IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-766

No. COA22-346

Filed 15 November 2022

Forsyth County, No. 19 CRS 52191

STATE OF NORTH CAROLINA

v.

JAMES WEST HIGHTOWER

Appeal by defendant from judgment entered 28 September 2021 by Judge Mark E. Klass in Forsyth County Superior Court. Heard in the Court of Appeals 2 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Elizabeth Curran O'Brien, for the State.

Anne Bleyman for defendant-appellant.

ARROWOOD, Judge.

¶ 1 James West Hightower ("defendant") appeals from judgment entered upon his conviction for assault with a deadly weapon inflicting serious injury. Defendant contends the trial court erred by entering judgment on a fatally defective verdict and providing the jury a second opportunity to deliberate after re-instruction. For the following reasons, we hold that the trial court did not err.

I. Background

¶ 2 On 30 June 2017, Officer Moses Ruiz ("Officer Ruiz") with the Winston-Salem Police Department responded, "just after 4:30 a.m., . . . to a call of an assault on a female at 241 Monmouth Street." When he arrived, Officer Ruiz found Clara Bentz ("Ms. Bentz") "in her bed covered in blood[,]" with "severe injuries and wounds [to] her face and head." Ms. Bentz was transported to Baptist Hospital by Forsyth County EMS. The forensics team was not able to locate any personal items belonging to defendant at the crime scene.

¶ 3 Upon arrival at Baptist Hospital, Ms. Bentz was treated by James Elbert Winslow, III, M.D. ("Dr. Winslow"), who was the attending physician in the department of emergency medicine. Ms. Bentz's "condition was very critical" and "[s]he could have easily died." She had "two fractures to her jaw[,]" "significant trauma and fractures" to her zygomatic arch, "a blowout fracture" to her right eye, "a fracture to her nose[,]" and "a subdural hematoma, which is a brain bleed[,] on the left side of her head."

¶ 4 Because Ms. Bentz was "in a huge amount of pain . . . . [and] distress," she was immediately given paralytics so a breathing tube could be placed, and she could be put on a ventilator. "About ten days afterwards," once the swelling had gone down, Ms. Bentz had to be seen by a plastic surgeon to repair her jaw, and a dentist because of the "open jaw fracture." On 4 July 2017, the intubation tube was taken out,

however, Ms. Bentz continued to have an "altered mental status" due to her head injury. Although she was released from the hospital on 21 July, doctors were unable to send Ms. Bentz home "because of the effects of her head injuries" and she had to be admitted to a rehabilitation center. Ms. Bentz was in rehabilitation for about 10 days, "working on . . . her ability to swallow because she was still aspirating fluids[,]" or getting food she swallowed in her lungs.

¶ 5 In December 2017, Ms. Bentz was interviewed by Officer Stephen Alexander Horsley ("Officer Horsley"), an investigator with the Winston-Salem Police Department. During their brief conversation, since her jaw was still wired shut, Ms. Bentz "advised [Officer Horsley] that James is the one that attacked her," and he "worked at 6th & Vine, the restaurant." Ms. Bentz also stated that she could identify the suspect if she saw him again.

¶ 6 On 7 December 2017, Ms. Bentz was shown two photo lineups by Officer Horsley. Defendant's photograph was not in either lineup and Ms. Bentz did not make an identification. After no suspect was identified, Officer Horsley went to 6th & Vine and spoke with an employee who stated the James that worked there was "James Hightower." Through investigation, Officer Horsley found defendant's South Carolina driver's license and made a formal request to South Carolina Law Enforcement Division ("SLED") for information related to defendant, including his license picture.

¶ 7 On 7 March 2018, Ms. Bentz was shown a paper lineup that included defendant's South Carolina license picture and she "positively identif[ied] [defendant] as the person who attacked her." On 4 March 2019, Officer Ruiz took out charges on defendant

¶ 8 Defendant was located on 12 December 2019. During an interview with Officer Ruiz, defendant stated that he lost his wallet 1 July 2017 and "was afraid [it] was going to turn up at a crime scene." Defendant further stated he was from New York and worked at 6th & Vine and a juice bar. On 5 April 2021, a Forsyth County grand jury returned an indictment against defendant for assault with a deadly weapon with intent to kill or inflict serious injury and assault inflicting serious bodily injury. On 13 September 2021, a Forsyth County grand jury returned a superseding indictment against defendant for the same charges.

¶ 9 The matter came on for trial on 27 September 2021 in Forsyth County Superior Court, Judge Klass presiding. At trial, defendant immediately requested to proceed *pro se*.

¶ 10 During the trial, Ms. Bentz testified. Ms. Bentz testified that at the time of the assault, she had known defendant "from three weeks to a month" and saw him "about once a week, sometimes twice a week." Ms. Bentz let defendant "come to [her house][,]" which she shared with her roommate Jessica Smith ("Ms. Smith"), because he needed a place [to stay] . . . and [so they could] do . . . drugs." Ms. Bentz described

their relationship as "fun[,]" and one in which they were intimate and used drugs together. From their conversations, Ms. Bentz learned defendant was from New York and worked for a juice company and at 6th & Vine.

¶ 11 Ms. Bentz testified that on 29 June 2017 defendant arrived at her house between 8:00 and 8:30 p.m. While defendant and Ms. Bentz were in her bedroom, they heard a knock "and [they] both ran to the bathroom." When they returned to the bedroom, defendant realized his wallet was missing and became "enraged." Defendant "started going after the two guys that had come in [and] . . . started hitting on them[.]" Ms. Bentz told them to "take it outside[.]" Defendant left and Ms. Bentz "closed the door" and did not see defendant again until the "early morning of the 30th[.]"

¶ 12 When defendant returned around 3:30 a.m. the next day, Ms. Bentz "let him in[,]" "asked him if he had gotten any cigarettes," and then "all [she] can remember is seeing his fist[.]" Ms. Bentz "woke up in the hospital two-and-a-half weeks later[.]" In open court, Ms. Bentz identified defendant as the one who assaulted her and testified that she was "100 percent sure that [defendant was] the one that" hurt her. Ms. Bentz still experiences numbness, must drink through a straw, and has permanent scarring.

¶ 13 Ms. Bentz's roommate, Ms. Smith, also testified. Ms. Smith stated that in the early morning hours of 30 June 2017, she heard Ms. Bentz asking about cigarettes

and then heard "[Ms. Bentz] yelling, punches, [and] stuff being knocked over." Then, a male Ms. Smith identified as defendant knocked on her bedroom door. He was "sweaty, out of breathe, [and] upset." Defendant told Ms. Smith "[t]hat his wallet was missing," and to "[j]ust stay in [her room] or basically [she was] going to get what's going on in [Ms. Bentz's room]." Ms. Smith stayed in her room until she heard defendant leave. Then, Ms. Smith called 911 and went to check on Ms. Bentz. Ms. Smith testified there was "blood everywhere" and Ms. Bentz's "head was . . . swollen like a basketball."

¶ 14 At the close of the State's evidence, defendant made a motion to dismiss for "lack of evidence." Defendant did not present any evidence and renewed his motion to dismiss at the close of all evidence. Both motions were denied. During the charge conference, defendant requested the jury be instructed on the lesser-included offenses of assault on a female and assault inflicting serious injury. The State argued that such instructions were inappropriate "given the severity and the magnitude of [Ms. Bentz's] injuries[.]" The trial court declined to give defendant's requested lesser-included instructions.

¶ 15 The trial court's charge to the jury included an instruction on assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") and assault inflicting serious bodily injury ("AISBI"). However, the initial verdict sheet only included AWDWIKISI, assault with a deadly weapon inflicting serious injury

("AWDWISI"), and a not guilty option. On 28 September 2021, the jury returned a verdict of guilty of AWDWISI. The trial court began discussing sentencing when defendant requested to see the verdict sheet and address the judge outside the jury's presence. Although the court initially continued with sentencing, eventually the jury was asked to step out so the court could discuss the verdict sheet.

¶ 16 After the jury exited, the State explained that AWDWISI was "a lesser included of the indicted [AWDWIKISI][,]" and their understanding based on the verdict sheet was the jury "found all of the elements except for the intent to kill element[.]" Furthermore, the State argued that even though AISBI was missing from the initial verdict sheet, had the jury also found defendant guilty of AISBI the court would have to "arrest[] on that offense, regardless." The trial court agreed with the State, but defendant requested the court "clarify the instructions again to the jury[.]" Although the trial court initially declined to do so, they eventually brought the jury back in when the jury had a question about what to do with the second verdict form.

¶ 17 The jury was re-instructed on AWDWISIKI, AWDWISI, and AISBI and provided with a verdict sheet with these options. However, the judge clarified that the jury would "not return a verdict of guilty of [AWDWISIKI] but [would] consider whether defendant [wa]s guilty of [AWDWISI]." The jury returned a verdict shortly thereafter, again finding defendant guilty of AWDWISI and finding defendant guilty of AISBI. The court "arrest[ed] judgment on the [AISBI]" charge and defendant was

sentenced to 44 to 65 months. Defendant gave notice of appeal in open court.

II. Discussion

¶ 18 On appeal, defendant argues the trial court erred by providing the jury with a "defective" verdict sheet and giving the jury a second opportunity to deliberate following the re-instruction. For the following reasons, we hold the trial court did not err.

A. Standard of Review

¶ 19 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1) (2022). However, "[i]n criminal cases, an issue that was not preserved by objection . . . 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). Because defendant did not preserve any such error, this Court's review is limited to whether the trial court's actions constituted plain error.

¶ 20 Our Supreme Court has stated:

> 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 affect[s] the fairness, integrity[,] or public reputation of judicial proceedings[.]

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

¶ 21 "Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial." *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996) (citation omitted). Despite defendant's argument that the defective verdict is a "fatal flaw" and "involve[s] an instructional issue" so it is therefore reviewable *de novo*, they present no authority to support such a contention. Accordingly, defendant's claims are reviewed for plain error.

B. Verdict Sheet

¶ 22 Defendant first argues that the verdict sheet was "fatally defective" and this "was a fundamental error" by the trial court. Our "statutes do not specify what constitutes a proper verdict sheet . . . [n]or have our Courts required the verdict forms to match the specificity expected of the indictment." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240-41 (2002) (citations omitted). "It is sufficient if the

verdict can be properly understood by reference to the indictment, evidence[,] and jury instructions." *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986), *aff'd*, 319 N.C. 392, 354 S.E.2d 238 (1987) (citations omitted). In this case, looking at the entire record, it is clear, despite the mistake of the trial court in its initial instruction and the clerical error on the verdict sheet, the jury did convict defendant of AWDWISI.

¶ 23 In *State v. Connard*, this Court found no plain error when the verdict sheet contained a clerical error. *Id.* at 335, 344 S.E.2d at 574. There, the defendant argued on appeal that the verdict was "fatally defective" and therefore constituted "prejudicial error, since the verdict reached was not a crime." *Id.* However, this Court found the defendant failed to object at trial and even if he had, "[t]he record, including the indictment and the instructions, ma[de] it abundantly clear" what crime "was at issue." *Id.* at 336, 344 S.E.2d at 574.

¶ 24 Additionally, in *State v. Crenshaw*, this Court found no plain error when the trial court re-instructed the jury to correct the verdict. 144 N.C. App. 574, 582, 551 S.E.2d 147, 152 (2001). In *Crenshaw*, the jury initially convicted the defendant of both the crime and a lesser-included crime. *Id.* at 581, 551 S.E.2d at 152. After realizing this error, the trial court provided the jury with another verdict sheet and re-instructed them. *Id.* On appeal, the defendant argued that the court should have re-instructed the jury differently, even though they "did not request such an

instruction at trial." *Id.* Therefore, this Court concluded the defendant was not "prejudiced by the trial court's re-instructing the jury to correct the verdict and to indicate the correction on the verdict sheet." *Id.* at 582, 551 S.E.2d at 152. Accordingly, this Court found no plain error. *Id.*

¶ 25 Here, like in *Crenshaw* and *Connard*, defendant failed to object to the verdict form, the initial instruction, and the re-instruction of the jury. Additionally, we see no way in which the trial court's re-instruction could have prejudiced defendant. Lastly, it is abundantly clear from the record and the second jury instruction what crimes were at issue. Even though there was an issue with the verdict sheet and initial instruction, it does not amount to plain error since we cannot conclude the error had a likely impact on the jury's finding of guilt.

¶ 26 "Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury would have reached a different verdict." *State v. Streeter*, 191 N.C. App. 496, 503, 663 S.E.2d 879, 885 (2008) (citation omitted). Here, we need not speculate as to whether this clerical issue on the verdict sheet and initial error with the jury instruction would have led the jury to reach a different verdict because the jury was awarded the opportunity to reconsider their verdict after being properly re-instructed. Once provided instructions as to all elements of the charged crime and lesser included crimes, the jury, again, found defendant guilty of the same crime. Because we are not convinced that the

error amounted to plain error, defendant's argument is without merit.

C. Re-instructing the Jury

¶ 27 Defendant next contends that the trial court erred by giving the jury a "second chance to deliberate" after hearing some of the sentencing information. However, this contention is likewise without merit. The trial court did not provide the jury a second opportunity to deliberate but re-instructed the jury after discovering an error on the verdict sheet. Furthermore, the trial court only re-instructed the jury after they submitted a question indicating there was some confusion and defendant requested the court "clarify the instructions again to the jury[.]"

¶ 28 In *State v. Weddington*, during deliberation on a murder charge, the jury asked a question, and the "defendant agreed that re[-]instructing the jury . . . was adequate." *State v Weddington*, 329 N.C. 202, 203, 210, 404 S.E.2d 671, 673, 677 (1991). On appeal, the defendant argued that the court's re-instruction was an error, and they should have responded differently to the jury's inquiry. *Id.* at 210, 404 S.E.2d at 677. However, our Supreme Court found no error since the instructions were given "in conformity with defendant's assent" and concluded "[t]he defendant will not be heard to complain on appeal when the trial court has instructed adequately on the law *and in a manner requested by the defendant*." *Id.* (emphasis added).

¶ 29 Here, defendant not only agreed to the re-instruction, but requested it. Since

defendant made no argument about the trial court's instructions as to the law, defendant will not be heard on appeal when the trial court sufficiently instructed the jury at the defendant's request. *See id.* Accordingly, defendant's second argument is likewise without merit.

III. Conclusion

¶ 30 For the foregoing reasons, we conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).