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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1339

Filed: 20 September 2016

Alamance County, No. 12CRS050800

STATE OF NORTH CAROLINA

v.

CENTELLAS OLANDO POTEAT, Defendant.

Appeal by defendant from judgment entered on or about 1 July 2015 by Judge William O. Smith III in Superior Court, Alamance County. Heard in the Court of Appeals 10 May 2016.

Attorney General Roy A. Cooper III, by Assistant Attorney General James D. Concepcion, for the State.

Sean P. Vitrano for defendant-appellant.

STROUD, Judge.

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

I. Background

The State's evidence tended to show that on 4 February 2012 defendant and Mr. Lucas Andrews were meeting so that Mr. Andrews could sell defendant cocaine. Defendant and Mr. Andrews began arguing over the weight of the cocaine, and

defendant swung at Mr. Andrews with a pocketknife, cutting him on the head and face. Thereafter, the two wrestled until Mr. Andrews was able to escape. Mr. Andrews initially went home, but later the same day went to the hospital where he was treated for lacerations to his head and face extending through the eyebrow, near the corner of his eye and down the cheek to the chin; he received staples on the back of his head and a long continuous stitch on his face.

At trial, defendant testified that Mr. Andrews asked for change for a \$20 and when defendant opened his wallet, Mr. Andrews “sw[u]ng on me” and cut his hand. Defendant grabbed his pocketknife and cut Mr. Andrews. The jury convicted defendant of assault with a deadly weapon inflicting serious injury, and the trial court entered judgment. Defendant appeals.

II. Jury Instructions

Defendant makes two arguments regarding jury instructions.

A. Inflicting Serious Injury Instruction

During the charge conference, defendant requested the jury be instructed on the lesser-included offense of assault with a deadly weapon. The trial court denied defendant’s request. Defendant objected, and the trial court overruled the objection and ultimately instructed the jury on the charge of assault with a deadly weapon inflicting serious injury. More specifically, the trial court decided to peremptorily

instruct the jury that Mr. Andrews's injury was a "serious injury[;]" defendant objected both before and after the instructions.¹

Defendant first contends that "the trial court erred when it rejected . . . [his] request for an instruction on [the] lesser-included offense" of assault with a deadly weapon instead of instructing the jury, as it did, on the charge of assault with a deadly weapon inflicting serious injury. (Original in all caps.)

The standard of review for appeals regarding jury instructions to which a defendant has properly requested at trial is the following:

This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury. If a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance.

State v. Cornell, 222 N.C. App. 184, 190-91, 729 S.E.2d 703, 708 (2012) (citation, ellipses, and brackets omitted). However, when "the State's evidence is positive as to

¹ The trial court instructed, "An injury caused by cutting with a knife that begins in the temple area that proceeds across the edge of the forehead near the temple, across the eyebrow, down the cheek, and extending to the chin at the lower jaw, as illustrated by State's Exhibits No. 1 and 2, resulting in permanent disfigurement by scarring would be a serious injury."

each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime, the court is not required to submit an issue as to defendant's guilt or innocence of a lesser included offense." *State v. Owen*, 24 N.C. App. 598, 604, 211 S.E.2d 830, 834 (citation and quotation marks omitted), *cert. denied*, 287 N.C. 263, 214 S.E.2d 435 (1975).

As to his contention that he was entitled to a lesser-included offense instruction, defendant also argues that "the trial court erred when it . . . peremptorily instructed the jury that the cut to Andrews' face leaving a scar was a serious injury, because reasonable minds could differ as to the seriousness of that injury." (Original in all caps.) Our standard of review remains the same and we review the "instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *State v. McGee*, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 645 (2014) (citation and brackets omitted). "In the absence of conflicting evidence, a trial judge may instruct the jury that injuries to a victim are serious as a matter of law if reasonable minds could not differ as to their serious nature." *State v. Hedgepeth*, 330 N.C. 38, 54, 409 S.E.2d 309, 318-19 (1991).

Ultimately, as to both arguments defendant contends that because Mr. Andrews went home before going to the hospital, his injury could not have been

serious; we disagree. Here, the uncontroverted evidence was that Mr. Andrews went to the hospital for treatment of a long laceration to his scalp and face and needed staples in the back of his head and stitches in his face. Mr. Andrews' facial scar is permanent and still visible more than three years after the incident. Photos from the time of Mr. Andrews' incident were presented to the jury and having viewed the photos we conclude that "the State's evidence [was] positive" as to the element of inflicting serious injury and "there is no conflicting evidence" as to this element; the trial court did not err in denying defendant's request for a lesser-included offense instruction. *Owen*, 24 N.C. App. at 604, 211 S.E.2d at 834. Furthermore, we do not believe "reasonable minds" would differ as to the seriousness of the injury, and thus the trial court did not err in its preemptory instruction. *Hedgepeth*, 330 N.C. at 54, 409 S.E.2d at 319. The fact that Mr. Andrews did not immediately seek medical attention is not conclusive, since there are many reasons that a person may not immediately seek care. Indeed, some people die from serious injuries for which they did not seek medical attention. A person may delay seeking care from the shock of trauma, a misunderstanding of the gravity of the situation, fear of medical professionals, or as Mr. Andrews testified, concerns regarding costs and a fear that law enforcement would become involved. The severity of Mr. Andrews' injury is apparent from the photographs. These arguments are overruled.

B. Aggressor Instruction

Lastly, defendant contends that “the trial court committed plain error in instructing the jury that . . . [defendant] was not entitled to act in self-defense if he was the aggressor because there was no evidence he was the aggressor.” (Original in all caps.) Defendant notes that since he did not object on the aggressor instruction issue, we may review only for plain error.

Plain error with respect to jury instructions requires the error be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected. Further, in deciding whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury’s finding of guilt.

State v. Wood, 185 N.C. App. 227, 232, 647 S.E.2d 679, 684 (citations, quotation marks, and brackets omitted), *disc review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007).

Defendant’s argument is that if the jury believed Mr. Andrews’ version of the facts, a self-defense instruction is not warranted, much less the aggressor instruction which was given. But if the jury believed his version of the facts, the self-defense instruction was warranted, but not the aggressor instruction. Defendant’s argument ignores two key facts: (1) The jury decides which evidence it deems to be credible, and (2) the jury can believe any part of the evidence and disregard any or all of any witnesses’ testimony. The jury was presented with two different accounts of what

happened. The jury was free to believe portions of testimony from each witness who testified. Portions of the evidence would support a theory that defendant was claiming self-defense, but was actually the aggressor, and thus was not entitled to claim self-defense. The trial court appropriately instructed the jury based upon all of the evidence, and the jury was properly left to determine that if they believed defendant was the aggressor, he was not entitled to claim self-defense. There was no error and thus no plain error, and this argument is overruled.

III. Conclusion

For the foregoing reasons, we determine there was no error.

NO ERROR.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).