An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2021-NCCOA-327

No. COA20-658

Filed 6 July 2021

Wake County, No. 18 CRS 223247, 223278

STATE OF NORTH CAROLINA

v.

EARL JOSEPH BAILEY

Appeal by defendant from judgment entered 7 February 2020 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 9 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Sondra Panico, for the State.

Stephen G. Driggers for defendant-appellant.

TYSON, Judge.

¶ 1 Earl Joseph Bailey ("Defendant") appeals from a judgment entered on a jury's verdict for simple assault. We find no error.

I. Background

¶ 2 Defendant lived with his half-brother, Ricky Setzer ("Setzer"), and his grandmother in Willow Spring, North Carolina. On 26 November 2018, Abigail Lipscomb ("Lipscomb") was watching television with Setzer at Defendant's residence.

Defendant was in his bedroom. While Lipscomb and Setzer were watching television, the internet service began to "cut out." Setzer and Lipscomb yelled at Defendant to "get off the internet" and teased Defendant to "stop watching porn."

¶ 3 Defendant entered the living room and hit Lipscomb several times in the back of the head with his elbow and a closed fist. Setzer separated Defendant from Lipscomb and reprimanded him for hitting Lipscomb. Lipscomb gathered her belongings and went outside to call the police.

¶ 4 The deputy director of communications for the Wake County Sheriff's Office, Sarah Templeton ("Templeton"), advised Lipscomb to continue to wait outside for the responding deputies. She input the call into the computer aided dispatch ("CAD") system. Templeton alerted first responders of a potential police hazard in the CAD system, which notified law enforcement officers Defendant suffers from mental illness, deputies should use caution when approaching, and Defendant had threatened officers with firearms and a knife in the past.

¶ 5 Responding deputies Michael Reitman ("Deputy Reitman") and Golet Holloway ("Deputy Holloway") individually heard the dispatcher's CAD alert regarding Defendant's previous threats towards law enforcement officers, but neither officer testified they had previously heard Defendant suffered from mental illness. Templeton did not request a crisis intervention team to respond.

¶ 6 When Deputy Reitman arrived at the scene, Lipscomb and Setzer were outside

the house. Lipscomb and Setzer explained the incident to Deputy Reitman, who then examined Lipscomb's head and observed redness and a contusion behind Lipscomb's ear. After Deputy Holloway arrived upon the scene, Deputy Reitman intended to enter the residence and question Defendant about the incident. Setzer led the deputies to the side entrance. When Setzer approached the door, he observed Defendant attempting to lock the door and holding a steak knife in his hand. Defendant's presence alarmed the officers and they instructed Setzer to move off the porch area.

¶ 7 Deputy Reitman ordered Defendant to drop the knife and exit the residence. He intended to arrest Defendant at this point. Deputy Reitman retreated from the porch and Defendant exited the house, still holding the knife. Deputy Reitman demanded of Defendant for him to drop the knife and come off the porch. Defendant left the porch and proceeded towards the officers. He did not drop the knife. Defendant continued to refuse to drop the knife and stated numerous times the officers would have to shoot him.

¶ 8 At one point, Defendant dropped the knife and turned to re-enter the home, but Deputy Reitman told him not to go back into the house. Defendant immediately picked the knife back up.

¶ 9 Defendant made an "aggressive move" towards Deputy Reitman, who then fired two shots at Defendant, striking him in his abdomen and forearm. Defendant

was transported to the hospital and treated for his wounds. Warrants for Defendant's arrest were issued on 17 December 2018, charging simple assault and assault with a deadly weapon on a government official.

¶ 10 The jury convicted Defendant on both offenses. The trial court consolidated the offenses for judgment. Defendant was sentenced to 16 to 29 months in custody. This sentence was suspended and Defendant was placed on 36 months of supervised probation, with a condition of special probation of 60 days to be spent in custody. Defendant timely noted his appeal in open court.

II. Jurisdiction

¶ 11 This Court possesses jurisdiction over a final judgment in the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2019).

III. Issue

¶ 12 Defendant argues the trial court erred when it denied his motion to dismiss the charge of simple assault. He asserts Deputy Reitman unlawfully seized him without a warrant for an alleged misdemeanor offense, which occurred outside of his presence. Defendant does not challenge his conviction for assault with a deadly weapon on a government official and it remains undisturbed.

A. Standard of Review

¶ 13 "When considering a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the crime." *State v.*

Kemmerlin, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (citation and internal quotation marks omitted). "'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981) (citations omitted).

¶ 14 Upon appeal, this Court views the evidence in the light most favorable to the State and gives the State the benefit of all reasonable inferences. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Defendant's counsel moved for dismissal at the close of the State's evidence and renewed the motion at the close of all evidence. The issue is preserved for appellate review. This Court reviews the trial court's denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008) (citation omitted).

B. Substantial Evidence

¶ 15 Defendant asserts his simple assault charge should have been dismissed on the ground the responding officers did not have lawful authority to arrest Defendant for an alleged misdemeanor not committed in their presence. N.C. Gen. Stat. § 15A-401(b)(2) provides:

> An officer may arrest without a warrant any person who the officer has probable cause to believe:
> a. Has committed a felony; or
> b. Has committed a misdemeanor, and:
> 1. Will not be apprehended unless immediately arrested; or
> 2. May cause physical injury to himself or others, or

> damage to property unless immediately arrested[.]

N.C. Gen. Stat. § 15A-401(b)(2) (2019).

¶ 16 Simple assault is a Class 2 misdemeanor. N.C. Gen. Stat. § 14-33 (2019). Assault with a deadly weapon on a government official is a Class F felony. N.C. Gen. Stat. § 14-34.2 (2019). "[A] warrantless arrest by an officer is reasonable under the Fourth Amendment if, given the objective facts available to the officer at the time of arrest, there is probable cause that a crime has been or is being committed." *State v. Burwell*, 256 N.C. App. 722, 732, 808 S.E.2d 583, 592 (2017).

¶ 17 Defendant argues Detective Reitman improperly seized him for an alleged misdemeanor not committed in his presence. *See State v. Baxley*, 15 N.C. App. 544, 546, 190 S.E.2d 401, 402 (1972) ("It is established law in North Carolina that an arrest without a warrant for a misdemeanor except as authorized by statute is illegal.").

¶ 18 Defendant argues his actions do not satisfy any statutory exceptions for arrest. He asserts he was not a flight risk, was mentally ill, and lived in the house with his grandmother. Defendant asserts Deputy Reitman did not have probable cause to believe Defendant would cause physical injury to himself or others, or would cause damage to the property unless he was immediately arrested.

¶ 19 Defendant argues seizure by a law enforcement officer is an objective test: whether a reasonable person under the circumstances "would have believed he was

not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980). The State argues an arrest had not occurred when Deputy Reitman approached the house and asserts an arrest has not occurred until:

> [a]n officer, by words or actions, indicates that an individual must remain in the officer's presence or come to the police station against his will, the person is for all practical purposes under arrest if there is a substantial imposition of the officer's will over the person's liberty.

Burwell, 256 N.C. App. at 732, 808 S.E.2d at 592 (quotations and citations omitted).

¶ 20 Viewed in the light most favorable to the State, the evidence tended to show Deputy Reitman did not place Defendant under arrest when he first attempted to enter Defendant's residence to question him about the alleged assault. Before Deputy Reitman saw Defendant, Setzer alerted the deputies Defendant was holding a steak knife. Defendant was legally seized no earlier than when Deputy Reitman ordered Defendant come out of the house, drop his weapon, and Defendant refused.

¶ 21 "To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." *State v. Crawford*, 125 N.C. App. 279, 281, 480 S.E.2d 422, 423–24 (1997) (quotations and citations omitted). Deputy Reitman had probable cause to believe Defendant had assaulted Lipscomb after he observed the redness and contusion behind her ear, and to believe Defendant may have caused physical injury to himself or others when he wielded a knife. *See* N.C. Gen. Stat. §

15A-401(b)(2).

¶ 22 Deputy Reitman was also aware of the CAD alert warning of Defendant's past threats to law enforcement officers. Here, Deputy Reitman acted in good faith under the totality of the circumstances and lawfully seized Defendant according to North Carolina's statutes and precedents. *Burwell*, 256 N.C. App. at 732, 808 S.E.2d at 592.

IV. Conclusion

¶ 23 The State presented sufficient evidence for the jury to determine whether Defendant had committed misdemeanor assault to cause physical injury to himself or others. The trial court did not err in denying his motion to dismiss the charge of simple assault.

¶ 24 Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdict or in the judgment entered thereon.

It is so ordered.

NO ERROR.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).