IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-284

Filed: 6 December 2016

Mecklenburg County, Nos. 14 CRS 233477-78

STATE OF NORTH CAROLINA

v.

JAMEL CORNELIUS WHATLEY

Appeal by Defendant from judgments entered 22 September 2015 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for Defendant.

STEPHENS, Judge.

This appeal from Defendant's convictions for assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon requires this Court to apply plain error review regarding the trial court's failure to instruct on several lesser included offenses. Because we conclude that the trial court plainly erred in failing to instruct on assault inflicting serious injury, Defendant is entitled to a new trial on the assault charge.

However, we find no error in the court's failure to submit the lesser included offense of assault with a deadly weapon and no prejudicial error in the failure to submit the lesser included offense of conspiracy to commit common law robbery.

Factual and Procedural History

The evidence at trial tended to show the following: In the early morning hours of 21 August 2014, as Fidel Cruz Vasquez walked along Central Avenue in Charlotte, a man came up behind him, grabbed him by the neck, struck him in the nose, and knocked him to the ground. Vazquez, unsure of what was happening, covered his face during part of the attack, but was later able to identify Defendant Jamel Cornelius Whatley as the man who attacked him. Whatley hit or stabbed Vasquez several times with what felt like a screwdriver, although Vasquez was not able to see the item Whatley was holding. As Vasquez lay on the ground, a female attacker kicked him and took a white iPhone from Vasquez's pocket before she and Whatley ran from the scene.

Vasquez was bleeding profusely from his face and upper body and used his shirt to staunch the flow. He was able to walk to a friend's home nearby, and the friend contacted 911. Vasquez was interviewed by officers with the Charlotte-Mecklenburg Police Department ("CMPD") and then transported to a hospital. As a result of the attack, Vasquez received a total of 19 stitches to close three separate wounds. Vasquez also suffered lesser cuts that did not require stitches, as well as a

chipped tooth. At the time of trial, Vasquez still suffered from the chipped tooth and testified that other teeth were more sensitive to heat.

Officer January Kirkpatrick, a crime scene investigator with the CMPD, canvassed the area soon after the assault and discovered what appeared to be a trail of blood on the sidewalk, as well as a broken piece of brick with what looked like blood on it. Kirkpatrick photographed the brick, the blood trail, and other aspects of the crime scene, but did not collect the piece of brick as evidence or for forensic tests. The photographs were introduced at trial, and Vasquez identified the location depicted as the place where he was attacked. Vasquez also stated that the blood shown on the sidewalk and grass was his, but was not asked whether the alleged blood on the piece of brick was his or whether the piece of brick was the weapon used to strike him.

Whatley was identified as a suspect in the assault on Vasquez as a result of a search of the electronic monitoring probation/parole database performed by Emily Spindler, a detective working in the CMPD's Realtime Crime Center. The database gathers and stores location information transmitted by electronic devices issued by the North Carolina Department of Public Safety ("DPS") to offenders on parole or probation. Spindler testified that Whatley was the only monitored individual near the crime scene at the time of the assault on Vasquez.[1]

[1] James Wilson, a probation and parole officer with the DPS, confirmed that Whatley was wearing an electronic monitoring device on 21-22 August 2014 and also testified that the location tracking of the device is accurate within about fifty feet.

At the time of his arrest, Whatley was in the company of a woman identified as Bryanna Wells. Whatley had a white iPhone in his possession which was later identified as belonging to Vasquez. Once in custody, Whatley confessed to the assault and robbery, claiming that it had been Wells' idea. However, Whatley was not asked about using a screwdriver, piece of brick, or any other weapon during the attack.

Whatley was indicted on one count each of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. The case came on for trial at the 14 September 2015 criminal session of Mecklenburg County Superior Court, the Honorable Hugh B. Lewis, Judge presiding. At the charge conference, Whatley did not request instructions on assault with a deadly weapon, assault inflicting serious injury, or conspiracy to commit common law robbery. Accordingly, the trial court instructed on (1) the principal offense of assault with a deadly weapon[2] inflicting serious injury, but no lesser included offenses; (2) the principal offense of robbery with a dangerous weapon and the lesser included offense of common law robbery; and (3) the principal offense of conspiracy to commit robbery with a dangerous weapon, but no lesser included offenses. On 22 September 2015, the jury returned guilty verdicts on all charges. The trial court found that Whatley was a Prior Record Level III offender and consolidated the robbery convictions for judgment, imposing a sentence of 75-102

[2] In the jury instructions, a brick was identified as the weapon used in the assault.

months in prison. The court imposed a consecutive sentence of 33-48 months of imprisonment for Whatley's assault conviction. Whatley gave notice of appeal in open court.

Discussion

On appeal, Whatley argues that the trial committed plain error by failing to instruct the jury on (1) the lesser included offense of assault inflicting serious injury, (2) the lesser included offense of assault with a deadly weapon, and (3) the lesser included offense of conspiracy to commit common law robbery. We agree that Whatley is entitled to a new trial due to the trial court's failure to submit assault inflicting serious injury to the jury, but we reject Whatley's other arguments as lacking in merit.

Standard of Review

> In 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). To establish plain error, a defendant must convince the reviewing 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) (citation omitted). Plain error review is available where

a defendant alleges error in the trial judge's instructions to the jury. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

"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) (citations omitted), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). Thus, "[i]t 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) (citation omitted). "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. Lowe*, 150 N.C. App. 682, 686, 564 S.E.2d 313, 316 (2002) (citation and internal quotation marks omitted). However, "[a]n 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." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citation omitted).

"When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to the defendant." *State v. Clark*, 201 N.C. App. 319, 323, 689 S.E.2d 553, 557 (2009) (citation and internal quotation marks omitted). "When there is some evidence

supporting a lesser included offense, the trial court must instruct the jury regarding the lesser offense. Failure to do so constitutes reversible error which is not cured by a verdict of guilty of the greater offense." *State v. Bell*, 87 N.C. App. 626, 635, 362 S.E.2d 288, 293 (1987) (citation omitted).

I. Instruction on assault inflicting serious injury

Whatley argues the trial court plainly erred by failing to instruct the jury on the lesser included offense of assault inflicting serious injury. We agree.

"[A]ssault inflicting serious injury [is a] lesser included offense[] of assault with a deadly weapon inflicting serious injury." *Id.*

> The North Carolina Supreme Court has defined a deadly weapon as any instrument which is likely to produce death or great bodily harm under the circumstances of its use. Sometimes, the deadly character of a weapon depends more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. When the deadly character of an instrumentality is dependent upon the particular circumstances of a case, the question is one of fact to be determined by a jury.

State v. Smith, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citations and internal quotation marks omitted). Thus,

> [i]f there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must, of course, resolve the conflict.

Lowe, 150 N.C. App. at 686, 564 S.E.2d at 316 (citation and internal quotation marks omitted).

In *Lowe*, "the testimony and evidence established that [the] victim . . . was beaten with fists and 'stomped,' presumably with feet. There was also some conflicting testimony that the victim was beaten with the lid of the commode." *Id.* at 685, 564 S.E.2d at 316. This Court held that the trial court committed plain error in failing to instruct on the lesser included offense of assault inflicting serious injury because the "evidence did not establish, at least conclusively, that a deadly weapon was used." *Id.*

Similarly, in *Bell*, all witnesses "agreed that [the] defendant struck the victim with his hands. . . .[, but there was] conflicting evidence regarding whether, thereafter, [the] defendant used a firearm to further assault the victim." 87 N.C. App. at 635, 362 S.E.2d at 293. This Court found plain error in the jury instructions because "the jury could have disbelieved that a weapon was involved at all, or could have believed that any shot fired was not the result of [the] defendant's use of a weapon." *Id.*

Here, as noted *supra*, the court instructed the jury that it must determine whether a brick, as allegedly used by Whatley in the assault, constituted a deadly weapon given "the nature of the brick, the manner in which it was used, and the size and strength of the defendant as compared to the victim[.]" Our review of the trial

transcript reveals that the evidence was conflicting regarding whether a brick was the weapon used in the assault at all. Taken as a whole, the evidence was that Vasquez believed Whatley struck him with something other than his hands—possibly a screwdriver—but never saw a screwdriver, brick, or any other item in Whatley's hands during the assault. CMPD patrol officer Joshua C. Skipper, who initially responded to the 911 call, testified that Vasquez reported that the male attacker "hit him with *something* in the face multiple times." (Emphasis added). On direct examination, Vasquez testified, through an interpreter, that he "had . . . a wound right here on this side, and it seemed like it was caused by . . . a screwdriver" and later identified one of wounds depicted in the photographs introduced at trial as "a hole . . . they caused with the screwdriver."

On cross-examination, Vasquez explained that CMPD officers told him at the hospital that a *rock* had been the weapon used in the assault before reiterating that he did not actually know what weapon had been used:

> A. . . . . When [Whatley] attacked me I didn't know why I started bleeding so quickly. And while I was at the hospital, the officer explained to me that he had attacked me using a rock.
>
> Q. Okay. Thank you. You said that the officer explained to you that someone had used a rock to attack you?
>
> A. Yes, because they found it at the place of the incident and it was covered with my blood.

Q. And you didn't tell the police that you had been hit by a rock, did you.

A. No, because since he grabbed me from the back and then hit me on my face, I thought he was just pissed. And I had never suffered an injury, like, prior to that, that type of injury, and so I didn't know he had used a rock.

Q. Okay. You didn't know that at the time this happened, did you. Yes or no will suffice.

A. What do you mean that didn't know what happened?

Q. When you said Mr. Whatley hit you, you didn't know what he hit you with, did you.

A. Exactly.

Q. You didn't know?

A. I didn't know.

. . . .

Q. And prior to today you never told anyone you were stabbed with a screwdriver, did you.

A. When I was at the hospital the officer asked me about the injury. He said what happened here, and I said I don't know what they stabbed me with.

Q. Because you didn't see any screwdriver, did you.

A. Since I was bleeding I didn't see what they used to attack me with.

Q. Is that a yes or no?

A. I didn't see.

> Q. Didn't see the knife?
>
> A. No.
>
> Q. Didn't see any gun?
>
> A. No. But I had the wound.

Thus, Vasquez never testified that he adopted the rock—or brick—theory offered by CMPD officers or that he personally believed a rock or brick rather than a screwdriver was the weapon used to wound him. Rather, Vasquez's evidence was that he was stabbed with a screwdriver or some unknown object.

The only other evidence regarding the alleged deadly weapon used in the assault came from Kirkpatrick, who testified as follows:

> Q. Was there any evidence on the scene still out there?
>
> A. Yes. There was a broken piece of a brick there, standard size piece of brick atop the sidewalk.
>
> Q. Did you make any observations about the brick?
>
> A. Yes. There was suspected blood on the brick. I photographed it for documentation.

The photographs of the piece of brick were published to the jury. Critically, CMPD Officer Evonne Galloway, who interrogated Whatley after his arrest, testified that, although Whatley admitted to assaulting Vasquez and taking his iPhone, he was never asked about his use of a brick or any other weapon:

> Q. Okay. Did you ever, through this whole time, ask Mr. Whatley where he got a brick from?

A. No.

Q. Did you ask him if he had a brick in his hand?

A. I don't think so.

Thus, there was a conflict in the evidence regarding the identity of the weapon used, and precedent is clear that such conflicts are for the jury to resolve. *See Lowe*, 150 N.C. App. at 686, 564 S.E.2d at 316. Accordingly, Whatley is entitled to a new trial on the assault charge. *See id.*

II. Instruction on assault with a deadly weapon

Having ordered a new trial, we briefly address Whatley's argument that the trial court also plainly erred by failing to instruct the jury on the lesser included offense of assault with a deadly weapon because this issue could arise on retrial.

The elements of assault with a deadly weapon inflicting serious injury "are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990). "[T]he lesser included offense of assault with a deadly weapon . . . does not require that the victim suffer serious injury." *State v. McCoy*, 174 N.C. App. 105, 113, 620 S.E.2d 863, 870 (2005), *disc. review denied*, __ N.C. __, 628 S.E.2d 8 (2006). "Whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. Pertinent factors for jury consideration include hospitalization, pain, blood loss, and time lost at work." *Id.* at 113-14, 620

S.E.2d at 870 (citations and internal quotation marks omitted). However, "evidence of hospitalization is not required." *State v. Musselwhite*, 59 N.C. App. 477, 480, 297 S.E.2d 181, 184 (1982). "[W]here there is positive and uncontradicted evidence as to the element of a serious injury, an instruction on the lesser offense of assault with a deadly weapon is not required." *State v. Hensley*, 90 N.C. App. 245, 249, 368 S.E.2d 208, 210-11 (1988) (citation omitted).

We find the injuries suffered by Vasquez easily distinguishable from those suffered by the victims in the cases relied upon by Whatley. In *McKoy*, for example, the victim "did not seek medical treatment (allegedly because [the] defendant would not allow her to do so), and the record [did] not contain *any evidence* of pain, blood loss or time lost from work as a result of her injuries." 174 N.C. App. at 114, 620 S.E.2d at 870 (emphasis added). In *State v. Bagley*, this Court determined that the trial court erred in giving a peremptory instruction that the victim's gunshot wound was a serious injury because reasonable minds could differ on that issue. We noted:

> The record also contains the following evidence which suggests that the injury was not serious: After sustaining the bullet wound, [the victim] refused help from a passerby at the scene, carried a book bag containing currency and marijuana fifty feet to his car, drove home, and stored the book bag in a cabinet. [The victim] then waited almost a half hour, without seeking treatment, before asking a friend for a ride to the hospital. After starting for the hospital, [the victim] changed his mind and returned to the crime scene instead, where he gave a statement to police before asking a paramedic at the scene for treatment of the bullet wound. When [the victim] finally arrived at the

> hospital, the staff took [X rays] of the wound, "squirted water on it," gave him pain pills, and released him after about two hours. [The victim] has no on-going difficulties from the wound.

183 N.C. App. 514, 527, 644 S.E.2d 615, 624 (2007).

Here, in contrast, the uncontradicted evidence showed that Vasquez suffered a chipped tooth and continuing sensitivity of other teeth, as well as multiple cuts to his head and upper body that bled profusely, three of which required a total of 19 stitches to close. These injuries are greater than those suffered by the stabbing victim in *Musselwhite*—"heavy bleeding and [a single] cut requiring 8 or 9 stitches"—where this Court rejected the defendant's argument that the trial court should have instructed the jury on the lesser included offense of assault with a deadly weapon because the evidence of a serious injury was positive and uncontradicted. 59 N.C. App. at 481, 297 S.E.2d at 184. We conclude that the trial court here did not err in failing to instruct the jury on assault with a deadly weapon. Accordingly, this argument is overruled.

III. Instruction on conspiracy to commit common law robbery

Whatley further argues that the trial court committed plain error in failing to instruct the jury on the lesser included offense of conspiracy to commit common law robbery. We disagree.

As noted *supra*, the trial court instructed the jury on both robbery with a dangerous weapon and common law robbery. However, in regard to Whatley's alleged

conspiracy with Wells, the court instructed on conspiracy to commit robbery with a dangerous weapon, but not conspiracy to commit common law robbery.

The elements of robbery with a dangerous weapon are "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citation and internal quotation marks omitted). "The statutory crime of robbery with a dangerous weapon requires that the dangerous weapon be one which endangers or threatens life." *State v. Summey*, 109 N.C. App. 518, 528, 428 S.E.2d 245, 250 (1993) (citation and internal quotation marks omitted). "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975) (citation omitted). However, it is

> not necessary for all of the parties to the conspiracy to agree expressly to the use of a dangerous weapon prior to the robbery in order for a charge of conspiracy to commit robbery with a dangerous weapon to be submitted to the jury. Rather, there need only be evidence that [the] defendant and the other parties had a mutual, implied understanding to commit robbery with a dangerous weapon.

State v. Carter, 177 N.C. App. 539, 541, 629 S.E.2d 332, 335 (citation and internal quotation marks omitted), *aff'd per curiam*, 361 N.C. 108, 637 S.E.2d 537 (2006).

Where the evidence presented could permit a jury to find that the weapon used during a robbery was not dangerous, "the nature of the weapon is an issue that should be left for the jury to determine." *Id.* at 542, 629 S.E.2d at 335 (citations omitted).

Whatley relies on *Carter* to support his assertion of plain error. We find that case distinguishable. In *Carter*, "[t]he trial court's charge to the jury included instructions on conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, and common law robbery[,]" and the defendant "was found guilty of conspiracy to commit robbery with a dangerous weapon, and not guilty of both robbery with a dangerous weapon and common law robbery." *Id.* at 543, 540, 543, 629 S.E.2d at 336, 334. As here, the evidence regarding the nature of the weapon used in the robbery was conflicting and, thus, "the trial court properly instructed the jury on the offenses of robbery with a dangerous weapon and common law robbery . . . . The same conflicting evidence directly pertained to [the] charge of conspiracy to commit robbery with a dangerous weapon . . . ." *Id.* at 543, 629 S.E.2d at 336. For that reason, this Court found plain error by the trial court "in failing to instruct the jury on the offense of conspiracy to commit common law robbery, and in doing so[,] . . . improperly limit[ing] the jury's consideration of the offenses [of] which [the] defendant could be found guilty . . . ." *Id.* at 543-44, 629 S.E.2d at 336.

The critical difference in Whatley's case is that the jury found him *guilty* of robbery with a dangerous weapon, a verdict which indicates that the jury determined

that the robbery of Vasquez involved the use of a dangerous weapon.[3] *See Small*, 328 N.C. at 181, 400 S.E.2d at 416. In light of that verdict, Whatley cannot show a reasonable probability that, had the jury been instructed on the lesser included offense, it would have acquitted him of conspiracy to commit robbery with a dangerous weapon. Accordingly, Whatley cannot establish plain error.

NEW TRIAL IN PART; NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judge CALABRIA concurs.

Judge BRYANT concurs in result only.

Report per Rule 30(e).

[3] The trial court's robbery instruction, unlike its assault instruction, did not specify a brick—or any other object—as the allegedly dangerous weapon.