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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-573

Filed: 2 February 2016

Catawba County, No. 13 CRS 1159

STATE OF NORTH CAROLINA

v.

JEROME SHAW, JR.

Appeal by Defendant from judgments entered 17 September 2014 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 4 November 2015.

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

*M. Alexander Charns for Defendant.*

STEPHENS, Judge.

Defendant Jerome Shaw, Jr., was convicted in Catawba County Superior Court of one count of assault with a deadly weapon inflicting serious injury and one count of assault on a female. On appeal, Shaw argues that the trial court erred by preventing him from fully presenting his theory of self-defense and committed plain error by failing to instruct the jury that he was legally entitled to protect himself from death or great bodily harm. Shaw also contends that the court erred by allowing a

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police officer to testify that Shaw invoked his constitutionally protected right to remain silent, and by failing to set aside one of his convictions because both arose as part of the same act or occurrence. After due deliberation, we hold that the trial court did not err.

*Factual Background and Procedural History*

On 4 February 2013, Shaw was indicted by a Catawba County grand jury on one count of assault with a deadly weapon inflicting serious injury and one count of assault on a female. Both these charges arose from an altercation Shaw had with his girlfriend, Kristen Johnson, on 11 October 2012 at the apartment where they lived with their one-year-old daughter in Hickory, during which Shaw allegedly struck Johnson in the head and face and cut her with an 8-inch carving knife.

At a jury trial held on 16 September 2014 in Catawba County Superior Court, the State presented testimony from Johnson, who testified that on the evening of 11 October 2012, Shaw confronted her as she emerged from the bathroom about a letter he found hidden in their daughter's toy box. The letter was written by Johnson, addressed to her ex-boyfriend who was incarcerated in New York on a murder conviction, and detailed her desire to bring the couple's daughter to visit him in prison. Johnson testified that Shaw initially asked her to sit down to discuss the letter, that they began to argue when she told him she did not wish to discuss the letter, and that shortly thereafter, Shaw began to slap and punch her in the face with

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his hands, causing her nose to bleed and bruising around her eyes. Shaw also repeatedly kicked Johnson, bruising her ribs. The altercation spanned several minutes and moved throughout the apartment, from the bathroom to a bedroom and into the living room, where Johnson bled from her injuries. Johnson testified further that when they reached the kitchen, Shaw grabbed an 8-inch carving knife and threatened to cut her throat. They then moved back into the hallway, where Shaw got on top of Johnson, pinned her to the floor, and held the knife to her throat. Johnson testified that when she put her hands up to push the knife away and defend herself, her right hand was deeply cut and she began to bleed profusely. Shaw got up and continued to argue with Johnson as they moved back toward the bedroom. Although Shaw did not immediately offer to help Johnson, he eventually calmed down and left the room in order to get their daughter and something with which to wrap Johnson's bleeding hand. At that point, Johnson fled the apartment and ran to a church down the street for help. Someone called the police while Johnson received medical attention until an ambulance arrived and transported her to Frye Hospital, where she received treatment for bruises to her face and ribs, as well as 50 external stitches and 4 internal stitches to her wounded hand. Johnson testified that although the stitches were removed after four weeks, she continued to suffer from pain and numbness in her hand nearly two years later.

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The State also presented testimony from several officers and investigators from the Hickory Police Department (“HPD”). HPD Deputy Adam Scott testified that he and two other officers were dispatched to the apartment Johnson and Shaw shared, where they observed a trail of blood on the stairs outside. The officers knocked on the door, announced themselves as police, and, after receiving no response, kicked the door down. Inside the apartment, Scott observed blood on the floor of several rooms and found Shaw in the bedroom holding his daughter. Despite the fact that he was uninjured, Shaw’s clothes were covered in blood. After Shaw declined to discuss what had happened and was taken into custody, HPD Investigator Gene Walker took photographs of blood pooled throughout the apartment and measured the trail of blood Johnson left as she fled down the street to the church at 150 yards.

At the close of the State’s evidence, Shaw made a motion to dismiss the charges against him, which the trial court denied. Then—against his trial counsel’s advice, and despite having given no notice pretrial of his intent to rely on a theory of self-defense—Shaw took the stand to testify on his own behalf. According to Shaw, his only intent in confronting Johnson about the letter to her ex-boyfriend was to engage in a discussion about whether it would be appropriate for her to take their daughter to visit a convicted murderer in prison. However, Shaw testified, Johnson refused to discuss the matter and instead began to curse and slap him. After acknowledging that he slapped Johnson back, Shaw testified that it was Johnson who went into the

kitchen, picked up the knife, and came at him. Shaw testified further that, in order to defend himself, he shoved Johnson away, which caused her to crash into a doorjamb, fall to the floor, and drop the knife. Shaw admitted to kicking Johnson several times as she reached for the knife to prevent her from picking it up because “I didn’t want her to have that knife because I felt like if you have a knife in your hand, like you can—you could bring serious harm to me. And I wasn’t going to allow anybody to play with my life or threaten my life.” Shaw claimed that the cut on Johnson’s hand resulted when she attempted to pick the knife up by the blade, and stated further that Johnson came at him again after cutting herself, and only calmed down after he punched her in the face. Shaw insisted that he never picked up the knife or threatened Johnson with it in any way, and also explained that he believed Johnson’s testimony to the contrary was implausible because “like if I was trying to cut her throat, like I’m stronger than her. Like—she’s, she’s like short and kind of petite. There is no way I would not have been able to overpower her.” Shaw revisited this theme again in summarizing his version of what happened when he testified:

I never pointed the knife at her or held the knife to her throat. I never told her, “I should kill you.” No, I didn’t do that. I tried to do everything in my power—like, even though I was—I look at it as I tried to defend myself. But I believe that I did go overboard and assault her. Like I went overboard. I went overboard as far as assaulting her with my hands. But I did not—like—I did not have the knife. I did not cut her. I didn’t do that. Like there is no—I—to be honest, there is no way, if that’s what I was trying to do, that she would have been able to stop that.

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On cross-examination, Shaw stated the reason his clothes were covered in blood despite the fact he was uninjured was that he had tried to help Johnson after the fight ended by offering to find her a towel to wrap up her wounded hand. However, Shaw also acknowledged that he made no attempt to call 911 or contact the neighbors for assistance before or after Johnson fled the apartment.

At the close of all the evidence, the trial court instructed the jury on the offenses charged in the indictment, as well as the lesser-included offense of assault inflicting serious injury. In addition, the court provided an instruction on self-defense for an assault not involving the use of deadly force pursuant to Pattern Jury Instruction 308.40. Later that afternoon, the jury returned its verdict convicting Shaw on one count of assault with a deadly weapon inflicting serious injury and one count of assault on a female. The trial court imposed a sentence of 38 to 58 months imprisonment for the former conviction to run with a concurrent sentence of 150 days imprisonment for the latter. Shaw gave notice of appeal in open court.

*Analysis*

*A. Shaw's testimony*

Shaw argues first that the trial court erred by refusing to allow him to fully present his theory of self-defense. We disagree.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant's right to present a defense theory of his choosing and to cross-examine

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witnesses for bias. *See* U.S. Const. amend. VI. In the present case, Shaw complains that the trial court undermined his theory of self-defense and violated his rights under the Sixth Amendment when it instructed him that he could only testify about what he said and did, rather than what he thought or believed, when he first confronted Johnson about the letter to her ex-boyfriend. In support of this argument, Shaw points to the following exchange from the trial transcript:

[Defense counsel]: What, if anything, did you do after you found this letter?

[Shaw]: Well, at that point, [Johnson] was in the bathroom. So, I went in the bathroom to confront her about this.

[Defense counsel]: What was she doing when she was in the bathroom?

[Shaw]: She was either, I can't really recall. She was either cleaning or just getting herself together. It was one or the other.

[Defense counsel]: Okay.

[Shaw]: So, I'm trying to speak to her about the situation. I'm like, "Listen how do you feel that it makes sense for you to take our daughter up to a jail to see somebody that has—that's locked up for [murder]?"

[Defense counsel]: What did she say in response to you, if anything?

[Shaw]: Well, initially she doesn't really want to—like she doesn't really want to respond to it, because it was pretty much like I had the letter in my hand,

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so you know, she was basically, the way I feel, clearly in the wrong. But the thing was is that I wanted to talk to her like, “Listen, you can’t bring our daughter up there to see this person, because we—when we started dealing with each other—

[Prosecutor]: Objection, Your Honor.

THE COURT: Sustained.

[Defense counsel]: All right, so you told her you did not agree with it and so forth, correct?

[Shaw]: Yes, but I wanted to pretty much—the reason I kept having the conversation with her was because I wanted her to change her mind about taking our daughter up there to this prison, you know, to go on this visit to see this person, because me and her started dealing with each other—

[Prosecutor]: Objection, Your Honor.

[Defense counsel]: Just tell us what happened after that conversation. Was that still in the bathroom?

[Shaw]: Yes, this is in the—this is in the bathroom.

[Defense counsel]: Okay. All right. What happened after that?

[Shaw]: So after that I’m telling her like, “Listen, we started dealing with each other like basically right after he went to jail. So, I don’t think that a person that was dealing with you when he went to jail, is appropriate for you to bring our baby up there—

[Prosecutor]: Well, objection, Your Honor, non-responsive.

THE COURT: Overruled.



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[Shaw]: I didn't think that it was appropriate for her to bring our child up there.

THE COURT: Well, I'm going to sustain that. You can say what you said, not what you think. What you said.

[Shaw]: Okay.

On appeal, Shaw argues that this instruction from the trial court violated his constitutional rights by limiting his ability to present his self-defense theory that it was Johnson who was the aggressor in their altercation.

This argument fails. Although Shaw seeks to raise a constitutional issue on appeal, he did not object to the court's instruction at trial, and it is well established that constitutional issues that were not raised and passed upon at trial will not be considered for the first time on appeal. *See, e.g., State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988), *abrogated in part on other grounds as recognized by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004). Further, Shaw does not cite any specific authority to support his argument that the trial court's decision to sustain the State's objection to his non-responsive answer and resulting instruction violated his constitutional rights. This Court and our Supreme Court have repeatedly held, in keeping with our Rules of Appellate Procedure, that an assignment of error is deemed abandoned if the appellant fails to "cite reasonable authority in its support." *State v. Alston*, 341 N.C. 198, 224, 461 S.E.2d 687, 700 (1995), *cert. denied*,

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516 U.S. 1148, 134 L. Ed. 2d 100 (1996); *see also State v. Velazquez-Perez*, \_\_ N.C. App. \_\_, \_\_, 756 S.E.2d 869, 876, *disc. review denied*, \_\_ N.C. \_\_, 759 S.E.2d 92 (2014) (recognizing that an argument for which no supporting authority is cited, in violation of N.C.R. App. P. 28(b)(6), is deemed abandoned). Moreover, even assuming *arguendo* that Shaw's argument had been properly preserved for our review and adequately supported, the trial transcript demonstrates that the trial court's decision and instruction were warranted in light of Shaw's non-responsive and repetitive testimony leading up to the court's ruling. Finally, after the instruction was given, Shaw was allowed to testify at length that he told Johnson he did not want her to take their daughter to visit her ex-boyfriend, and that Johnson became angry and aggressive and initiated the altercation shortly thereafter by slapping Shaw. We therefore find it difficult to discern how the court's instruction inhibited the presentation of Shaw's self-defense theory in any way whatsoever, and we consequently conclude this argument is without merit.

*B. Jury instruction on self-defense*

Shaw argues next that the trial court committed plain error by instructing the jury on the incorrect legal standard for self-defense. We disagree.

Because Shaw did not object to the self-defense instruction given at trial, the standard of review is plain error. Thus, in order to prevail, "[the] defendant must demonstrate that a fundamental error occurred at trial. To show that an error was

fundamental, [the] 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) (citations and internal quotation marks omitted).

In the present case, Shaw contends that because he testified that he shoved, kicked, and punched Johnson after she allegedly picked up the knife because he “wasn’t going to allow anybody to play with my life or threaten my life,” the trial court should have instructed the jury that he “could use self-defense to protect himself from great bodily injury or death.” In support of this argument, Shaw relies on this Court’s decision in *State v. Whetstone*, 212 N.C. App. 551, 711 S.E.2d 778 (2011).

In *Whetstone*, the defendant was convicted of assault with a deadly weapon inflicting serious injury after he struck and stabbed an acquaintance following a night of heavy drinking. *Id.* at 552-53, 711 S.E.2d at 780-81. The defendant testified at trial that during an argument, the victim threw him to the floor and threatened to kill him, and then later “attacked him from behind, hit him in the back of his head, forced and held him to the ground, and started choking him,” at which point the defendant “grabbed a knife that had fallen from a table and started swinging back[.]” *Id.* at 553, 711 S.E.2d at 780. When the defendant requested an instruction on self-defense, the trial court instructed the jury according to Pattern Jury Instruction 308.40, which pertains to assaults that do not involve the use of deadly force where the

circumstances “would cause a person of ordinary firmness to reasonably believe that such action was necessary or apparently necessary to protect that person from bodily injury or offensive physical contact.” *Id.* at 555, 711 S.E.2d at 782 (quoting N.C.P. I.—CRIM 308.40).

On appeal, we held that this instruction constituted plain error, and that the trial court should have instructed the jury based on Pattern Jury Instruction 308.45—which applies when a defendant commits an assault involving the use of deadly force under circumstances that “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.” *Id.* at 556, 711 S.E.2d at 782 (quoting N.C.P.I.—CRIM 308.45). In reaching this result, we concluded there was sufficient evidence in the record to make the question of whether the defendant had acted under a reasonable apprehension of death or great bodily harm one for the jury. *Id.* at 560, 711 S.E.2d at 784-85. In so holding, we determined that the trial court’s erroneous instruction rose to the level of plain error because requiring the jury to find that the defendant did not use excessive force when he stabbed the victim with a deadly weapon under a reasonable apprehension of bodily injury or offensive physical contact “essentially lessened the burden of the State in disproving [the d]efendant’s claim of self-defense” insofar as it “implied, contrary to [the d]efendant’s evidence, that the assault being made upon [the d]efendant did not put

[the d]efendant in fear of death or great bodily harm” and thus “bordered on requiring that the jury conclude that the force [the d]efendant used was excessive force.” *Id.* at 561-62, 711 S.E.2d at 785-86.

We find Shaw’s reliance on *Whetstone* misplaced. Unlike the defendant in *Whetstone*, who admitted to assaulting the victim with a knife but testified he did so to defend himself, here, by contrast, Shaw denies using the knife to assault Johnson. Indeed, Shaw testified that although he shoved, kicked, and punched Johnson, he never touched the knife, and insisted instead that Johnson cut herself while attempting to grab the knife’s blade as it lay on the ground. Essentially then, Shaw seeks to excuse the charge of assault with a deadly weapon inflicting serious injury by claiming that he acted in reasonable fear of death or great bodily injury, while simultaneously insisting that he did nothing at all to cause Johnson’s injury. Consequently, we conclude that *Whetstone* is inapposite to the present facts, and we therefore hold that the trial court did not err, let alone commit plain error, in basing its self-defense instruction on Pattern Jury Instruction 308.40.

*C. Testimony regarding Shaw’s exercise of his right to remain silent*

Shaw argues next that the trial court committed plain error by allowing the State to introduce testimony commenting on his exercise of his right to remain silent. We disagree.

“A criminal defendant’s right to remain silent is guaranteed under the Fifth Amendment to the United States Constitution and is made applicable to the States by the Fourteenth Amendment.” *State v. Richardson*, 226 N.C. App. 292, 299, 741 S.E.2d 434, 440 (2013) (citation omitted). In *Richardson*, we outlined several factors, “none of which should be deemed determinative,” that “must be considered in ascertaining whether a prosecutorial comment concerning a defendant’s post-arrest silence constitutes plain error,” including:

(1) whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; (2) whether the record contained substantial evidence of the defendant’s guilt; (3) whether the defendant’s credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony by, for example, engaging in extensive cross-examination concerning the defendant’s post-arrest silence or attacking the defendant’s credibility in closing argument based on his decision to refrain from making a statement to investigating officers.

226 N.C. App. at 302, 741 S.E.2d at 442.

In the present case, Shaw complains that the trial court undermined his credibility with the jury when it allowed HPD Investigator Brian Ollis—who testified that he responded first to the church Johnson fled to and then to Frye Hospital to take her statement—to offer the following testimony:

[Prosecutor]: Other than your interview with the victim in this matter, did you do anything else in regard[] to this

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investigation besides gathering the reports of the patrol officers and the officer on the scene?

[Investigator Ollis]: Yeah, I went to see if I could interview the suspect, or the defendant. He wouldn't talk to me.

Later, on cross-examination, the prosecutor pressed Shaw on his claim that he had attempted to help Johnson once he realized her hand was severely injured and bleeding profusely. Specifically, the prosecutor inquired why Shaw had not called 911; contacted the neighbors; mentioned her injuries and need of immediate medical attention to the HPD officers who responded to the apartment; or made any statement to Ollis. On this last point, Shaw stated that he “[didn’t] remember [Ollis] saying anything to me.”

Shaw concedes that, because he did not object to this testimony at trial, the standard of review is plain error. However, we do not find these fleeting and isolated lines of testimony to be improper comments on Shaw’s exercise of his right to remain silent. Our application of the factors enumerated in *Richardson* supports this conclusion. Reading Ollis’s testimony in its proper context, it is clear that the challenged statement was neither a specific reference to Shaw’s invocation of his right to remain silent, nor was it specifically elicited by the prosecutor, who did not dwell on or attempt to emphasize or capitalize on any implication that Shaw had invoked his rights under the Fifth Amendment. Likewise, the prosecutor’s question on cross-examination about whether Shaw made a statement to Ollis was similarly *de*

*minimis*, especially when considered against the context of the preceding line of questions that permissibly impeached the credibility of Shaw's claims and which Shaw does not challenge on appeal. Therefore, because we do not find these purported errors to be so fundamentally prejudicial as to have "had a probable impact on the jury's finding the defendant guilty," see *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334, we hold that the trial court did not commit plain error in allowing this testimony.

*D. Double jeopardy*

Finally, Shaw argues that because both of his convictions arose from the same transaction or occurrence, the trial court violated the constitutional prohibition against double jeopardy by failing to set one of them aside. We disagree.

"Double jeopardy is prohibited both by the Fifth Amendment to the United States Constitution and by our State's common law." *State v. McCoy*, 174 N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005) (citation omitted), *disc. review denied*, \_\_\_ N.C. \_\_\_, 628 S.E.2d 8 (2006). "The double jeopardy clause prohibits (1) a second prosecution for the same offenses after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense." *Id.* (citations omitted). Consequently, it is well established that

[i]n order for a criminal defendant to be charged and convicted of two separate counts of assault stemming from one transaction, the evidence must establish a distinct interruption in the original assault followed by a second assault, so that the subsequent assault may be deemed separate and distinct from the first.



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*State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (citation, internal quotation marks, and certain brackets omitted), *disc. review denied*, 357 N.C. 510, 588 S.E.2d 377 (2003).

In the present case, although both of Shaw's convictions stemmed from his 11 October 2012 altercation with Johnson, in our view, the evidence introduced at trial was more than sufficient to establish that two distinct and separate assaults occurred. Specifically, Johnson testified that after she exited the shower, Shaw slapped and punched her in the head and face while they argued in the bedroom and hallway of the apartment. This evidence is sufficient to satisfy the essential elements of assault on a female. *See, e.g., State v. Craig*, 35 N.C. App. 547, 549, 241 S.E.2d 704, 705 (1978) ("The essential elements of the assault upon a female crime are (1) assault and (2) upon a female person by a male person."). Johnson testified further that the altercation then moved to the kitchen, where Shaw picked up the 8-inch carving knife and held it to her throat, ultimately cutting her hand severely and satisfying the essential elements of assault with a deadly weapon inflicting serious injury. *See, e.g., State v. Daniels*, 59 N.C. App. 63, 65, 295 S.E.2d 508, 509-10 (1982) ("The essential elements of assault with a deadly weapon inflicting serious injury are: an assault, the use of a deadly weapon, and the infliction of serious injury, not resulting in death."). Because our review of the record indicates that Johnson was wounded in different ways, by different means, and in different areas of the apartment, we conclude that

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the evidence here “establish[es] a distinct interruption in the original assault followed by a second assault, so that the subsequent assault may be deemed separate and distinct from the first.” *Littlejohn*, 158 N.C. App. at 635, 582 S.E.2d at 307 (citation, internal quotation marks, and certain brackets omitted). Accordingly, we hold that the trial court did not violate the prohibition against double jeopardy when it declined to set aside one of Shaw’s convictions.

NO ERROR.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).