NO. COA07-1428

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2008

STATE OF NORTH CAROLINA

v. Transylvania County
No. 05 CRS 52842

MARK ELLIOTT MORROW

Appeal by defendant from judgment entered 20 April 2007 by Judge James U. Downs in Transylvania County Superior Court. Heard in the Court of Appeals 23 June 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Faison Hicks, for the State.

Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for defendant-appellant.

CALABRIA, Judge.

Mark Elliott Morrow ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of resisting an officer. We find no error.

The State presented evidence that on the evening of 2 December 2005, defendant's former girlfriend Terry Russell ("Ms. Russell") was at his residence in Transylvania County, North Carolina visiting him. When defendant and Ms. Russell became involved in an argument, defendant asked her to leave. Instead of leaving, Ms. Russell went to bed.

At approximately 2:44 a.m. the next morning, three deputies from the Transylvania County Sheriff's Department responded to a call from "someone wishing to have another person removed from the residence" and arrived at defendant's home. The deputies interviewed defendant and Ms. Russell separately. During Ms. Russell's interview with two of the deputies, she asked why she was the one who had to leave when it was the defendant who had pushed her during the argument. Ms. Russell showed the deputies "several cuts and scrapes on her hands[.]" According to the deputies, the injuries were consistent with her story of being shoved into a chair several times. Based upon this information, the deputies decided to place defendant under arrest for assault on a female. During the arrest, a struggle ensued and the deputies used a Taser device. One of defendant's fingers on his left hand was broken during the struggle, but he was eventually restrained in handcuffs and taken into custody.

Defendant subsequently was charged with the offenses of assault on a female, two counts of assault on a government official, and resisting an officer. At the close of the State's evidence, the trial court dismissed all of the charges except for the charge for resisting an officer. Defendant testified that he called the officers to come to his house and help him "remove somebody from my house." Defendant said Ms. Russell was drinking that night. In addition, she was upset because she did not get a job she wanted, and they had an argument. When the officers arrived, defendant led the officers to the bedroom where Ms.

Russell was asleep. When the officers saw Ms. Russell asleep in the bedroom, they told defendant to go to the kitchen and he complied. After Deputy Jason Brown ("Deputy Brown") walked into the kitchen, he yelled at Ms. Russell to stay in the bedroom. Defendant responded "[t]here's no reason to yell at [Ms. Russell]." Deputy Brown then placed defendant under arrest, but never told defendant the reason.

On 20 April 2007, in Transylvania County Superior Court, the jury returned a guilty verdict finding defendant guilty of resisting an officer. The Honorable James U. Downs sentenced defendant to sixty days in the custody of the Sheriff of Transylvania County, but suspended defendant's sentence and ordered supervised probation for twenty-four months. From the judgment, defendant appeals.

On appeal, defendant argues the trial court erred in (I) failing to grant defendant's motion to dismiss the charge of resisting an officer and (II) instructing the jury regarding defendant's right to remonstrate with the officers.

I. Motion to Dismiss

Defendant first argues the trial court erred in denying his motion to dismiss the charge of resisting an officer. We disagree.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense and that the defendant is the perpetrator. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "'Substantial evidence is relevant evidence that a reasonable mind might accept

as adequate to support a conclusion.'" *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). In considering a motion to dismiss, "the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (citation omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). "[C]ontradictions and inconsistencies do not warrant dismissal; the trial court is not to be concerned with the weight of the evidence." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citation omitted). "[I]f the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Ford*, 136 N.C. App. 634, 641, 525 S.E.2d 218, 223 (2000).

Defendant contends the trial court was bound by the doctrines of collateral estoppel and *res judicata* in determining that probable cause existed to arrest defendant for the offense of assault on a female. "'Collateral estoppel' means that once an issue of ultimate fact has been determined by a valid final judgment, that issue may not be relitigated by the same parties in a subsequent action." *State v. Brooks*, 337 N.C. 132, 147, 446 S.E.2d 579, 589 (1994) (quoting *State v. Warren*, 313 N.C. 254, 264, 328 S.E.2d 256, 263 (1985)).

> The application of the common law doctrine of collateral estoppel to criminal

> cases has been codified by N.C. Gen. Stat. § 15A-954(a)(7), which requires dismissal of the charges stated in a criminal pleading if it is determined that "[a]n issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of defendant in a prior action between the parties."

State v. Safrit, 145 N.C. App. 541, 552, 551 S.E.2d 516, 524 (2001) (alteration in original) (quotation and citation omitted). "When raising a claim of collateral estoppel, the defendant bears the burden of showing that the issue he seeks to foreclose was necessarily resolved in his favor at the prior proceeding." *State v. Warren*, 313 N.C. 254, 264, 328 S.E.2d 256, 263 (1985) (citation omitted). "Under the doctrine of *res judicata*, also referred to as claim preclusion, 'a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them.'" *Safrit*, 145 N.C. App. at 551, 551 S.E.2d at 523 (quoting *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). For either doctrine to apply, there must be a prior proceeding where either a claim or an issue was decided.

In the instant case, there was no prior proceeding, therefore, there was no claim or issue that determined whether the officers had probable cause to arrest defendant or whether defendant was guilty of resisting an officer under the facts at issue. The determination by the trial court granting defendant's motion to dismiss the charge of assault on a female does not constitute a prior proceeding. Furthermore, the failure of the State to show substantial evidence that defendant committed the offense of

assault on a female does not necessarily indicate the State failed to establish substantial evidence that the deputies had probable cause to arrest defendant for assault on a female. *State v. Jefferies*, 17 N.C. App. 195, 198, 193 S.E.2d 388, 391 (1972). The trial court was not bound by either the doctrine of collateral estoppel or the doctrine of *res judicata* in determining defendant's motion to dismiss the charge of resisting an officer. This assignment of error is overruled.

Defendant's assertion that the State failed to produce substantial evidence that the deputies had probable cause to arrest defendant for the offense of assault on a female is similarly without merit. The deputies testified that Ms. Russell informed them that she was pushed several times and showed them the injuries she sustained on her arms. The deputies determined the injuries were consistent with Ms. Russell's account of the alleged assault. While Ms. Russell denied at trial that she suffered any injuries to her arms, taking the evidence in the light most favorable to the State, there was substantial evidence to establish probable cause to arrest defendant for assault on a female. *See State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999) (alteration in original) (internal quotations omitted) ("'Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.'"); *see also State v. McKinney*, 361 N.C. 53, 62, 637

S.E.2d 868, 874-75 (2006) (citations and quotations omitted) ("The existence of probable cause is a 'commonsense, practical question' that should be answered using a 'totality-of-the-circumstances approach.' '*Probable cause is a flexible, common-sense standard*. It does not demand any showing that such a belief be correct or more likely true than false.'"). This assignment of error is overruled.

II. Jury Instruction

Defendant also argues the trial court improperly instructed the jury regarding defendant's right to remonstrate with the officers. We disagree.

We first note a procedural matter. Defense counsel submitted a proposed jury instruction regarding defendant's right to remonstrate with the officers. The trial court subsequently denied defendant's proposed instruction. Defendant did not repeat his objection to the trial court's instruction in order to preserve the issue for appellate review. However, it was not necessary for the defendant to repeat his objection to the instruction after the trial court denied the proposed instruction. *See State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984) ("Defendant is not required by either Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure or Rule 21 of the General Rules of Practice for the Superior and District Courts, to repeat his objection to the jury instructions, after the fact, in order to properly preserve his exception for appellate review.").

"It is fundamental that the purpose of the jury charge is to provide clear instructions regarding how the law should be applied to the evidence, in such a manner as to assist the jury in understanding the case and in reaching a verdict." *State v. Wardrett*, 145 N.C. App. 409, 417, 551 S.E.2d 214, 220 (2001) (citation omitted). "[W]here 'a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance[.]'" *State v. Augustine*, 359 N.C. 709, 729, 616 S.E.2d 515, 529 (2005) (citation and quotations omitted). However, "[w]here the instructions to the jury, taken as a whole, present the law fairly and clearly to the jury, we will not find error even if isolated expressions, standing alone, might be considered erroneous." *State v. Morgan*, 359 N.C. 131, 165, 604 S.E.2d 886, 907 (2004) (citations omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005).

In the instant case, following the presentation of all the evidence, defendant proposed the following special jury instruction:

> Merely remonstrating, objecting, protesting or criticizing an officer while he is performing his duty does not present sufficient evidence to find the defendant guilty of the offense of Resist, Delay and Obstruct. In order to find that the defendant committed the offense of Resist, Delay or Obstruct an officer, you must rely on evidence of some action other than merely remonstrating, objecting, protesting or criticizing the officer while he was attempting to discharge his duties.

The trial court denied defendant's request and instead gave the following instruction: "In addition to that, members of the jury,

merely remonstrating with an officer on behalf of another, or criticizing, or questioning the officer while he's performing his duty, when done in an orderly manner, does not amount to obstructing or delaying an officer in the performance of his duties."

At trial, evidence of defendant's remonstrating with, criticizing or questioning the deputies came from defendant's testimony:

> [Defense Counsel]: What happened next?
>
> [Defendant]: [Deputy] Brown came walking into the kitchen, and hollered out for [Ms. Russell] to stay in the bedroom. And I told him, I said, "There's no reason to yell at her."
>
> [Defense Counsel]: What happened after you said that?
>
> [Defendant]: After I said that, they said that they were placing me under arrest, and I asked them what for. And they never told me why, never said why.
>
> And I said, well this is my house. I was the one that called you guys to help me. At that time [Ms. Russell] came back – Ms. Russell came back into the adjacent area. And she said, "I'll just leave", and I put my arms up like this. I got grabbed by [Deputy] Sherman, and I got grabbed by [Deputy] Queen, and I was getting tazed. And I went straight down to the ground.

This evidence supports the trial court's instruction that defendant's testimony shows that he not only remonstrated on behalf of Ms. Russell, but he also questioned and criticized the actions of the deputies before they took him into custody. Although the trial court qualified "remonstrating" with "on behalf of another," the instruction given by the court is supported by the evidence,

substantially similar to that requested by defendant, and is not so misleading to the jury that it prejudiced defendant. The trial court did not err in giving its instruction as opposed to the instruction requested by defendant.

Defendant further contends that the instruction failed to articulate exactly what the jury should do if it was determined that defendant's conduct should be excused by this rule. This conclusion is similarly misplaced. The trial judge's instruction to the jury regarding defendant's remonstrating with the officers came from this Court's decision in *State v. Allen*, 14 N.C. App. 485, 188 S.E.2d 568 (1972). In *Allen*, defendant Walter Allen ("defendant Walter") was charged, *inter alia*, with resisting, delaying and obstructing an officer. *Id.* at 491, 188 S.E.2d at 572. This Court articulated a remonstrating exception to the charge of resisting arrest and determined defendant Walter's actions did not constitute "the offense of resisting, delaying and obstructing an officer." *Id.* at 491, 188 S.E.2d at 573. In determining defendant Walter's actions did not rise to the level of resisting an officer, this Court held: "[M]erely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer[.]" *Id.* (alteration in original) (quotation marks omitted).

In addition, "[t]he trial court is not required to give the exact instructions requested by a defendant. Instead, requested instructions need only be given in substance if correct in law and

supported by the evidence." *Morgan*, 359 N.C. at 169, 604 S.E.2d at 909. Here, the trial court clearly delineated in the instruction the remonstrating exception set forth in *State v. Allen*. Therefore, the trial judge's instructions correctly stated the law and as previously discussed, were supported by the evidence. As such, the trial judge's instruction gave "in substance" the defendant's requested instruction. *Id.* Moreover, "defendant has not demonstrated that the instructions given were erroneous or prejudicial to him. He has presented no evidence that any juror misunderstood or failed to follow the court's instructions, misapplied the law, or reached the sentencing recommendation by inappropriate means." *Id.* at 169-70, 604 S.E.2d at 909. These assignments of error are overruled.

No error.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).