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NO. COA10-566

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 07CRS234277
09CRS42324, 46095

VERNON RUSSELL KIRK,
Defendant.

Appeal by defendant from judgments entered 5 November 2009 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 November 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Kevin P. Bradley for defendant.

ELMORE, Judge.

Vernon Russell Kirk (defendant) appeals his convictions and sentences for assault with a deadly weapon inflicting serious injury, possession of a firearm by a convicted felon, and habitual felon status. After careful consideration, we remand for the correction of a clerical error only.

In the summer of 2007, defendant worked for Timothy Avery (the victim), a contractor, on a remodeling job installing sheetrock. The week before the incident, the victim was able to pay defendant only a portion of the wages he owed defendant. On 2 July 2007,

defendant and the victim met with the victim's boss to discuss the rest of the money owed; the victim told defendant he could pay him nothing more at the time.

On 3 July 2007, the victim saw defendant at a gas station; defendant was hauling a trailer behind his vehicle, and the victim followed him in hopes of recovering some equipment he had loaned defendant. The victim followed defendant's vehicle at a distance of a few car lengths for a short time, and then defendant pulled his vehicle to the side of the road. Defendant testified at trial that he believed the victim had a gun with him.

Once both cars were stopped, the victim exited his car and began to approach defendant's car. The victim and his passenger testified that the victim had nothing in his hands at the time; defendant testified that he saw something in the victim's hand. Defendant testified that he "opened [his] door and started to shoot" at the victim while aiming for the victim's feet and legs. The victim was struck by three bullets in his left arm and five bullets in his right leg.

Defendant was convicted by a jury of assault with a deadly weapon inflicting serious injury, and possession of a firearm by a convicted felon and found to have habitual felon status. He was sentenced to two consecutive terms of 133 to 169 months' imprisonment.

Defendant first argues that the trial court erred in instructing the jury in two ways: first, by equating the concept of "reasonableness of belief" with "use of excessive force," and

second, by referring to the victim as "the victim" throughout. As defendant objected to neither at trial, we review both for plain error.

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)
(quotations and citation omitted; alterations in original).

Defendant first argues that the trial court erred in its reply to the jury's request for a definition of the term "ordinary firmness" from the jury instructions. After consulting with the prosecutor and the defendant's attorney, the trial court answered the jury by repeating its earlier instruction in part, as follows:

With respect to this request, for a definition of the term "ordinary firmness," this appears at page 8 and 11, I believe, of the instructions that I gave you, and I would suggest, first of all, you consider all the instructions. You need to consider all the instructions I've given you, but if you look at the subsequent paragraph in page 8, right after the term "ordinary firmness" is used -- let me just read it. It says, "*If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that*

person from death or great bodily harm and the circumstances did create such belief in the defendant's mind, such assault would be justified by self-defense."

You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time. And then the next paragraph says, "A defendant does not have the right to use excessive force. The defendant had the right to only use such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm."

And then it says, "In making this determination, you should consider the following circumstances as you find them to have existed from the evidence, including the size, age, strength of the defendant as compared to the victim, the fierceness of the assault, if any, upon the defendant, whether or not the victim possessed a weapon and the reputation, if any, of the victim for danger and violence."

(Emphasis supplied.) The italicized portions of the trial court's instructions track almost verbatim, aside from very minor syntactic alterations, the pattern jury instruction for self-defense as it pertains to all assaults, including those involving deadly force. See N.C.P.I. Crim 308.45A.

Defendant is correct in his statement that our Supreme Court has expressly stated that it is error to equate the elements of "reasonableness of belief" and "use of excessive force," *State v. McAvoy*, 331 N.C. 583, 596-97, 417 S.E.2d 489, 497-98 (1992), but does not explain in what way that concept applies to the case at hand. Nor does defendant explain how the trial court's repetition of the relevant portion of the jury instructions - instructions agreed to by defendant - constitutes error, much less plain error.

Defendant's second argument is that the trial court's referring to Mr. Avery as "the victim" throughout its jury instructions prejudiced the jury against defendant. Defendant contends that this constitutes a prejudicial expression of judicial opinion on defendant's guilt, something expressly forbidden by statute. N.C. Gen. Stat. § 15A-1222 (2009).

We considered this argument recently in *State v. Jackson*, where we noted: "Our Supreme Court has held that a trial court referring to the prosecuting witness as 'the victim' does not constitute plain error." ___ N.C. App. ___, ___, 688 S.E.2d 766, 769 (2010) (citing *State v. McCarroll*, 336 N.C. 559, 565-66, 445 S.E.2d 18, 22 (1994)). Further, as the State notes, the relevant pattern jury instructions use the phrase "the victim" throughout. "We can find no error, much less plain error, when the trial court instructed the jury consistent with the pattern jury instructions." *State v. Martin*, 191 N.C. App. 462, 471, 665 S.E.2d 471, 476 (2008); see also *Jackson*, ___ N.C. App. at ___, 688 S.E.2d at 769 (holding that "[t]he trial court did not err, let alone commit plain error[,] in using the phrase 'the victim' where it was used in the pattern jury instruction).

Finally, defendant argues that the written judgments regarding his convictions misstate the felony class for both charges, and he is correct. A conviction for assault with a deadly weapon inflicting serious injury is a class E felony, and possession of a firearm by a felon is a class G felony; the judgments designate both as class C felonies. This error is rooted in the fact that

defendant's habitual felon status elevates each to a C felony for purposes of sentencing. As such, there was no error in the actual sentence given - rather, the error is literally that these two letters were mistyped. We agree with defendant that this constitutes an error, but also agree with the State that it is a clerical error that can be fixed on remand. As such, we remand for the sole purpose of correcting the misclassification of these felonies on the judgment and commitment sheets pertaining to defendant's convictions.

No error in part; remand in part.

Judges HUNTER, Robert C. and JACKSON concur.

Report per Rule 30(e).