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NO. COA05-276

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Wake County
No. 03CRS39203-04

ROBIN LEE

Appeal by defendant from judgment entered 1 September 2004 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 20 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly W. Duffley, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

LEVINSON, Judge.

Defendant (Robin Lee) appeals from judgments entered on convictions of assault with a deadly weapon on a government official, and resisting, delaying, or obstructing a law enforcement officer. We affirm.

Defendant was tried before a jury during the 30 August 2004 term of court in Wake County, North Carolina. The State's evidence at trial is summarized as follows: Three Wake County Sheriff's deputies testified about the incident giving rise to the charges against defendant. Each officer testified generally that on 18 May

2003 they were dispatched to defendant's house in response to a 911 call about domestic violence; that defendant shouted and cursed at the investigating officers, refusing to let them inside the house; and that defendant was hit by a single gunshot after he threatened the officers with a butcher knife.

In particular, Deputy Darrell Johnson of the Wake County Sheriff's Department testified that he was on duty on the afternoon of 18 May 2003, when he was dispatched to 111 Pine Country Lane in Knightdale, North Carolina, to investigate a 911 call reporting possible domestic violence. Defendant met Deputy Johnson at the door of the house, and Deputy Johnson explained to defendant that he was there to investigate the 911 call. Defendant told Deputy Johnson that he and his wife were fine, and refused to admit Deputy Johnson into his house. When Deputy Johnson explained to defendant that he was hindering a police investigation, and therefore could be charged with resisting, delaying, or obstructing a police investigation, defendant started cursing at Deputy Johnson. In a few minutes, Ms. Helene Lee (Ms. Lee), defendant's wife, came to the door. She looked nervous and tried to talk to Deputy Johnson, but defendant continued to swear at Deputy Johnson so loudly that Deputy Johnson could not hear Lee. Deputy Johnson then tried to arrest defendant, but when he attempted to place defendant's hands behind his back, defendant pushed forward and grabbed Deputy Johnson by the throat. By that time, two other law enforcement officers had arrived, Wake County Sheriff's Deputies Chris Otto and

R.K. Whitlow. Deputy Otto grabbed defendant's shirt, but defendant slipped away and ran "sprinting" into the kitchen.

When defendant broke away from the officers and ran to the kitchen, Deputy Johnson followed, shouting at defendant to stop. However, defendant ran to a counter in the kitchen, where Deputy Johnson saw him grab a large butcher knife. Deputy Johnson unholstered his gun while telling defendant, who was then within ten feet of him, to drop the knife. Deputy Johnson testified that at that point he believed his life to be in danger. When defendant would not release the butcher knife, Deputy Johnson fired a single shot hitting defendant in the elbow and side. Defendant dropped the knife, but continued to curse at the law enforcement officers. Deputy Johnson denied hearing defendant say anything about needing food, or about going to the kitchen to get food.

Deputy Otto's testimony generally corroborated that of Deputy Johnson. On 18 May 2003 Deputy Otto was on patrol with Deputy R.K. Whitlow, when they received a domestic violence call on the police scanner. They proceeded to defendant's house, where Deputy Otto saw Deputy Johnson, defendant, and Ms. Lee in the doorway of the house. Deputy Johnson was trying to talk to Ms. Lee, and defendant was loudly cursing. Deputy Otto ran up the porch stairs behind Deputy Johnson, and when defendant grabbed Deputy Johnson, Deputy Otto grabbed onto defendant's shirt. Defendant "broke loose" and ran "straight for the kitchen." Deputy Otto followed Deputy Johnson to the kitchen where he saw defendant "turn[] toward [them] with a knife" noticing "very clear[ly], the blade that was there."

Within a few seconds, Deputy Johnson fired one shot and defendant dropped the knife. Deputy Otto described the incident as a "deadly situation" in which an officer must react on instinct and previous training.

Deputy Whitlow's testimony further corroborated that of Deputy Johnson and Deputy Otto. Deputy Whitlow testified that, when he and Deputy Otto arrived at defendant's house, the defendant was agitated, sweating, and shouting. He saw defendant reach out the door of his house to push Deputy Johnson, before taking off on a "dead sprint" into the kitchen. Deputy Johnson followed, telling defendant to stop. As Deputy Whitlow turned the corner into the kitchen, he heard a gunshot and saw defendant crouched in the corner with a knife at his feet. Deputy Whitlow later spoke to Ms. Lee, who told him that defendant had threatened to hit her with a vacuum cleaner earlier that day, and that she had been packing to leave him when the law enforcement officers arrived.

Donald Williams, a paramedic for Wake County, testified that he drove defendant to Rex Hospital in Raleigh. During the ride, defendant never asked for something to eat, and showed no signs of diabetic shock. This testimony was corroborated by Dr. Steven Wiegand, an emergency room physician at Rex Hospital. Although defendant acknowledged being diabetic when his medical history was taken, he did not indicate to Dr. Wiegand that he was having any problems relating to diabetes. Significantly, defendant also told Dr. Wiegand that his injury occurred as follows:

. . . [T]he patient states that he and his wife were having words and that the Sheriff

showed up at the front door. He told the deputy that he could not enter the house. The deputy insisted on entering the house. Again, **according to the patient, he went to the kitchen to get a knife to convince the deputy not to enter the property** and the next thing he knew he was shot in the arm.

(emphasis added). Deputy Lee Shambly overheard defendant's admission to Dr. Wiegand, and testified that, while waiting with defendant in the emergency room, he heard the following:

A doctor came in, had asked him what was going on, and he had told them that he did not wish for them, assuming that he was talking about the Sheriff's office, to come into his house and was **going to do whatever he had to do to stop them from coming into his house. And at that - and that he had ran into the kitchen to get something to stop them.**

(emphasis added).

Sergeant Jerry Winstead, a Sheriff's Department investigator, testified that on 18 May 2003 he had interviewed defendant's wife, Ms. Lee, while another officer interviewed defendant's daughter, Quashima Lee (Quashima). Ms. Lee told him that on 18 May 2003 defendant was "very argumentative" and "basically assaulted" her by grabbing and yanking on her ankles to get her out of bed. As the day progressed, defendant became more agitated, until Ms. Lee decided to "pack up her clothes and leave." Shortly thereafter the law enforcement officers arrived. At the time Sergeant Winstead interviewed her, Ms. Lee was too upset to compose a written statement. However, she reviewed and signed a statement written by Quashima.

Sergeant Winstead also interviewed Ms. Lee's cousin, a Mr. Blunt, who had originally called 911. Mr. Blunt told Sergeant Winstead that he had called defendant's house several times on 18 May 2003, and heard defendant and Ms. Lee arguing in the background. He spoke to Quashima twice on the phone, and during the second conversation she asked him to call 911. Sergeant Winstead's account of his interview of Mr. Blunt was corroborated by Quashima's essentially identical description of her phone conversations with Mr. Blunt.

Quashima testified for the State concerning the events of 18 May 2003. She also was questioned about State's Exhibits 15 and 16, two written statements describing the incident. Exhibit 15 was purportedly written by Quashima at home, shortly after her father was taken to the hospital. Wake County Sheriff's Deputy Greg Street testified that he was at defendant's house on 18 May 2003, soon after defendant had been shot. He asked Quashima to write and sign an account of the incident, and identified Exhibit 15 as Quashima's written statement. Exhibit 16 was written later that evening at the Sheriff's Department.

Quashima admitted that she had signed both writings. However, she denied writing Exhibit 15, and testified that she had written Exhibit 16 on behalf of her mother. Quashima was questioned about specific statements in Exhibit 15, which she denied have written. Nonetheless, Quashima's testimony generally corroborated the statements in Exhibit 15 about which she was questioned, as well as the testimony of other State's witnesses. Her trial testimony

differed from the statements in Exhibit 15 in only one significant respect: Exhibit 15 states that the defendant tried to grab a knife in the kitchen; however, Quashima testified at trial that she was out of view, "back down the hallway" when defendant and Deputy Johnson were in the kitchen.

The defendant's evidence may be summarized, in pertinent part, as follows: Ms. Lee testified that defendant was her husband, and that they were at home the afternoon of 18 May 2003. When she heard law enforcement officers at the front door, she came out of a back bedroom into the living room. Defendant and Deputy Johnson were arguing, and Deputy Johnson shoved defendant back into the house. Defendant walked quickly into the kitchen, followed by the officer, while the other two law enforcement officers stayed outside. In the kitchen, Deputy Johnson shot defendant without warning him to stop. The defendant was unarmed, and no knife was on the floor after he was shot. Ms. Lee denied that defendant had assaulted or threatened her, and denied making statements to law enforcement officers that contradicted her trial testimony.

The defendant testified he and Ms. Lee were arguing on 18 May 2003; that he had "picked up" a radio, chair, and vacuum cleaner during their disputes; and that he yelled at the law enforcement officers who came to his house. He denied threatening or assaulting Ms. Lee, threatening Deputy Johnson, or brandishing a knife. Defendant testified that after he and Deputy Johnson argued on defendant's doorstep, Deputy Johnson pushed him against the television set in his living room. Defendant, who is diabetic,

then realized that he needed something to eat. He walked into the kitchen to get some food, but did not pick up a knife in the kitchen. Although defendant was unarmed, Deputy Johnson shot him with no warning. Defendant also denied making statements to others that contradicted his trial testimony. Ronnie Braswell, a neighbor of defendant's, testified that when he heard a gunshot the other law enforcement officers were outside.

Other evidence will be discussed as necessary to address the issues presented on appeal.

Defendant has assigned plain error to the admission of five different pieces of evidence, including:

1. testimony by Sgt. Winstead that an internal police investigation cleared Deputy Johnson of wrongdoing for shooting at defendant;
2. testimony by Sgt. Winstead relating his conversation with Mr. Blunt, the person who called 911 on 18 May 2003;
3. testimony by Sgt. Winstead that the officer who interviewed Quashima was not in court because he had been murdered or "assassinated" in the line of duty;
4. testimony by John Kissinger, instructor in "Officer Survival Training," regarding the number of law enforcement officers injured or killed each year in the line of duty; and
5. the prosecutor's "line by line" questioning of Quashima from Exhibit 15, a statement that she denied writing.

Defendant did not object to any of these pieces of evidence at trial. Consequently, we review only for plain error.

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional

case where, . . . the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," . . . or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings[.]"

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "Before an error by the trial court amounts to 'plain error,' we must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Waddell*, 351 N.C. 413, 419, 527 S.E.2d 644, 648-49 (2000) (citing *State v. Keel*, 337 N.C. 469, 485, 447 S.E.2d 748, 757 (1994)). Accordingly, in determining whether the admission of evidence was plain error, this Court considers the strength of the evidence against the defendant. See, e.g., *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) ("The overwhelming evidence against defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached.").

Defendant herein was convicted of two separate offenses. One of these was resisting an officer, a violation of N.C. Gen. Stat. § 14-223 (2003). The statute makes it a Class 2 Misdemeanor to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office[.]" G.S. § 14-223. "[T]he elements of obstruction or delay of an officer are as follows:

1. that the victim was a public officer;

2. that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
3. that the victim was discharging or attempting to discharge a duty of his office;
4. that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office;
5. that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Dammons, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612, *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133 (2003).

Defendant was also convicted of assault with a deadly weapon on a government official, a Class F felony, in violation of N.C. Gen. Stat. § 14-34.2 (2003). "[A]n individual is guilty of assault with a deadly weapon on a government official where the individual: (I) commits an assault; (II) with a firearm or other deadly weapon; (III) on a government official; (IV) who is performing a duty of the official's office." *State v. Spellman*, __ N.C. App. __, __, 605 S.E.2d 696, 701 (2004), *disc. review denied*, 359 N.C. 325, 611 S.E.2d 845 (2005). Conviction of this offense also requires that the defendant know or have reasonable grounds to know that the victim is a government official. *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985). Further, evidence that a defendant threatened a law enforcement officer with a knife is sufficient to support a conviction of assault on a government official. See *State v. Doisey*, 162 N.C. App. 447, 590 S.E.2d 886 (2004) (defendant threatens law enforcement officers with box-cutter).

In the instant case, the only real disputed issue was whether or not defendant displayed a butcher knife to the law enforcement officers before Deputy Johnson shot him. The evidence of the other elements of both offenses was largely uncontradicted. Law enforcement officers present at the scene testified they were on duty at the time of the incident. The defendant testified that Deputy Johnson (1) arrived at his house in a Sheriff's Department car; (2) was in uniform; (3) told defendant that he was there to investigate a 911 call; and (4) warned the defendant that he would be arrested if he hindered Deputy Johnson's investigation. Defendant also testified that he yelled at Deputy Johnson, and refused to allow the officer to enter his house. This evidence, standing alone, is sufficient to support defendant's conviction of resisting a law enforcement officer. See, e.g., *State v. Leigh*, 278 N.C. 243, 179 S.E.2d 708 (1971) (where defendant curses at law enforcement officer and urges witness not to cooperate with investigation, he may properly be convicted of violating G.S. § 14-223). It also suffices to establish that any assault on Deputy Johnson was an assault on a government official, at a time when the officer was performing an official duty. Furthermore, defendant does not dispute that a butcher knife is a deadly weapon.

Thus, the only significant issue in dispute was whether defendant brandished a butcher knife at the law enforcement officers. The State's evidence on this point included testimony of three law enforcement officers that defendant shouted and cursed at Deputy Johnson, and then threatened Deputy Johnson with a knife.

The emergency room physician, Dr. Wiegand, testified that defendant said he was shot while trying to get a knife in order to prevent the law enforcement officers from entering his house; his testimony was corroborated by Deputy Shambly. A forensic investigator testified that there was a knife on the kitchen floor shortly after the incident. In response, defendant and his wife testified that defendant did not have a knife when he was shot. Therefore, a key issue was the relative credibility of the State's witnesses as compared to that of defendant and his wife.

"Upon our review of the entire record, we cannot say that the claimed error[s] had a probable impact on the jury's finding of guilt of a nature which would mandate the award of a new trial." *State v. Leroux*, 326 N.C. 368, 382, 390 S.E.2d 314, 324 (1990). In the context of the other record evidence, we conclude that admission of the challenged items, even if erroneous, does not rise to the level of plain error. The relevant assignments of error are overruled.

We have considered defendant's remaining assignment of error and conclude it is without merit. For the reasons discussed above, we conclude that the defendant had a fair trial, free from reversible error.

No error.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).