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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-997

Filed: 4 August 2020

Person County, No. 18 CRS 00086

STATE OF NORTH CAROLINA

v.

JERON GAVIN FRENCH

Appeal by Defendant from Judgment entered 8 February 2019 by Judge James E. Hardin Jr. in Person County Superior Court. Heard in the Court of Appeals 29 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Torrey Dixon, for the State.

Appellate Defender Glenn Gerding and Assistant Appellate Defender Kathryn L. VandenBerg for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jeron Gavin French (Defendant) appeals from Judgment entered on 8 February 2019 upon his convictions of Assault with a Deadly Weapon with Intent to

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Kill, Inflicting Serious Injury (AWDWWIKISI) and misdemeanor Breaking or Entering. The Record reflects the following:

On 8 January 2018, Defendant's brother, Jarvis French (Jarvis), posted on Facebook that his dog had died. Antonio Ford (Ford), a long-time friend of both Jarvis and Defendant, responded with a comment saying, "I'm sorry for your loss or whatever, now he's in heaven, playing with DMX." DMX was the name of a dog Ford previously owned. Ford served time for involuntary manslaughter in 2012 after DMX, his dog, had killed someone. Jarvis took offense to the comment, commenting back something along the lines of "don't make me smack you in the mouth[.]"

Later that day, Jarvis contacted Ford, saying he was outside of Ford's house. Ford exited his house to find Jarvis on the driveway where the two men argued. Eventually, Ford retreated back into his home, leaving Jarvis in the driveway. At this point in the day's events, Ford had no contact with Defendant.

That evening, Ford went down to his basement, accessed through an exterior door in his home. After putting some wood on the fire, Ford re-emerged from the basement to find Jarvis and another man he did not recognize walking into his home. The second man was later identified as Ramsey Ali (Ali). According to Ford, he said, "Jarvis, what the 'H' are you doing going into my house." Ford testified Ali then pointed at him and stated, "well, there he is right there." Ford walked between the

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two men and into his home, locking the door behind him and leaving Jarvis and Ali outside.

Upon entering his house, Ford walked through his kitchen and into the unlit dining room where he discovered Defendant leaning against the dining room wall. Defendant looked at Ford and said, “what’s up.” Defendant was holding a .380 caliber pistol, which Ford said he then “chucked back” to show Ford it was loaded. Ford looked at Defendant and asked, “well, what are you going to do, shoot me?” As Ford went to walk past Defendant, Defendant shot him in the back from close range. After being shot, Ford retreated to his bedroom and told his fiancée, Sonjua Cox (Cox), to call 911.

Ford did not see Defendant again. Cox left the bedroom and discovered Defendant was no longer in the house. Ali testified immediately after hearing a gunshot from inside the house, Defendant ran out, and Ali, Jarvis, and Defendant left together.

Law enforcement and medical personnel arrived on the scene. Sheriff’s Deputies found a small caliber shell casing in the dining room, as well as the projectile of the bullet. They also noticed a piece of wood, shaped like a bullet, chipped off one of the tables in the dining room. Ford had recognized the gun Defendant used as belonging to Jarvis, having seen it several times in the past. At trial, Trooper Eric L. Hunt would also testify that in 2017, in an apparently unrelated matter, Trooper

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Hunt had occasion to return a .380 caliber handgun to Jarvis under a court order for return of seized property.

Ford was immediately taken via ambulance to Duke Medical Center (Duke). The bullet had entered Ford's back and exited close to his navel, causing serious damage to Ford's liver, spleen, intestines, and kidneys. En route to the hospital, Ford's vitals began to decline, his blood pressure dropped, his pulse rate increased, and his physical appearance started to change. EMS administered TXA, a medication to help blood remain clotted that is administered in emergency situations.

Ford underwent two procedures during his first stay at Duke. His chest cavity was left open for several days to allow for swelling to go down, and he eventually received thirty-five staples from his breastplate to his groin. Ford stayed at Duke until the end of January 2018 and later was airlifted back to Duke after suffering an aneurysm in his groin related to the shooting. The shooting caused damage to Ford's nerves, necessitating physical therapy and leaving him with a lifelong limp. To fix the aneurysm, doctors implanted a balloon, which Ford will have for life. He can no longer do any heavy lifting, and he sees a psychiatrist for emotional trauma.

In the days following the shooting, police interviewed Ford, Cox, and Ali. These interviews, as well as their respective trial testimony, all provided slightly different narratives of specifically who was where and who said what, but all three attested Defendant entered Ford's home uninvited, shot Ford, and then left.

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At trial, Defendant's counsel showed the jury bodycam footage from one of the officers responding to the shooting and interacting with Ford and Cox. Afterwards, Defendant's counsel made a note on the record that Juror 11 appeared to be asleep "during the majority of the video." The trial court disagreed with that interpretation, responding that when it observed Juror 11 beginning to doze, the trial court addressed the situation at the time by asking all the jurors to stand up.

On the final day of the trial, it was brought to the trial court's attention Juror 8 was not the juror whose name was called to serve. Oscar Rodriguez was called to serve as Juror 8, but Oscar Rodriguez did not show up to court the day the jury was selected. Instead, Ricardo Rodriguez, thinking his name was called, sat down. Without anyone realizing the mistake, both the State and Defendant's counsel questioned Ricardo Rodriguez in voir dire and deemed him passable to serve on the jury. Upon discovery of the misidentification, Defendant requested a mistrial under the Fifth and Sixth Amendments of the United States Constitution, as well as under Article 1, Sections 19, 23, and 24 of the North Carolina Constitution, arguing he was deprived of his right to have a fair and impartial jury consisting of twelve jurors. Alternatively, Defendant moved to reopen jury selection. The trial court denied Defendant's motion to reopen jury selection and the request for a mistrial.

During jury deliberations, the jury sent a question to the trial court, asking, "Do we have to be unanimous on each of the charges? For example AWDWWIKISI,

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AWDWWIK, AWDWISI, AWDW, AISI[.] Do we have to be unanimous on guilty or not guilty of each of these or only the one charge we go with?” The trial court called the jury back in and answered its question, saying:

[Y]ou’re to consider the most serious charge first. You will reach a unanimous verdict, guilty or not guilty, as to that charge, before you move to the next lesser included offense. And you will continue going down from the most serious to the next lesser included offense. You will find guilty or not guilty beyond a reasonable doubt, and then move to the next charge below that.

At the time, Defendant did not raise any issue with the trial court’s answer. The jury returned verdicts finding Defendant guilty of misdemeanor Breaking or Entering and of AWDWWIKISI. The trial court entered a consolidated Judgment on the jury’s verdicts, sentencing Defendant to 73 to 100 months’ active imprisonment. Defendant gave Notice of Appeal in open court.

Issues

The dispositive issues on appeal are whether: (I) the trial court plainly erred by giving the jury an “acquittal first” instruction in response to its question on unanimity; (II) the trial court abused its discretion by allowing the allegedly sleeping juror to remain on the jury without further inquiry; and (III) the trial court abused its discretion by denying Defendant’s request for a mistrial or alternatively to reopen jury selection when it was discovered that Ricardo Rodriguez was not the juror who was called to serve.

Analysis

I. Acquittal-First Instruction

During trial, Defendant did not object to the trial court giving an instruction wherein the jury was instructed it must reach a unanimous decision on the most serious offense before moving down to the next lesser included offense. When a defendant in a criminal trial does not object in the trial court to the trial court's decision to give a particular jury instruction, on appeal, we review the trial court's decision for plain error. *See State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) ("Unpreserved error in criminal cases . . . is reviewed only for plain error." (citations omitted)).

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[.]

Id. at 518, 723 S.E.2d at 334 (alteration, citations, and quotation marks omitted).

Here, the trial court gave the jury an "acquittal first" instruction, where the jury is instructed it cannot consider a lesser included charge unless the jurors unanimously acquit Defendant of the more serious charge. *State v. Mays*, 158 N.C. App. 563, 565, 582 S.E.2d 360, 362 (2003). Such instructions are improper under North Carolina law. *Id.* at 574-75, 582 S.E.2d at 367-68 (citations omitted). In *Mays*,

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this Court suggested a jury should instead be instructed to “first consider the primary offense, but [the jury] is not required to determine unanimously that the defendant is not guilty of that offense before it may consider a lesser included offense[.]” *Id.* at 575, 582 S.E.2d at 368; *see also* N.C. Gen. Stat. § 15A-1237(e) (2019) (“If there are two or more offenses for which the jury could return a verdict, it may return a verdict with respect to any offense, including a lesser included offense on which the judge charged, as to which it agrees.”).

While the acquittal-first instruction was erroneous, Defendant did not object to the trial court’s instruction during trial, so the trial court’s conduct is reviewed for plain error only. The trial court’s erroneous instruction rises to the level of plain error only if it had a probable impact on the jury’s finding that Defendant was guilty of AWDWWIKISI. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (explaining plain error arises only when an error is proven to be prejudicial, meaning “the error had a probable impact on the jury’s finding that the defendant was guilty” (citations and quotation marks omitted)).

Defendant argues he was prejudiced because the jury may have convicted him of one of the lesser included offenses had the trial court not instructed the jury to reach unanimity on AWDWWIKISI first. There are two elements distinguishing AWDWWIKISI from the lesser included assault offenses: (1) the intent to kill and (2) the infliction of serious injury. N.C. Gen. Stat. § 14-32 (2019). Accordingly, if the

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State presented sufficient evidence of these two elements, Defendant cannot establish the trial court's acquittal-first instruction rose to the level of plain error. Defendant does not challenge the element of serious injury given the amount of internal damage to Ford's liver, spleen, intestines, and kidneys caused by the gun shot; rather, the element in question is the intent to kill.

Defendant argues the jury probably would have returned a verdict convicting Defendant of Assault With a Deadly Weapon Inflicting Serious Injury (AWDWISI), which does not require an intent to kill, instead of AWDWWIKISI had the acquittal-first instruction not been given. *See id.* § 14-32(b). Defendant agrees the difference between the two charges is an intent to kill but makes no attempt to argue the evidence shows he lacked the requisite intent. Instead, Defendant focuses his argument on whether Defendant was the shooter at all, discussing the differences in the testimony and prior statements of Ford, Ali, and Cox. However, this argument has no merit as the jury convicted Defendant of AWDWWIKISI, so it already found Defendant to be the shooter. This would not change if the jury was contemplating a lesser AWDWISI charge instead. This is so because whether a jury could find Defendant guilty of AWDWISI or AWDWWIKISI depends solely on whether Defendant shot Ford with the requisite intent to kill—not on whether Defendant was the shooter.

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Further, “[a]n intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred.” *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956). “Such intent may be inferred from the nature of the assault, the manner in which it is made, the conduct of the parties, and other relevant circumstances.” *State v. Revels*, 227 N.C. 34, 36, 40 S.E.2d 474, 475 (1946) (citations omitted).

On the question of Defendant’s intent, *State v. Cromartie* proves instructive. *See* 177 N.C. App. 73, 627 S.E.2d 677 (2006). In *Cromartie*, the defendant was convicted of AWDWWIKISI after evidence at trial showed the defendant told the victim to stand in front of defendant’s home, went inside to retrieve a loaded handgun, and shot the victim once in the back. *Id.* at 75, 627 S.E.2d at 679. On appeal, the defendant argued the trial court erred by not instructing the jury on the lesser included crime of AWDWISI. *Id.* at 76, 627 S.E.2d at 680. The defendant contended the jury should have been instructed on the lesser included offense because evidence of his intent to kill was equivocal, given that he did not immediately shoot the victim but went into his home to retrieve the gun first and then shot him only one time in the back, not the head. *Id.*

This Court upheld the trial court’s decision, concluding:

Where the defendant points a gun at the victim and pulls the trigger, this constitutes evidence from which intent to kill may be

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inferred. Moreover, defendant shot [the victim] in his torso, where the majority of his major organs are located. This also demonstrates an intent to kill since an assailant must be held to intend the natural consequences of his deliberate act. It is irrelevant that defendant only shot the victim one time. The lack of multiple shots fired does not negate intent to kill.

Id. at 77, 627 S.E.2d at 680 (citations and quotation marks omitted).

Here, the State presented sufficient evidence showing Defendant acted with the requisite intent to kill. Defendant entered Ford's home without permission and stood in the unlit dining room holding a gun. He "chucked" the gun back to show Ford it was loaded. Then, without attempting to engage in any discussion with Ford other than asking "what's up[,]" Defendant shot the weaponless Ford in the back from point-blank range as Ford tried to leave. *See id.* ("Where the defendant points a gun at the victim and pulls the trigger, this constitutes evidence from which intent to kill may be inferred." (citations omitted)). The bullet tore through Ford's torso, entering in his back and exiting near the navel, causing damage to Ford's major organs. *See id.* ("[D]efendant shot [the victim] in his torso, where the majority of his major organs are located. This also demonstrates an intent to kill since an assailant must be held to intend the natural consequences of his deliberate act." (citation and quotation marks omitted)). In their testimony, Ford, Cox, and Ali each named Defendant as the shooter, and evidence found at the scene corroborated Ford's account of the shooting.

Accordingly, the State presented ample evidence showing Defendant shot Ford with the requisite intent to kill. Because the State presented sufficient evidence to support the AWDWWIKISI charge, Defendant cannot show the trial court's erroneous acquittal-first instruction "had a probable impact on the jury's finding that [D]efendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted). Furthermore, where plenary evidence of Defendant's intent was presented, the trial court's erroneous jury instruction does not amount to the "exceptional case" warranting relief. *See id.* Therefore, the trial court's erroneous instruction did not rise to the level of plain error.

II. Sleeping Juror

Defendant next argues because Juror 11 appeared to be asleep while the bodycam footage was being shown, his right to be tried by a jury of twelve persons was violated. *See State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971) (recognizing a defendant's constitutional right to be tried by a jury of "twelve persons"). Our Supreme Court has explained:

The trial court's discretion in supervising the jury continues beyond jury selection and extends to decisions to excuse a juror and substitute an alternate. These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error.

State v. Lovin, 339 N.C. 695, 715-16, 454 S.E.2d 229, 241 (1995) (citations and quotation marks omitted); *see also State v. Johnson*, 280 N.C. 281, 285, 185 S.E.2d

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698, 700 (1972) (“The competency of jurors at the time of selection and their continued competence to serve thereafter are matters left largely to the sound legal discretion of the presiding judge.”).

Our courts have previously addressed the issue of the sleeping juror, and these decisions control our analysis in the case *sub judice*. In *Lovin*, a courtroom bailiff informed defense counsel that one of the jurors appeared to be asleep during part of the trial. 339 N.C. at 714-15, 454 S.E.2d at 240. The trial court held a hearing where the chief bailiff testified there were several times where the juror seemed as though he may be asleep but when the bailiff started towards the juror to investigate, he would raise his head. *Id.* at 715, 454 S.E.2d at 240. The trial court said it too had observed the juror during the trial and that the juror, like other jurors, at times seemed inattentive but had not been sleeping. *Id.* The trial court decided not to remove the juror, and on appeal, our Supreme Court found no abuse of discretion as “the testimony of the chief bailiff and the observations of the [trial] court support the [trial court’s] conclusion that the juror could perform his duties.” *Id.* at 716, 454 S.E.2d at 241.

Likewise, in *State v. McCallum*, defense counsel alerted the trial court of a juror who appeared to be sleeping. 187 N.C. App. 628, 638, 653 S.E.2d 915, 922 (2007). The trial court paused the proceedings and asked the juror if he was alright, with the juror immediately responding that he was. *Id.* The trial continued. Later,

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defense counsel argued the juror had been sleeping, but the trial court said it observed the juror regularly during the timeframe in question and deemed the juror had been awake and could continue to serve as a juror without further inquiry. *Id.* On appeal, this Court found no abuse of discretion by the trial court given questions regarding jury competency are left to the court's discretion and the trial court came to a reasoned decision based upon its own observation of the situation. *Id.* at 638-39, 653 S.E.2d at 922; *see also State v. Yelverton*, 334 N.C. 532, 543, 434 S.E.2d 183, 189 (1993) (stating "it is within the trial court's discretion, based on its observation and sound judgment, to determine whether a juror can be fair and impartial" (citation omitted)).

In this case, it was within the trial court's discretion to decide whether Juror 11 could still competently perform her duties as a juror or whether she should be excused, based on the observation of Defendant's counsel that Juror 11 appeared to be asleep during a majority of the bodycam video footage. *See Lovin*, 339 N.C. at 715-16, 454 S.E.2d at 241 ("The trial court's discretion in supervising the jury continues beyond jury selection and extends to decisions to excuse a juror and substitute an alternate." (citation and quotation marks omitted)). The trial court disagreed, noting it observed Juror 11 while the footage was playing and had taken action when it saw her beginning to doze, instructing the jurors to stand up.

The trial court relied upon its own observation of Juror 11 to conclude Juror 11 could continue to competently serve as a fair and impartial juror, requiring no further inquiry. *See id.* at 716, 454 S.E.2d at 241 (holding “the observations of the [trial] court support the conclusion that the juror could perform his duties”); *see also McCallum*, 187 N.C. App. at 638-39, 653 S.E.2d at 922 (upholding the trial court’s decision to not remove a juror because the trial court determined the juror had not been asleep “based upon the juror’s response, statements by counsel, and the court’s own observations of the juror”). Under *Lovin* and *McCallum*, the trial court did not abuse its discretion by allowing Juror 11 to continue serving on the jury where the trial court based its decision on its own observation of the events.

III. Misidentified Juror

Defendant lastly argues that by allowing Ricardo Rodriguez to remain on the jury and denying requests for a mistrial or to reopen jury selection, the trial court violated Defendant’s constitutional right to an impartial jury. *See* U.S. Const. amend. VI; *see also* N.C. Const. art. I, § 24. Our Supreme Court has held, “the trial court may reopen the examination of a juror after the jury is impaneled and that this decision is within the sound discretion of the trial court.” *State v. Holden*, 346 N.C. 404, 429, 488 S.E.2d 514, 527 (1997) (citations omitted). Likewise, we generally review a trial court’s decision to deny a motion for a mistrial for an abuse of discretion. *See State*

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v. Dye, 207 N.C. App. 473, 482, 700 S.E.2d 135, 140 (2010) (citation omitted); *State v. Glenn*, 221 N.C. App. 143, 153, 726 S.E.2d 185, 191 (2012) (citation omitted).

“Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (“A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court’s decision] was so arbitrary that it could not have been the result of a reasoned decision.” (citation omitted)). “If the jurors who have been selected and drawn are individually qualified, that is usually deemed sufficient.” *State v. Mallard*, 184 N.C. 667, 675, 114 S.E. 17, 21 (1922) (citation and quotation marks omitted); *see also State v. Hensley*, 94 N.C. 1021, 1027 (1886) (reasoning, “[i]t is only essential to obtain a fair and impartial jury, composed of eligible men”).

In the present case, counsel for both sides thoroughly questioned Ricardo Rodriguez in voir dire. Neither side’s questioning revealed he was not the juror whose name was actually called. Counsel for each side did question him about prior interactions with the courts and with law enforcement, possible relationships with the parties or witnesses, and any other reasons he might not be able to adequately serve as a juror. After hearing his answers, both sides deemed Ricardo Rodriguez a

satisfactory juror. He was sworn in, and his wrongful identity was not discovered until the third and final day of the trial after the clerk of court informed the trial court of the error.

As Ricardo Rodriguez was eligible and deemed satisfactory by the parties to serve on the jury, the fact he was not the person who was called to be on the jury does not constitute a fundamental error requiring a new trial. *See Mallard*, 184 N.C. at 667, 114 S.E. at 21 (citation omitted); *see also Hensley*, 94 N.C. at 1027 (reasoning, “[i]t is only essential to obtain a fair and impartial jury, composed of eligible men”). Given the extent of questioning of Ricardo Rodriguez by counsel for both sides during voir dire and the fact they ultimately found him satisfactory to serve as a juror, the trial court’s decision to allow Ricardo Rodriguez to remain seated on the jury was supported by reason. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *see also White*, 312 N.C. at 777, 324 S.E.2d at 833 (reasoning, “[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason” (citation omitted)). Therefore, the trial court did not abuse its discretion by denying Defendant’s request for a mistrial or alternatively to reopen voir dire.

Conclusion

Accordingly, for the foregoing reasons, we conclude the trial court did not: (I) commit plain error by giving the erroneous acquittal-first instruction; (II) err by allowing Juror 11 to continue to serve on the jury; and (III) err by denying

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Defendant's request for a mistrial or alternatively to reopen voir dire upon discovering the mistaken identity of Juror 8.

NO PLAIN ERROR IN PART; NO ERROR IN PART.

Judges DILLON and BERGER concur.

Report per Rule 30(e).