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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1177

Filed: 3 July 2018

Lincoln County, No. 16CRS053384

STATE OF NORTH CAROLINA

v.

JOSHUA McRAVION, Defendant.

Appeal by Defendant from a judgment entered 9 June 2017 by Judge Carla Archie in Lincoln County Superior Court. Heard in the Court of Appeals 1 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Irons & Irons, PA., by Ben G. Irons, II, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Joshua McRavion ("Defendant") appeals from a 9 June 2017 judgment entered after a jury convicted him of one count of assault with a deadly weapon with intent to kill. Defendant contends trial court erred when it instructed the jury that two plastic sporks taped together and sharpened at the end was a deadly weapon *per se*. We agree and grant Defendant a new trial.

I. Factual and Procedural Background

On 10 January 2017, a Lincoln County Grand Jury indicted Defendant on one count of assault with a deadly weapon inflicting serious injury. On 8 May 2017, another Lincoln County Grand Jury indicted Defendant on one count of assault with intent to kill inflicting serious injury, via a superseding indictment.

On 7 June 2017, the trial court called Defendant's case for trial. The State first called Joshua Blackwell, an inmate at Tabor City Correctional Institution. On 23 September 2016, while in custody at Lincoln County Detention Center, Blackwell played poker with two other inmates. During the poker game, Blackwell "felt someone hit [him] on the back." Blackwell initially "thought somebody was just patting" him. One of the inmates told him he was "getting stabbed[.]" In response, Blackwell slammed his assailant against the wall. According to Blackwell, he felt "nothing at the time, . . . but afterwards, yeah."

Blackwell identified his assailant as Defendant. Blackwell never saw the "weapon" Defendant used during the altercation.

Prison officers broke up the fight and took Blackwell to "medical." Blackwell's injuries included cuts on his head and neck, as well as two "puncture wounds" on his neck and shoulder. A nurse cleaned Blackwell's wounds and put "some kind of glue" on them. Blackwell later "put [a] sick call in to be seen for x-rays and stuff" after he experienced pain in his neck. Blackwell described his neck pain as "shoot[ing] down [his] fingers."

The State next called Officer Jason Harris with the Lincoln County Detention Center. During September 2016, Harris ran "central control." Harris's duties included controlling the facility's doors and monitoring security cameras. On 23 September 2016, Harris heard "a banging" behind him while he worked central control. Harris then "looked at the cameras in the C Block" and saw two men "hitting the wall." Harris stated, "I didn't see any punches. They were just locked up. I just heard the banging on the wall." Harris called for assistance, and other officers came and separated the inmates.

The State called Officer Rodney Neal with the Lincoln County Detention Center. On 23 September 2016, Neal sat with Harris in the control room and monitored the inmates. Harris called for assistance, and Neal went in to C Block to break up the altercation. When Neal entered C Block, he pulled Defendant away from Blackwell. Neal returned to his post in the control room.

Later, Neal stood guard while other officers searched Defendant's cell for a possible "shank." Defendant and his cellmate stood outside the cell with Neal during the search. Defendant stood next to the trashcan. After completion of the in-cell search, Neal searched the trashcan outside the cell. Neal found "two spoons taped, duct taped together, with duct tape" and "a white sock." The duct taped spoons "had a sharp formed point on the end[.]" Inside the white sock "was another spork." This spork "had been formed to a point on the end" and "it looked like it was kind of burnt,

like it had been melded and there was some residue from the spork on the sock . . . ." Neal placed the items in an evidence bag, filled out the correct paperwork, and sealed the bag. The State admitted the sporks and sock into evidence.

Outside the presence of the jury, the State requested the trial court allow the jurors to "at least be able to touch [the spork] and touch the point so they [could] see the characteristic of the weapon itself." The State further asserted, "It's not a normal, what they would call a spork. It's not something -- it's much thicker. It's much more heavy duty and sharp."

The trial court said it would permit "the witness [to] open the evidence bag, display it on the table and have the jurors parade by the table to see but not touch the weapon or the contents of the bag." Defendant noted he preferred the evidence to stay in the bag but conceded "I think what the Court has suggested is fine." The trial court told the State:

> All right. So if you will make arrangements for the witness to have some gloves and to open the bag, arrange those items in front of the jury. We're not going to open the bag in recess, but when the jury is back have the witness open State's 7 and display them on the table and then I'll ask the bailiff to escort the jurors by the table.

After the jury returned, Neal placed the items on the table. The jury viewed the exhibits without touching them.

The State called Captain Tim Johnson with the Lincoln Sheriff's Office. Johnson oversaw investigations and narcotics in the Lincoln County Detention Center and the Harven Crouse Detention Center.

The trial court excused the jury and *voir dire* began. During *voir dire,* Johnson read aloud part of Defendant's handwritten letter to a third party. Both the State and Defendant agreed to certain redactions. However, Defendant objected to the letter's overall admission and claimed the letter lacked a sufficient connection to the case. The trial court overruled Defendant's objection.

The trial court recalled the jury. Johnson read part of Defendant's letter to the jury, including the following: "About two weeks ago, by the time you get this, I stabbed this dude in C Block in the neck and head with a shank I made so they gave me 35-days lockdown, 30 for assault and five for the shank." Defendant noted his objection for the record.

At the close of the State's evidence, Defendant made a motion to dismiss for insufficient evidence. Defendant argued, "[T]here has been no evidence presented on the intent to kill or serious injury." The State countered, arguing "the video of the defendant lunging at the victim's neck with a deadly weapon certainly would satisfy the intent to kill." The trial court denied Defendant's motion to dismiss.

Defendant called Judy Humphries to the stand. Humphries worked at the Lincoln County Detention Center as lead nurse. On 23 September 2016, Humphries

saw Blackwell after "an altercation with another inmate." Humphries noted Blackwell's injuries included two marks on the back of his neck, a scratch on his nose, and another on his cheek. Humphries did not indicate in her notes whether she glued the wounds shut. The wounds did not require stitches. Humphries also described the wounds as "superficial." She stated, "The largest penetration was on -- the only two things on the back and it was still just very small. There was not much bleeding. It didn't go much depth."

At the close of all evidence, Defendant renewed his motion to dismiss. The trial court denied the motion.

During the charge conference, Defendant proposed the trial court instruct the jury according to North Carolina Pattern Jury Instruction 208.10 (2017).[1] Defendant also requested "lesser included of the Class E assault as well as misdemeanor assault charges that are appropriate in this case."

Defendant further requested, "The weapon that's been contended in here, we would ask for the instruction that the jury consider the nature and the manner in which it was used and not instruct the jury that that is a deadly weapon." The State disagreed. The State argued if the trial court found the "weapon" was deadly as a matter of law:

> [T]he Court is required at that point, when giving the instruction to say -- for example in this case, during the

[1] North Carolina Pattern Jury Instruction 208.10 is titled "Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury." (All capitalized in original).

> deadly weapon portion, a shank or however the Court wants to characterize it, a shank is a deadly weapon. At that point that element is not a determination for the jury.

The State requested:

> I first ask the Court if the Court would take a closer look. I don't know [i]f the Court got a good enough look or not from the bench, but our particular weapon in this case is the two sporks duct taped together and then ground down to a finer point. Obviously it's not like a knife point. It's not that sharp. But it is ground into a fine point. At that point it turned into a weapon.

The State further argued a "deadly weapon" status is determined by "the manner in which the weapon is used[.]" The State concluded by asking the trial court to instruct the jury the weapon was a "deadly weapon" *per se*.

Defendant disputed the State's method of determining the status of the weapon. Defendant argued a "deadly weapon" must be "an instrument likely to produce death or great bodily harm under the circumstances of its use." Defendant added "the condition of the person assaulted plays into that." Defendant concluded:

> [U]nder the evidence we have that condition of the person assaulted does not indicate that this was a deadly weapon in any manner that can be held by the Court in and of itself to be a deadly weapon and contend that it should be a matter for the jury to decide in this case.

The trial court stated:

> The Court is going to find that the spork, as it was described, is a deadly weapon based upon the nature of its alteration and the manner in which it was used and as such will give instructions 208. 10, assault with a deadly weapon

> intent to kill inflicting serious injury; assault with a deadly weapon inflicting serious injury; assault with a deadly weapon intent to kill; and assault with a deadly weapon.

After a recess and closing statements, the trial court proceeded to instruct the jury according to North Carolina Pattern Jury Instruction 208.10. The trial court stated in pertinent part:

> Now, the defendant has been charged with assault with a deadly weapon with intent to kill inflicting serious injury. For you to find the defendant guilty of this offense the State must prove four things beyond a reasonable doubt.
>
> . . .
>
> Second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. Two sporks taped together and sharpened is a deadly weapon.

The trial court dismissed the jury for deliberations and asked if the State or Defendant wished to review the verdict sheet. The State assented to the verdict sheet. Defendant reviewed the verdict sheet and assented, "except for [his] objection to the deadly weapon[.]" The trial court noted Defendant's objection to the deadly weapon portion but did not reinstruct the jury.

The jury returned a unanimous guilty verdict for assault with a deadly weapon with intent to kill. The trial court sentenced Defendant to 48 to 70 months imprisonment. Defendant orally appealed.

II. Standard of Review

This Court reviews questions of law raised by a trial court's jury instruction decisions *de novo*. *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (citations omitted). A party must object to the jury instruction before the jury is dismissed for deliberations in order to preserve the issue for appellate review. N.C. R. App. P. 10(a)(2) (2017). Because Defendant properly preserved the issue below, "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) (quotation marks and citation omitted).

III. Analysis

Defendant contends the trial court erred when it instructed the jury that two sporks taped together and "sharpened" at the end was a "deadly weapon" *per se*. Defendant argues the trial court should have submitted the issue to the jury.[2] Specifically, Defendant contends the trial court erred because it only considered the "nature of [its] alteration and the manner in which [the weapon] was used" instead of the totality of circumstances. In cases not involving inherently deadly weapons, Defendant contends the trial court should also consider the nature of the injuries inflicted before declaring a weapon is deadly *per se*. We agree.

[2] In his brief, Defendant contends he specifically requested the trial court instruct the jury as follows: "In determining whether the two sporks taped together and sharpened was a deadly weapon, you should consider the nature of the two sporks taped together and sharpened, the manner in which they were [sic] used, and the size and the strength of the defendant as compared to the victim." (Quotation marks and citation omitted).

North Carolina Pattern Jury Instruction 208.10 contains the instruction for assault with a deadly weapon with intent to kill inflicting serious injury. This instruction defines a deadly weapon as "a weapon which is likely to cause death or serious bodily injury." N.C.P.I.--Crim. 208.10. Additionally, this instruction provides the trial court with two options: a prompt for when the alleged deadly weapon is a deadly weapon *per se*, and the other for when it is not. *Id.* When the alleged deadly weapon is not a deadly weapon *per se*, the jury "should consider the nature of [the object], the manner in which it was used, and the size and strength of the defendant as compared to the victim." *Id.*

Our case law supports instruction number 208.10. *See State v. Everhardt*, 96 N.C. App. 1, 11, 384 S.E.2d 562, 568, (1989) (defining a deadly weapon as "[a]ny instrument which is likely to produce death or great bodily harm, under the circumstances of its use . . .") (citation omitted); *State v. Lane*, 1 N.C. App. 539, 541, 162 S.E.2d 149, 151 (1968) ("In order to be a deadly weapon it is not required that the instrument be a deadly weapon *per se*, but it is sufficient if, under the circumstances of its use, it is an instrument which is likely to produce death or great bodily harm, having regard to the size and condition of the parties and the manner in which the weapon is used.") (internal quotation marks and citation omitted).

In North Carolina, in the context of assault, no "mechanical definition" exists to distinguish a deadly weapon *per se* from a weapon "which may or may not be deadly

or dangerous depending upon the circumstances." *State v. Morgan*, 156 N.C. App. 523, 530, 577 S.E. 2d 380, 386 (2003) (some internal quotation marks and citation omitted). *See also* 2A Strong's North Carolina Index 4th *Assault and Battery* § 46 (2018). This Court has held each case requires a unique factual inquiry as to whether the weapon is deadly as a matter of law or whether the "nature [of the weapon] and manner of [its] use raises a factual issue" for the jury. *Morgan*, 156 N.C. App. at 530, 577 S.E.2d at 386 (citation omitted).

Our case law permits a trial court to declare a weapon as deadly *per se* if "the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion[.]" *State v. James*, 224 N.C. App. 164, 169, 735 S.E.2d 627, 630-31 (2012) (citation omitted) (reviewing whether a chair was a deadly weapon in a challenge to the trial court's denial of defendant's motion to dismiss). Some items are deadly weapons *per se*. This Court previously held a pistol, or a gun, and a four and one-half inch long "steak" knife were properly labeled deadly weapons *per se* by the trial courts. *See State v. Reives*, 29 N.C. App. 11, 12, 222 S.E.2d 727, 728 (1976) (citation omitted); *State v. Parker*, 7 N.C. App. 191, 195-96, 171 S.E.2d 665, 667-68 (1970). However, other objects which may or may not be likely to cause death or great bodily injury "according to the manner of [their] use or the part of the body at which the blow is aimed . . . [and their] alleged deadly character is one of fact to be determined by the jury." *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373

(1978) (citing *State v. Perry*, 226 N.C. 530, 39 S.E.2d 460 (1946); *State v. Watkins*, 200 N.C. 692, 158 S.E. 393 (1931)).

This Court previously held cola bottles, a six to eight inch stool leg, fists, tree limbs, and a police nightstick were all properly submitted to the jury to determine their deadly nature. *State v. Wallace*, 197 N.C. App. 339, 346, 676 S.E.2d 922, 927 (2009) (fists and tree limbs); *Everhardt*, 96 N.C. App. at 11-12, 384 S.E.2d at 568-69 (cola bottles and a six to eight inch stool leg); *State v. Buchanan*, 28 N.C. App. 163, 166, 220 S.E.2d 207, 209 (1975) (holding a police nightstick was properly submitted to jury but the trial court erred on other grounds). *See also Joyner*, 295 N.C. at 65, 243 S.E.2d at 374 (soft drink bottle). *Cf. Perry,* 226 N.C. at 535-36, 39 S.E.2d at 464 (concluding a brick could be a deadly weapon *per se*).

When an object is not clearly a deadly weapon *per se*, this Court uses the following factors to determine if the object is a deadly weapon as a matter of law: (1) the manner of its use; (2) the nature of the instrument; (3) the part of the body at which the blow is aimed; and/or (4) the nature of the injuries.[3] *See Morgan*, 156 N.C. App. at 530, 577 S.E.2d at 386; *Everhardt*, 96 N.C. App. at 11, 384 S.E.2d at 568 (citation omitted); *Parker*, 7 N.C. App. at 195-96, 171 S.E.2d at 667-68. While no bright line rule determines what factors to employ under certain facts, our case law

[3] In cases involving whether fists are a deadly weapon, the relative size and condition of the parties may also be considered. *See State v. Lawson*, 173 N.C. App. 270, 278-80, 619 S.E.2d 410, 416 (2005).

is clear courts must consider the totality of circumstances of each case. *State v. Beal*, 170 N.C. 857, 859, 87 S.E. 416, 417 (1915) ("all the facts and circumstances should be examined"). *See State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 726 (1981) (citations omitted) (concluding "the evidence in each case determines" whether a weapon is deadly or not).

In *State v. Morgan*, this Court looked to the manner of the weapon's use, nature of the weapon, and injuries inflicted to determine whether a wine bottle was a deadly weapon *per se*. 156 N.C. App. at 530, 577 S.E.2d at 386 (2003). In *Morgan*, the aggressor approached one victim from his "blind side" and hit the victim over the head with a wine bottle. *Id.* at 530, 577 S.E.2d at 386. The wine bottle was "made of 'thick' glass." *Id.* at 530, 577 S.E.2d at 386. The blow was so strong the bottle broke on impact. *Id.* at 530, 577 S.E.2d at 386. The aggressor struck both victims with the broken bottle repeatedly, cutting the victims both in the head and face. *Id.* at 530, 577 S.E.2d at 386. The blows cut one of the victim's head, which required staples and stiches to close the wounds. *Id.* at 530, 577 S.E.2d at 386. The facts showed the broken wine bottle, as used to hit the victims over the head, was likely to produce death or great bodily harm. *Id.* at 530, 577 S.E.2d at 386. Accordingly, this Court held the trial court properly instructed the jury the wine bottle was a deadly weapon *per se*. *Id.* at 530, 577 S.E.2d at 386.

In *State v. Joyner*, our Supreme Court focused on the condition of the person assaulted and the manner of the weapon's use to determine whether a cola bottle was a deadly weapon *per se*. 295 N.C. at 64-65, 243 S.E.2d at 373-74. In *Joyner*, assailants rammed a cola bottle up the victim's rectum "with such force as to cause excessive bleeding, dilation of the rectum, and the infliction of multiple cuts, some deep and long, about the rectum." *Id.* at 65, 243 S.E.2d at 374. The Court held the trial court properly submitted the question of whether the cola bottle was a deadly weapon to the jury.[4] *Id.* at 65, 243 S.E.2d at 374.

The question of whether two plastic sporks duct taped together could be a deadly weapon *per se* is an issue of first impression for this Court.[5] Accordingly, we consider all relevant facts and circumstances to determine if the spork device could be a deadly weapon *per se*. *See State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924).

First, this Court considers the manner of use. Here, like in *Morgan*, Defendant approached Blackwell from behind, and repeatedly hit Blackwell with the spork device. *Morgan*, 156 N.C. App. at 530, 577 S.E.2d at 386. The State showed a video

[4] Specifically, the Court held, "Since the bottle used is an instrument which, depending on its use, may or may not be likely to produce great bodily harm, the trial judge properly submitted the question regarding its deadly character to the jury." *Joyner*, 295 N.C. at 65, 243 S.E.2d at 374.

[5] This Court has held handmade "shanks" with metal blades were deadly weapons *per se* in the context of assault with a deadly weapon with intent to kill. *See State v. Allred*, 129 N.C. App 232, 236, 498 S.E.2d 204, 206-07 (1998) (concluding "a shank made by attaching a razor blade to a ballpoint pen" was a deadly weapon *per se*). However, we have not considered whether a handmade plastic shank is a deadly weapon *per se*.

of the altercation to the jury. Defendant wrote to a third party, "I stabbed this dude in C Block in the neck and head with a shank I made . . . ." Though the manner of use of the spork device is similar to a deadly weapon *per se*, the manner of use is not the sole consideration for "other objects" not previously determined by our courts to be deadly weapons *per se*. *See* 2A Strong's North Carolina Index 4th *Assault and Battery* §§ 46, 52.

Next, this Court considers the intrinsic nature of the spork device. Here, the nature of the spork device is not on par with the facts in *Morgan* or other prison "shank" cases. *See Morgan*, 156 N.C. App. at 530, 577 S.E.2d at 386; *Allred*, 129 N.C. App. at 236, 498 S.E.2d at 207. Unlike thick glass or metal blades, Defendant used a plastic device. *Cf. Morgan,* 156 N.C. App. at 530, 577 S.E.2d at 386; *Allred*, 129 N.C. App. at 236, 489 S.E.2d at 206-07. Neal described the two sporks duct taped together as having a "sharp formed point on the end[.]" However, the State admitted the point was "not like a knife . . . [i]t's not that sharp." The judge and jury viewed, but did not touch, the weapon.

The ambiguous nature of the spork device Defendant used is further evidenced by the injuries sustained by Blackwell. Unlike one of the victims in *Morgan*, Blackwell did not need staples or stiches to close his wounds. *See Morgan*, 156 N.C. App. at 530, 577 S.E.2d at 386. Blackwell stated he needed additional treatment, but the nurse described his wounds as "superficial." The nurse also disputed whether she

glued the wounds shut. Additionally, Blackwell did not initially feel he was "getting stabbed[.]"

After reviewing the record in light of these facts, we hold a question requiring jury resolution is needed to determine whether two sporks duct taped together and sharpened at the end would ordinarily result in death or serious injury during an assault. Because the facts as presented cannot "admit. . . one conclusion" as to whether the spork device constituted a deadly weapon, we hold the issue should have been submitted to the jury. *James*, 224 N.C. App. at 169, 735 S.E.2d at 631 (citation omitted).

NEW TRIAL.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).