NO. COA03-1587

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 02 CRS 215147

HERBERT HOOVER HAWKINS, JR.,

Defendant.

Appeal by defendant from judgment entered 13 December 2002 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 September 2004.

Attorney General Roy Cooper, by Special Deputy Attorney General Judith R. Bullock, for the State.

Jon W. Myers, for defendant-appellant.

ELMORE, Judge.

Defendant was convicted of assault with a deadly weapon. He now appeals that judgment, alleging that the trial court erred in its instructions to the jury. After a complete review of the record, we find no error in the instructions given.

The salient facts at trial consisted of testimony by Ms. Hawkins, defendant's wife, that defendant shot a .45 caliber hand gun at her at least four times.

> I said I was going to leave. And I was standing at the door. The first shot was fired through the door. . . . I came back and sat on the couch. The second shot was above

> my head, went through the house . . . [a]bove the couch I was sitting on. Third, fourth shot, one went up the ceiling. One went up the floor. One went near where we have a clock. After that I don't know, that was where all of them were.

Ms. Hawkins' testimony went on to describe previous incidents of violence directed at her by defendant involving a gun. Defendant admitted to firing the gun at least four times in the house, but testified that another man in the house had a knife.

> DEFENDANT: I wasn't too old to fight with him anymore, they young men. They scared me.
>
> DEFENSE COUNSEL: Okay. What happened with the gun?
>
> DEFENDANT: When he pulled around with the knife, I shot in the floor, or I shot at the door.
>
> DEFENSE COUNSEL: How many times did the gun go off?
>
> DEFENDANT: Well, after I shot in the door, he left so I come around there. And I come – well, the gun went off – well, let's see. I got scared and I popped it four times.
>
> DEFENSE COUNSEL: Okay.
>
> DEFENDANT: I didn't shoot at nobody. All I wanted them to do was to leave my home.

Ms. Hawkins testified that there was no knife present. Defendant was the only person who testified that he was being threatened with a knife and reacted by firing several shots in self-defense.

Defendant alleges plain error regarding the instructions to the jury. Specifically, he alleges that 1) the charge did not require that the jury find that an assault occurred under North Carolina common law and statutory law; 2) the trial court failed to

frame its jury instructions with the particularity necessary to enable the jury to understand and apply the law; 3) the charge failed to present the law fairly and clearly; and 4) the trial court failed to instruct the jury on the definition of assault during the original and subsequent charges. Defendant failed to object to the jury instructions as required by N.C.R. App. P. 10(b), but instead relies on plain error.

When reviewing jury instructions for plain error, this 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. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983) (citing *United States v. Jackson*, 569 F. 2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L. Ed. 2d 1137 (1978)). For a reversal of the judgment to be warranted on plain error, "the error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

Here, the trial court's jury instruction tracked the language of the pattern jury instructions regarding assault with a deadly weapon, properly instructing the jury on self-defense as well. *See* N.C.P.I., Crim. 208.50 (2002). At no point did the judge fail to explain any portion of the required charge. Therefore, the instructions were clear and presented the law fairly.

The jury did, nonetheless, request further guidance in the instructions by several times asking to actually see the written instructions. It is clearly within a judge's discretion whether to provide a jury with a written copy of the instructions upon their request. *See State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992) (citing *State v. Bass*, 53 N.C. App. 40, 45, 280 S.E.2d 7, 10 (1981)). Here, the judge explained that his copy had notes on it and could not be handed out, but he reread the instructions each time the jury asked and gave the jury the opportunity to write the instructions down. While providing the written instructions may have been beneficial to the jury, the judge did orally reread them, and as such did not abuse his discretion. *See State v. Moore*, 339 N.C. 456, 463, 451 S.E.2d 232, 235 (1994); *McAvoy*, 331 N.C. at 591, 417 S.E.2d at 494 (oral repetition of instructions likely provided the same effect as providing a written copy); *State v. Holland*, 161 N.C. App. 326, 329-30, 588 S.E.2d 32, 35-6 (2003) (no error for judge to reread instructions upon jury request for written instructions).

The record is clear that the defendant fired a gun at least four times with his wife in the room. Ms. Hawkins testified that the shots were directed at or near her. Our Supreme Court has defined assault as

> an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

State v. Mitchell, 358 N.C. 63, 69-70, 592 S.E.2d 543, 547 (2004) (internal quotations omitted). There was more than enough evidence presented to support a finding of guilt as to the charge of assault with a deadly weapon and there was no error in either the instructions given or the oral repetition of those instructions.

"Indeed, even when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *Odom*, 307 N.C. at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). The facts of this case simply do not present that rare case.

No error.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).