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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-823

Filed: 1 December 2020

Lincoln County, No. 17CRS053755

STATE OF NORTH CAROLINA

v.

OSMIN ARNUL CABALLERO LOPEZ, Defendant.

Appeal by Defendant from judgment entered 29 January 2019 by Judge Carla Archie in Lincoln County Superior Court. Heard in the Court of Appeals 23 September 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly S. Murrell, for the State.*

*Guy J. Loranger for the Defendant.*

DILLON, Judge.

Osmin Arnulfo Caballero Lopez (“Defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of assault on a law enforcement officer inflicting physical injury. We conclude that Defendant received a fair trial, free from reversible error.

I. Background

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The evidence at trial tended to show as follows: On 14 October 2017, a Lincoln County deputy was dispatched to resolve a “verbal disturbance” caused by Defendant and his uncle at a restaurant. The deputy asked both men for identification, but Defendant, who appeared to be drunk, refused. Subsequently, the deputy arrested Defendant for resisting, delaying or obstructing a public officer.

The deputy transported Defendant to the Lincoln County Magistrate’s Office. Once there, Defendant was shackled to a bench in the hallway while the deputy went to swear out charges before the magistrate. Defendant repeatedly screamed and complained that the handcuffs were too tight. On one occasion while the deputy was checking Defendant’s handcuffs, Defendant turned toward the deputy and gave him an “intentional forceful headbutt” to his chest.

The deputy proceeded to escort Defendant to jail. At this time, Defendant was unshackled. While the deputy was taking Defendant up a flight of stairs, Defendant turned toward him and headbutted him again. Based on Defendant’s assaultive behavior towards him, the deputy took out a felony charge of assault on a law enforcement officer inflicting physical injury. Due to the location of the incident, the hallway camera did not capture anything that occurred in the stairwell. When the deputy was taking out the new felony charge, the magistrate noticed that the deputy had a fresh, puffy cut above his eye.

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The jury found Defendant guilty of assault on a law enforcement officer inflicting physical injury. Defendant timely appealed to our Court.

II. Analysis

Defendant argues that the trial court committed plain error by allowing the deputy's lay opinion testimony that Defendant "intentionally" headbutted him, contending that this testimony amounted to a legal conclusion as "intent" is an element of the assault charge.

As Defendant failed to object to the admission of lay opinion testimony at trial, we review for plain error. N.C. R. App. P. 10(a)(4). To show plain error, Defendant must convince this Court that: (1) there was error, and (2) absent the error, the jury either probably would have reached a different result; or, that the error was so fundamental, basic, and prejudicial, and lacking in its elements that it caused a miscarriage of justice. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983). Specifically, here Defendant must show that the lay opinion testimony was inadmissible, that the trial court erred by not intervening on its own to strike the testimony, and that but for the trial court's failure to intervene, the outcome probably would have been more favorable to Defendant.

We conclude that the trial court did not commit error. Even if the trial court did commit error, we conclude that the error did not rise to the level of plain error.

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The trial court did not commit error. We conclude that the trial court did not commit error based on two alternative grounds. First, the lay opinion testimony was admissible. Lay witness testimony in the form of opinions or inferences is limited to testimony that is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701 (2017). Our courts have long held that this rule allows witnesses to state the “instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.” *State v. Brown*, 350 N.C. 193, 203, 513 S.E.2d 57, 64 (1999) (quotation marks omitted). These statements are often referred to as “shorthand statements of facts.” *Id.* at 203, 513 S.E.2d at 64. “Such shorthand statements are admissible even though the witness must also state a conclusion or opinion in rendering them.” *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). Rule 701 applies “even if the instantaneous conclusion is also an element of the charged offense.” *State v. Graham*, 186 N.C. App. 182, 195-196, 650 S.E.2d 639, 649 (2007).

Because Defendant was charged with assault, he argues that the key issue is whether he intentionally or accidentally struck the deputy. Defendant argues that the deputy was stating his opinion during trial, rather than providing a shorthand statement of facts. Defendant further argues that the deputy was speaking to his

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perception not only of the incident but of the intentionality of the act to the jury, who had no other witness or evidence to rely on but the deputy's testimony.

Defendant was right to point out that due to a lack of video footage and other witnesses, the deputy's testimony played a crucial role in determining whether he was guilty during trial. However, we determine after a closer look at the questioning that there was nothing improper in the deputy's testimony. The deputy testified regarding Defendant's conduct while walking up the stairs:

Q: Okay.

A. And that one was more forceful, at least to me, than the headbutt in the chest.

Q. Okay.

A. Again, that was not like he was falling backwards and, "Oh, I caught you." It was an intentional pull your head back and ram it into my head.

Q. And did you say he turned around -- he had to turn around to do that?

A. Yes. Yes. It wasn't he was falling backwards. He turned his body, faced me, rammed his head into right above my eyebrow.

Q. And, again, I mean, was that painful?

A. That hurt, like I said, a whole lot worse than the headbutt to the chest.

The deputy's testimony was both rationally based on his perception and helpful to a clear understanding of his testimony or the determination of a fact in issue. Due

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to the lack of video footage and other witnesses, the deputy's testimony is bound to be crucial to help the jury understand the incident. It is clear from the questioning that when the deputy spoke to the intentionality of the incident, he was answering the prosecutor's question as to the appearance of the act and the mental state of Defendant.

It is true that intentionality is an element of assault, but an instantaneous conclusion or an opinion is allowed even if it is also an element of the charged crime. Furthermore, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704. Here, the deputy's testimony provided clarity as to an element of the crime and was helpful for a clear understanding, especially because there was no alternative evidence to provide this function. Therefore, the trial court did not err in allowing the deputy's testimony as to the intentionality of the headbutt.

Presuming error, the error did not rise to the level of plain error. Even if the lay opinion testimony was not proper, we conclude that the trial court did not err by failing to intervene on its own to strike the testimony. The testimony was not so egregious as to rise to the level to require the trial court to step in.

We further conclude that Defendant has failed to show that such action amounted to fundamental error. In addition to the deputy's lay opinion testimony that Defendant acted intentionally, there was evidence that during the transport to

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the magistrate's office, Defendant made several threatening and extremely obscene comments to the deputy. While at the magistrate's office, Defendant was being uncooperative by constantly screaming and complaining. Defendant headbutted the deputy twice, once when the deputy was trying to adjust the handcuffs, and again when the deputy was escorting him up the stairs.

The incident of a second headbutt also dramatically reduced the likelihood that the action was an accident. Defendant has failed to show that the jury likely would have reached a different result absent the deputy's challenged lay opinion testimony.

III. Conclusion

We conclude that the trial court did not err in admitting the deputy's testimony.

NO ERROR.

Judges INMAN and YOUNG concur.

Report per Rule 30(e).