

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA12-1561
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v.

Robeson County
No. 11 CRS 2843

DAVID HAROLD INMAN

Appeal by defendant from judgment entered 30 March 2012 by Judge James F. Ammons, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 13 August 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Dahr Joseph Tanoury, for the State.

Anne Bleyman for defendant-appellant.

STEELMAN, Judge.

Where the State presented positive evidence as to each element of the charge of assault with a deadly weapon inflicting serious injury and there was no conflicting evidence, the trial court did not commit plain error by failing to instruct the jury on lesser included offenses of misdemeanor assault. The trial court's order awarding \$5,000 in restitution was not supported

by evidence, is vacated, and this case is remanded to the trial court for further evidentiary proceedings.

I. Factual and Procedural Background

On the morning of 20 April 2011, Robeson County EMS responded to an emergency call at 149 Mudd Alley. When they arrived, they saw William Cash Phillips (Phillips) lying on the side of the roadway in a pool of blood. Phillips told the paramedic that he had been assaulted by two males, one of whom shot him, and the other struck him several times in the back of the head with a log. Phillips was transported to the hospital, where the two cuts on his head were cleaned and sutured with staples. Phillips gave a description to police of the man who assaulted him with the log and later identified David Harold Inman (defendant) as that assailant from a photographic lineup. Defendant was indicted for assault with a deadly weapon inflicting serious injury.

At trial, Phillips testified that defendant hit him on the back of the head with an oak log causing Phillips to fall down and that defendant kept hitting Phillips on his back and sides. Phillips crawled away from defendant and made it to the highway where EMS treated him. Defendant did not present any evidence. On 30 March 2012, the jury found defendant guilty of assault

with a deadly weapon inflicting serious injury. The trial court sentenced defendant as a level IV felony offender to an active term of imprisonment of 36 to 53 months. The trial court also ordered defendant to pay \$5,000 in restitution.

Defendant appeals.

II. Lesser Included Offenses

In his first argument, defendant contends that the trial court erred by not instructing the jury on the lesser offenses of misdemeanor assault inflicting serious injury or assault in violation of Phillips' rights. We disagree.

A. Standard of Review

Because defendant "did not object to the instructions given by the trial court and did not request instructions on lesser offenses[,] " our review is limited to plain error. *State v. Collins*, 334 N.C. 54, 61-62, 431 S.E.2d 188, 193 (1993). To demonstrate plain error, a defendant must show "that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted).

B. Analysis

"In North Carolina, a trial judge must submit lesser included offenses as possible verdicts, even in the absence of a request by the defendant, where sufficient evidence of the lesser offense is presented at trial." *State v. Owens*, 65 N.C. App. 107, 110, 308 S.E.2d 494, 497 (1983). However, "when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime," an instruction on lesser included offenses is not required. *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972).

The primary distinction between felonious assault under G.S. § 14-32 and misdemeanor assault under G.S. § 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used *and* serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that *either* a deadly weapon was used *or* serious injury resulted, the offense is punishable only as a misdemeanor.

Owens, 65 N.C. App. at 110-11, 308 S.E.2d at 498. We have previously held that the trial court's failure to charge on simple assault was not error when the evidence indicated that the defendant repeatedly beat the victim with a metal walking cane and that she suffered very serious injuries as a result of

that assault. *State v. Hensley*, 91 N.C. App. 282, 284, 371 S.E.2d 498, 499 (1988). In *Hensley*, there was "no evidence which indicate[d] that [the victim] was not beaten with the cane or that she was not seriously injured by it. Thus, the court's failure to charge on simple assault was not error, plain or otherwise." *Id.*

Defendant argues that there was evidence that the injuries were not serious and that a jury could have determined the log was not a deadly weapon. The trial court submitted these factual determinations to the jury and charged the jury to determine whether defendant used a deadly weapon and whether defendant inflicted serious injury upon Phillips.

Our Supreme Court has defined a deadly weapon as:

[a]ny instrument which is likely to produce death or great bodily harm, under the circumstances of its use The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself.

State v. Smith, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924). A metal walking cane is a weapon "clearly capable" of inflicting a lethal wound when used as a club. *Hensley*, 91 N.C. App. at 284, 371 S.E.2d at 499; see also *Smith*, 187 N.C. App. at 470, 121

S.E. at 737 (describing a baseball bat as a deadly weapon if viciously used).

The term "inflicts serious injury" as used in N.C. Gen. Stat. § 14-32 is defined as "physical or bodily injury resulting from an assault with a deadly weapon. The injury must be serious but it must fall short of causing death." *State v. Hensley*, 90 N.C. App. 245, 248, 368 S.E.2d 208, 210 (1988). "Factors our courts consider in determining if an injury is serious include pain, loss of blood, hospitalization and time lost from work." *Owens*, 65 N.C. App. at 111, 308 S.E.2d at 498.

In the instant case, the State presented evidence that the log was a deadly weapon and that Phillips suffered serious injury. The evidence included: that defendant hit Phillips on the head with an oak log, causing Phillips' hands to curl up, his eyes to roll back, and his body to fall to the ground; that defendant continued to hit Phillips on his back, sides, and shoulders as Phillips tried to crawl away; and that Phillips had blood running down the side of his face where he was hit by the log. When EMS responded to the emergency call, a paramedic found Phillips lying in a pool of blood from both his head wound and the gunshot wound. The paramedic applied pressure dressings to treat his head wounds. Phillips sustained two lacerations to the

back of his head, measuring ten and eight centimeters long. At the hospital, his lacerations were cleaned and stapled. Phillips has a scar on his head where defendant hit him, the staples remained in his head for two weeks, and his head remained sore for about three to four weeks. Aside from his head injury, Phillips had bruises down his back, and on the day after the assault, he was unable to stand or put a crutch under his shoulder due to pain in his torso. The facts of this case are similar to those in *Hensley*. *Hensley*, 91 N.C. App. at 284, 371 S.E.2d at 499. Because there was no evidence that indicated Phillips was not beaten with the wooden log or that he was not seriously injured by it, *Hensley* is controlling.

While it might have been prudent for the trial court to submit the lesser included misdemeanor assault offenses to the jury when it submitted the factual determinations of whether the oak log was a dangerous weapon and whether Phillips sustained serious injury to the jury, we cannot say that this omission was plain error. The evidence presented by the State is positive as to each and every element of the offense charged and there is no conflicting evidence relating to any element. Defendant cannot meet his high burden of establishing that the error had a probable impact on the jury's finding that the defendant was

guilty of felony assault. We hold the trial court did not commit plain error in failing to instruct the jury on lesser included offenses of misdemeanor assault.

This argument is without merit.

III. Restitution

In his second argument, defendant contends that the trial court erred by ordering restitution as part of his sentence when there was no evidence presented that supported the award of \$5,000 in restitution. We agree.

A. Standard of Review

"On appeal, we consider *de novo* whether the restitution order was 'supported by the evidence adduced at trial or at sentencing.'" *State v. McNeil*, 209 N.C. App. 654, 667, 707 S.E.2d 674, 684 (2011) (quoting *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004)).

B. Analysis

"The amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *Shelton*, 167 N.C. App. at 233, 605 S.E.2d at 233 (citation omitted). "[U]nsworn statements of the prosecutor . . . [do] not constitute evidence and cannot support the amount of

restitution recommended." *State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992).

In the instant case, an exhaustive review of the record indicates that no evidence was presented at trial or at the sentencing hearing which supports the amount of \$5,000 ordered by the trial court as restitution other than a remark by the clerk referring to proceedings in another case. The trial court apparently based the amount of restitution upon the unsworn statement of the clerk that "[i]t was five thousand according to the Clerk's calendar." The State concedes that "there appears to be no testimony of record to support the restitution amounts"

The restitution portion of the judgment is vacated, and we remand this case to the trial court for further evidentiary proceedings to determine the proper amount of restitution in this case.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).