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NO. COA14-600  
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Robeson County  
No. 10 CRS 054508

MARQUEST ANDRE PAGE

Appeal by defendant from judgment entered 21 November 2013 by Judge Claire V. Hill in Robeson County Superior Court. Heard in the Court of Appeals 5 November 2014.

*Attorney General Roy Cooper, by Assistant Attorney General Carolyn McLain, for the State.*

*Law Office of Margaret C. Lumsden PLLC, by Margaret C. Lumsden, for defendant.*

ELMORE, Judge.

On 21 November 2013, a jury found defendant guilty of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to 50-69 months of active imprisonment. Defendant appeals and, in relevant part, raises as error the trial court's denial of his request for a jury

instruction on the lesser included offense of assault inflicting serious injury. After careful consideration, we order a new trial.

### I. Facts

Marquest Andre Page ("defendant") was charged with first-degree kidnapping, felonious restraint, robbery with a firearm, and assault with a deadly weapon inflicting serious injury (the assault). On 21 November 2013, a jury found defendant guilty of the assault. Defendant was acquitted of robbery with a firearm and felonious restraint. The trial court declared a mistrial with respect to the charge of first-degree kidnapping because the jury deadlocked over that charge.

In the six months prior to the assault, David Oxendine ("the victim") regularly purchased crack cocaine (crack) from defendant. Early in the morning on 1 July 2010, defendant informed the victim that he would not provide any more crack until the victim paid him an outstanding balance of \$700.

At approximately 9:00 a.m. that day, defendant and two companions (with at least one gun among the three of them) drove the victim to a bank so that the victim could retrieve money to pay defendant. After returning to the car from the bank, however, the victim only paid defendant \$500. At defendant's

behest, the victim paid defendant an additional \$80 but refused to give any more. Thereafter, defendant and one of his companions assaulted the victim. The victim testified that defendant used at least one handgun to hit him during the assault. After defendant's arrest, defendant gave a statement to Detective Adam Chavis and indicated that only fists were used during the assault.

After the assault concluded, defendant called Jotana Barton on the phone and instructed her to pick up the victim from his location and drive him to a different bank to obtain the remaining \$120. When the victim arrived at the bank, a bank employee called 911 after observing the severe nature of the victim's injuries. The victim was transported to Southeastern Regional Medical center, wherein Detective Chavis noted severe injuries such as damage to the victims' face and right eye, bruises on the victim's chest and shoulder, and a fractured rib. Defendant and his companions were placed under arrest and a gun was found in the pocket of the one companion who did not take part in the physical assault but "just stood at the front door . . . to keep [the victim] from getting away."

At trial, the victim, Jotana Barton, and Detective Chavis testified, and defendant's statement to Detective Chavis was introduced into evidence by the State.

## II. Analysis

Defendant argues the trial court erred in denying his request for an instruction on the lesser included offense of assault inflicting serious injury because the jury could have found that no gun was used in the assault and that defendant's hands were not a deadly weapon. We agree.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A]n error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility

that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citation and internal quotation marks omitted).

An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater. 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. Northington*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 749 S.E.2d 925, 927 (2013) (citations and internal quotation marks omitted). A trial court's failure to instruct on a lesser-included offense "constitutes reversible error not cured by a verdict of guilty of the offense charged." *State v. Tillery*, 186 N.C. App. 447, 449-50, 651 S.E.2d 291, 293 (2007) (citation and quotation marks omitted).

Misdemeanor assault inflicting serious injury is a lesser included offense of assault with a deadly weapon inflicting serious injury. 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.

*Id.* (emphasis in original) (citations omitted).

Here, the trial court declined to instruct the jury on misdemeanor assault inflicting serious injury because “[t]he Court f[ound] that the State’s evidence [wa]s clear and positive as to each element of the charged offense of assault with a deadly weapon inflicting serious injury.” However, a conviction for assault with a deadly weapon inflicting serious injury requires proof that defendant used a deadly weapon. *See id.* Thus, if the evidence would have permitted the jury rationally to find that defendant did *not* use a deadly weapon during the assault, the jury should have been instructed on the lesser included offense of assault inflicting serious injury. *See Northington, supra.* This case involves two potential deadly weapons: a gun and defendant’s hands.

Because a handgun is considered a deadly weapon *per se*, the trial court correctly instructed the jury that “[a] handgun is a deadly weapon.” *See State v. McCree*, 160 N.C. App. 200, 206,

584 S.E.2d 861, 865 (2003) (“[A] handgun is a deadly weapon *per se.*”).

However, the State presented conflicting evidence at trial about whether defendant actually used a gun during the commission of the assault. The victim consistently testified that he was hit with a gun but the State did not produce a gun from defendant. Although defendant did not testify at trial, the State introduced his prior statement to Detective Chavis as substantive evidence during its case-in-chief. See N.C. Gen. Stat. § 8C-1, Rule 801(d) (2013). In that statement, defendant told Detective Chavis only that he “punched [the victim] in the jaw one time” and that his cousin, one of defendant’s companions, “hit [the victim] at least twice in the head with just his fists.” Thus, in order to resolve the factual issue of whether a gun was used in the assault, the jury would need to weigh the credibility of the witnesses’ statements. Accordingly, the evidence would have permitted the jury rationally to find that that a gun was not used in the assault, which would support a conviction of the lesser included offense of assault inflicting serious injury.

Additionally, because the trial court asked the jury to determine whether defendant’s hands constituted a deadly weapon,

it was required to provide a jury instruction on the lesser included offense of assault inflicting serious injury.

Our ruling in *Tillery* supports this proposition. 186 N.C. App. at 451, 651 S.E.2d at 294. In *Tillery*, this Court ruled that the trial court erred by failing to instruct the jury on the lesser included offense of assault inflicting serious injury where a jury was asked to determine whether a "2x4 board" was a deadly weapon for purposes of assault with a deadly weapon inflicting serious injury. *Id.* This Court held that "[h]aving made the determination that the '2x4 board' was not *per se* a deadly weapon, the trial judge should have instructed the jury on the lesser included offense of assault inflicting serious injury." *Id.*

In the present case, the trial court instructed the jury that the assailants' hands were not *per se* a deadly weapon: "[i]n determining whether hands were a deadly weapon, you should consider the nature of the hands, the manner in which they were used, and the size and the strength of the defendant as compared to the victim." Thus, the aforementioned evidence that no gun was used during the assault would have permitted the jury rationally to convict defendant of the lesser included offense (assault inflicting serious injury) and acquit him of the



greater offense (assault with a deadly weapon inflicting serious injury) if the jury determined that the hands used in this case were not a deadly weapon. Accordingly, the trial court erred by failing to instruct the jury on the lesser included offense of assault inflicting serious injury. In light of our ruling, we need not address defendant's remaining argument on appeal.

**III. Conclusion**

In sum, we order a new trial. The trial court's failure to instruct the jury on the lesser included offense of assault inflicting serious injury was error because the evidence would have permitted the jury rationally to convict defendant of that charge and acquit him of assault with a deadly weapon inflicting serious injury.

New Trial.

Judges ERVIN and DAVIS concur.

Report per Rule 30(e).