. The defendant in *Mitchell* had been asked twice by the police to leave the premises and instead of complying, the teenager cursed and swung at the officer and resisted arrest. After the teenager's

arrest for disorderly conduct, the crowd of teenagers began throwing things at the officers and after an officer stood on a table to address the crowd in an effort at calming them, the defendant rushed the table and knocked it over. In resolving whether sufficient evidence of the defendant's willful engagement in a riot was presented in *Mitchell*, this Court stated

. . . we conclude that the evidence of defendant's resistance to being arrested and the apparent assault on Officer Ward does not by itself appear sufficient to support the charge of participation in riotous activity. However, this conduct when coupled with the defendant's deliberate act of running into the table upon which the officer was standing while the riot was taking place, was clearly sufficient to show that the defendant 'willfully engaged' in the riot.

Mitchell, 110 N.C. App. at 255, 429 S.E.2d at 582-83.

Similarly, in this case, Defendant's inappropriate behavior occurred prior to any riot in this case, assuming a riot occurred. Prior to Defendant's arrest, the police activity and Ms. Blue's yelling attracted the attention of the residents and neighborhood visitors. Indeed, the police officers testified that it was not unusual for the residents in that area to congregate when police activity occurred to "see what was going on," and the police described the crowd's activity on this particular day in that manner. Moreover, the testimony indicated that a smoking police car, which had malfunctioned upon its arrival at the scene, drew the attention of several people. Furthermore, the officers testified the crowd did not interfere with their arrest of Defendant and that prior to Defendant's arrest, several people in the crowd were trying to calm Defendant and Ms. Blue.

Testimony indicated that although the crowd was initially peaceful, the crowd's demeanor changed after the arrest of Defendant's son, Carlos Engle, which occurred after Defendant's arrest. A resident and Defendant's relative testified that upon observing Defendant's arrest, she shouted that the police had lied about not arresting Defendant if he calmed down and also indicated that several people in the crowd stated the police were wrong in arresting Defendant. A paramedic, who arrived after Defendant's arrest, testified that several people in the crowd were cursing and someone expressed satisfaction that one of the police officers had been hurt. Furthermore, assuming Defendant's son kicked Officer Edwards and caused his injury,¹ the assault did not occur until after the police had subdued and placed Defendant under arrest. Thus, viewing the evidence in the light most favorable to the State, if a riot occurred, it did not begin until after Defendant had been subdued and arrested. Prior to Defendant's arrest, the record reveals that the crowd was a peaceful assemblage of approximately 50 people who had congregated to watch the police activity and the actions of Defendant and his sister. A few people in the crowd tried to calm Defendant and his sister. After Defendant's arrest, crowd members began shouting and yelling and the officer was injured. However, the record does not indicate Defendant's conduct was disorderly after his arrest nor does it

¹ According to the transcript, Defendant's son, Carlos Jacobs Engle, was found not guilty of felonious inciting to riot and not guilty of misdemeanor inciting a riot. There is no indication of whether Carlos Engle was charged and convicted of an assault on Officer Edwards.

indicate he made any comments after his arrest.

Finally, it should be noted that it is not the size of the assemblage that determines whether a riot occurred. Indeed, in general, it is not a crime for a group of any size to assemble peacefully to watch out of curiosity police activity, ambulances, smoking cars or people yelling in the street. The State must establish the remaining three elements in order to classify the assemblage as a riotous group.

As we have concluded the trial court erroneously denied Defendant's motion to dismiss based upon insufficient evidence that he willfully engaged in a riot, it is unnecessary to address Defendant's remaining issues. Accordingly, the judgment below is,

Reversed.

Judges TIMMONS-GOODSON and ELMORE concur.

Report per Rule 30(e).