NO. COA12-429
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

STATE OF NORTH CAROLINA

v. Martin County
No. 10 CRS 50803

GLENN EARL MORRING

Appeal by defendant from judgment entered 4 November 2011 by Judge Wayland J. Sermons, Jr. in Martin County Superior Court. Heard in the Court of Appeals 5 November 2012.

Attorney General Roy Cooper, by Assistant Attorney General James C. Holloway, for the State.

Hunt Law Group, P.C., by James A. Hunt, for defendant-appellant.

Calabria, Judge.

Glenn Earl Morring ("defendant") appeals from judgment entered upon a jury verdict finding him guilty of assaulting a government official. We find no error.

I. Background

On 6 July 2010, defendant and his wife, Sylvia Morring ("Sylvia"), were attending a family party at defendant's

mother's house. Defendant called law enforcement to assist him in removing Sylvia. Officer Jordy Cutler ("Officer Cutler") of the Robersonville Police Department responded to the call, along with several other officers. After the officers arrived, they learned that Sylvia had refused to leave after becoming disruptive, and they diffused the situation. Subsequently, defendant went to his wife's van to retrieve his eight-year-old son. Defendant stated that he and his wife agreed that defendant would have custody of his son that night. Officer Cutler saw defendant standing in front of Sylvia's van, apparently blocking her from leaving. When the officer approached, defendant informed him that he did not want his wife to leave with their son because she had been drinking. Officer Cutler testified that defendant, rather than Sylvia, appeared to be intoxicated. The officer told defendant that he could not intervene in a child custody matter and their son would have to remain in Sylvia's care. Defendant continued to try to remove the child from the van.

Officer Cutler testified that since defendant seemed "very agitated," the officer placed his hand on defendant's right shoulder, without pushing, and asked defendant to back out of the vehicle so they could discuss the matter. Defendant turned,

grabbed the top straps of the officer's vest and lifted the officer off the ground. Officer Cutler told defendant to release him, but defendant did not listen, until the Velcro on the officer's vest gave way and he slid down. Defendant then ignored the officer's commands to lie on the ground. Officer Cutler used his taser in an effort to subdue defendant.

At trial, both defendant and Sylvia testified that as defendant tried to retrieve his son from the van, Officer Cutler stood behind him and placed him in a choke hold. Defendant stated that after he spun around, he grabbed Officer Cutler and asked him what he was doing. Defendant said after he pushed the officer back, he followed the order to get down on the ground. Nevertheless, Officer Cutler tasered him.

Defendant was arrested and charged with assaulting a government official. The jury returned a verdict finding defendant guilty of assaulting a government official. The trial court sentenced defendant to 150 days in the North Carolina Department of Correction, suspended the sentence, and placed defendant on supervised probation for twenty-four months. As a special condition of probation, defendant was required to serve an active term of thirty days in the custody of the Martin County Sheriff. Defendant appeals.

II. Jury Instruction

Defendant contends the trial court abused its discretion by failing to adequately respond to a question submitted by the jury during deliberations. We find defendant has not properly preserved this issue for review.

"A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires . . ." N.C.R. App. P. 10(a)(2); *see also State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000). However,

> [i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

In the instant case, after the jury was excused to deliberate, the trial court received a note from them asking the question, "What is lawful excuse?" The trial court discussed the request with both the parties outside the presence of the

jury. Defense counsel then responded, "I thought what we gave them [in the instruction] then was what they had to go with ... I just think that's got to be up to them to figure this out." The trial court agreed with defense counsel and instructed the jury that the court had given the jury "all of the law and instructions that [they needed] to answer that issue." Defendant did not request any particular instruction concerning "lawful excuse" or otherwise object to the trial court's handling of the jury question during deliberations. Therefore, the issue was not properly preserved for review. Furthermore, defendant did not argue plain error in his brief. Since defendant failed to "specifically and distinctly contend that the trial court's instruction ... constituted plain error," he has waived appellate review of this issue. *State v. Truesdale*, 340 N.C. 229, 233, 456 S.E.2d 299, 301 (1995).

III. Instruction on Self-Defense

Defendant argues his counsel provided ineffective assistance for failing to request a jury instruction on self-defense. We disagree.

For a defendant to "prevail on a claim of ineffective assistance of counsel" he

> must first show that his counsel's performance was deficient and then that

> counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "[I]n order to show ineffective assistance of counsel because of the failure to request jury instructions, the defendant must show that without the requested instructions there was plain error in the charge." *State v. Swann*, 322 N.C. 666, 688, 370 S.E.2d 533, 545 (1988). Plain error arises when the error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

A defendant is entitled to an instruction on self-defense when he has presented evidence from which a juror might infer that he acted in self-defense. *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977). Even assuming, *arguendo*, that defendant did present such evidence, to show plain error, he still must show that a different result would have been reached had the instruction been given. *Swann*, 322 N.C. at 688, 370 S.E.2d at 545.

In the instant case, there was sufficient evidence that defendant did not act in self-defense, and thus it is unlikely that the jury would have reached a different result. Two officers testified that defendant and his wife were arguing when the officers arrived at defendant's mother's house followed by another argument at Sylvia's van. Further, Officer Cutler testified that defendant appeared intoxicated and became very agitated when he was asked to step away from the van. In addition, Officer Cutler warned defendant multiple times to step away from the van so they could talk. Sylvia testified that she also heard the officer tell defendant to step back from the van. Sylvia's testimony diminishes defendant's claim that the officer's contact came without warning and also diminishes defendant's justification for using force against the officer.

Based on all of the evidence, regarding Officer Cutler's warnings, we conclude that absent an instruction on self-defense, defendant has not shown that the jury would have reached a different result. In addition, since defendant has failed to show plain error on appeal, his contention that his counsel was ineffective for failing to request an instruction on self-defense is without merit.

No error.

Judges HUNTER, Robert C. and McCULLOUGH concur.

Report per Rule 30(e).