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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1253

Filed: 21 August 2018

Guilford County, Nos. 16 CRS 81360, 16 CRS 81358

STATE OF NORTH CAROLINA

v.

TATIANA MORENA ARACENA and SANDRA SMITH, Defendants.

Appeal by defendants from judgments entered 24 April 2017 by Judge Angela B. Puckett in Guilford County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Francisco Benzoni and Assistant Attorney General Asher P. Spiller, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant-appellant Aracena.

Dylan J.C. Buffum for defendant-appellant Smith.

ZACHARY, Judge.

Defendants Tatiana Morena Aracena and Sandra Smith appeal from judgments entered upon jury verdicts finding them guilty of common-law robbery and assault with a deadly weapon inflicting serious injury. On appeal, defendants argue

that the trial court committed plain error by failing to instruct the jury on the definition of serious bodily injury. Defendants also argue that the restitution order was not supported by competent evidence. After careful review, we conclude that defendants received a fair trial, and affirm the trial court's order of restitution.

Background

In September 2016, the Guilford County Grand Jury indicted defendants for robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. Defendants and the charges were joined for trial. This matter was heard at the 17 April 2017 criminal session of Guilford County Superior Court, the Honorable Angela B. Puckett presiding. At trial, the State presented evidence tending to establish the following facts:

Defendant Smith and the complaining witness in this case, Helen Burkes, were roommates from March 2016 to July 2016. On 19 July 2016, Burkes was moving out because of "a little bit of tension in the house." When she arrived at the home to pack her things, Tatiana Aracena was present and refused to let her inside. Burkes left at that time and then returned a short while later with some members of her family. At this point, a physical altercation occurred between Burkes and defendant Aracena. The police were called to intervene, but no one was arrested.

During the following days, heated exchanges occurred between Burkes and Aracena on social media. Burkes testified that, after the first altercation, she "started

getting notifications and messages on Facebook from where [Aracena] was inboxing me, reporting photos on my page.” Burkes admitted that she “posted on Facebook five laughing emojis with the tears coming out and then typed, ‘beat the shit out of that bitch, bet she won’t try me again,’ and three exclamation points.” Burkes also posted a Facebook status in which she wrote “big ups tried to report my profile, bitch you real funny, but how your head feel, [Aracena]” with “five crying laughing emojis.”

One week following the first altercation, on 26 July 2016, Burkes and her co-worker, Jequan Brown, left work at a convenience store at approximately 11:00 p.m. According to Burkes’s testimony, when she approached her car, defendants “came from behind [the dumpster] and they started attacking [her],” eventually tasing her as well. As Burkes tried to fight back, Smith “yelled to [Aracena] to ‘grab her pocketbook.’ ” After “they both took [her] pocketbook,” Burkes chased Aracena and Smith as they ran across the parking lot to the car wash. Aracena and Smith got into their cars, and Smith attempted to hit Burkes with her car.

Burkes testified that Smith exited her car and the brawl continued, and that the “next thing I knew, I was hit across my forehead” with some sort of hard, blunt object, “[m]aybe a foot” or “about six inches long.” Jequan Brown testified that he saw two people “hitting [Burkes] with something.” Although he could not identify the object that was used to strike her, Brown testified that it “[l]ooked like she was being hit with two different things,” one object that “[kept] lighting up,” and one that looked

like “a long pole.” Likewise, the responding police officer testified that Burkes described the weapon as “a hard baton kind of object,” and that Burkes “was bleeding pretty significantly from the forehead.”

The jury found both defendants guilty of common-law robbery and assault with a deadly weapon inflicting serious injury. Defendants timely appealed.

Discussion

I. Jury Instruction

Before the close of evidence, the trial court presented both parties with its proposed instructions to the jury. After hearing the parties’ objections and requests for additions to the instructions, the judge announced that she would use North Carolina Pattern Jury Instruction § 208.15 to explain assault with a deadly weapon inflicting serious injury. Defense counsel withdrew any objections and requests for additional instructions, and the trial court instructed the jury. Later, during jury deliberations, the judge was handed a jury note asking, “Can we get a legal definition of a deadly weapon and serious injury?” The judge proposed that she simply re-read the same instructions she had already given. When the defense attorneys were directly asked whether they wanted to be heard on the matter, neither objected. The jury returned guilty verdicts on the charge of assault with a deadly weapon inflicting serious injury and the charge of common-law robbery.

On appeal, defendants assert that the trial court committed plain error when it “did not correctly instruct [the jury] on the definition of a ‘deadly weapon,’ ” in addition to giving the pattern jury instruction for assault with a deadly weapon inflicting serious injury. This argument is without merit.

It is well settled that “[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 to consider its verdict . . . provided that opportunity was given to the party to make the objection.” N.C. R. App. P. 10(a)(2) (2018); *see State v. Banks*, 213 N.C. App. 599, 601, 713 S.E.2d 754, 756 (2011) (citations and quotation marks omitted) (“[G]enerally a defendant’s failure to object to an alleged error of the trial court precludes the defendant from raising the error on appeal.”). Because there was no objection to the jury instruction Judge Puckett gave to the jury, defendants failed to preserve this assignment of error on appeal, but argue that it was plain error.

Our Supreme Court has explained that:

For error to constitute plain error, a defendant must demonstrate 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

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State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

“A prerequisite to our engaging in a ‘plain error’ analysis is the determination that the instruction complained of constitutes ‘error’ at all.” *State v. Johnson*, 320 N.C. 746, 750, 360 S.E.2d 676, 679 (1987) (citation and quotation marks omitted). As a general matter, this Court recognizes that “ ‘the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions.’ ” *State v. Ballard*, 193 N.C. App. 551, 555, 668 S.E.2d 78, 81 (2008) (quoting *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994)). Moreover, we note with approval that “jury instructions in accord” with the North Carolina Pattern Jury Instructions “provide . . . an understandable explanation of the law.” *Id.* (quoting *Carrington v. Emory*, 179 N.C. App. 827, 829, 635 S.E.2d 532, 534 (2006)).

Here, the trial court used the North Carolina Pattern Jury Instruction for assault with a deadly weapon inflicting serious injury. Under North Carolina law, “[s]erious bodily injury”

is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4 (2017). The Pattern Jury Instruction provides:

For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant assaulted the victim by intentionally (and without justification or excuse) (describe assault).

Second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. [(Name object) is a deadly weapon.] [In determining whether (name object) was a deadly weapon, you should consider the nature of (name object), the manner in which it was used, and the size and strength of the defendant as compared to the victim.]

And third, that the defendant inflicted serious injury upon the victim.

N.C.P.I.—Crim. 208.15 (2008). The trial court gave this instruction to the jury almost verbatim, and this was an “accurate instruction[] of the relevant law. . . .” *Ballard*, 193 N.C. App. at 555, 668 S.E.2d at 81. There was no error, and defendants’ arguments are overruled.

II. Restitution Order

On appeal, defendants argue that the trial court erred by ordering them to pay \$2,338.13 in restitution because that amount was not supported by competent evidence.

Upon a criminal conviction, “the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question.” N.C. Gen. Stat. § 15A-1340.34(a) (2017). However, “[a] trial court’s award of restitution

must be supported by competent evidence in the record.” *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 399 (1997); accord *State v. Hinton-Davis*, ___ N.C. App. ___, 788 S.E.2d 683 (2016) (citing *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)). This Court recently stated:

Whether the amount of restitution recommended by the trial court is supported by competent evidence adduced at trial or sentencing is reviewed by an appellate court de novo. However, the award does not have to be supported by specific findings of fact or conclusions of law, and the quantum of evidence needed to support the award is not high. Rather, when there is some evidence that the amount awarded is appropriate, it will not be overruled on appeal.

State v. Hillard, ___, N.C. App. ___, ___, 811 S.E.2d 702, 704 (2018) (citations omitted).

Defendants argue that, although the documents provided to the trial court during the sentencing hearing support the specific amount of restitution, there was no competent evidence to support the award of restitution because “the documents were never authenticated or admitted as evidence.” This argument is without merit.

In *Hillard*, this Court upheld an order for restitution, determining that unsworn written and oral victim impact statements, an expense worksheet, and supporting documentation such as “surgery bills, veterinary bills, letters, and receipts for supplies and other necessities purchased . . . constitute[d] sufficient competent evidence to support the restitution award.” *Id.* at ___, 811 S.E.2d at 703, 704-05. Further, this Court noted that “it is well-settled that the requirement that a

witness be sworn does not apply during such hearings.” *Id.* at ___, 811 S.E.2d at 704 (citing *State v. Hendricks*, 138 N.C. App. 668, 671, 531 S.E.2d 896, 899 (2000)); *see also* N.C. Gen. Stat. § 15A-1334(b) (2017) (“Formal rules of evidence do not apply at the [sentencing] hearing.”).

In the present case, the State tendered to the trial court a victim impact statement with supporting documentation—Burkes’s medical bills—attached. Additionally, Burkes testified at trial that she was taken to Moses Cone Hospital in an ambulance after the assault, received seven stitches, and was given topical pain medication. Accordingly, we conclude that there was sufficient competent evidence to support the restitution award.

Conclusion

For the foregoing reasons, we find no error in the trial court’s jury instructions, and find that the restitution order was properly supported by competent evidence.

NO ERROR.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).