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NO. COA14-608

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v.

Pitt County
Nos. 11 CRS 051062-63

JOSEPH EARL HIGHSMITH,
Defendant.

Appeal by defendant from judgment entered 13 June 2013 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 22 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Justin M. Hampton, for the State.

Michelle FormyDuval Lynch for defendant-appellant.

BRYANT, Judge.

Where defendant can show no prejudice from the trial court's failure to deliver jury instructions regarding the overruling or sustaining of objections, we find no plain error. Defendant's conviction for one count of resisting arrest and one count of assault on a government official, with both counts

concerning the same officer, did not violate double jeopardy where defendant's act of resistance was separate from defendant's assault on the officer. Where the evidence was sufficient to support the jury verdict of resisting a public officer, and where the evidence indicated defendant was not illegally arrested, the trial court did not err in refusing to dismiss the charges of resisting a public officer and failing to instruct the jury with respect to resistance to an illegal arrest.

On 28 March 2011, defendant Joseph Earl Highsmith was indicted by a Pitt County grand jury for one count of assault with a deadly weapon on a government official, one count of assault on a government official, one count of driving while license revoked, and four counts of resisting a public officer. The charges came on for trial during the 11 June 2013 criminal session of Superior Court in Pitt County, the Honorable Quentin T. Sumner, Judge presiding. At trial, the State's evidence tended to show the following.

On 4 February 2011, while making his child support payment at the Pitt County Department of Social Services, Ronald Wilkins approached Pitt County Sheriff Deputy Rudy Newsome and told Deputy Newsome that he could assist the Sheriff's Department in

apprehending defendant. The Sheriff's Department had an outstanding arrest warrant for defendant, for failing to appear and show cause regarding unpaid child support, that was over a year old. Deputy Newsome had been unsuccessful in serving the arrest warrant on defendant despite multiple attempts to do so.

Wilkins, who was also the subject of an outstanding warrant relating to unpaid child support, agreed to help Deputy Newsome apprehend defendant in exchange for Wilkins having his arrest warrant recalled. Wilkins told Deputy Newsome that because defendant was his "long-time friend," he could persuade defendant to get into Wilkins' truck. Wilkins stated that because the passenger door in his truck could not be opened from the inside, once defendant was seated inside of the truck, Deputy Newsome would be able to pull the vehicle over and arrest defendant.

Deputy Newsome contacted Detective Michael Stroud of the Pitt County narcotics unit and arranged for Detective Stroud to use his unit's unmarked cars in the apprehension of defendant. The plan was for Wilkins to pick-up defendant and drive past Detective Stroud's location. Once Detective Stroud saw Wilkins' truck, Detective Stroud would activate his car's flashing

lights, pull the truck over, and remove defendant from the passenger side of the vehicle.

That afternoon, Wilkins drove to the River Bluff housing complex and picked-up defendant. Wilkins then exited the housing complex and began to drive down 10th Street. After Wilkins drove past Detective Stroud's location, Detective Stroud activated his lights and stopped the truck. Upon approaching the truck, Detectives Stroud and Pinner removed Wilkins from the truck while Detectives Foust and Bryan tried to make contact with defendant. All four men wore their badges and black vests with the word "sheriff" printed in gold on the front and back of the garments. The men also gave verbal announcements identifying themselves as members of the Sheriff's Department and ordered defendant to exit the vehicle.

Defendant attempted but was unable to open the passenger door. Detective Pinner then leaned into the vehicle through the driver's side door and asked defendant to climb out of the vehicle on the driver's side but defendant refused. Detective Pinner testified that he then crawled inside of the truck and attempted to unbuckle defendant's seatbelt and pull defendant from the vehicle but defendant resisted by pushing against Detective Pinner with his hands and feet.

While attempting to resist Detective Pinner, defendant twice reached for the truck's gearshift and accelerator. On his first attempt, defendant was able to engage the truck's motor but the vehicle remained stationary because the transmission was in neutral. On his second attempt, defendant managed to put the truck into drive and the truck moved forward into traffic before Detective Stroud was able to climb into the truck and turn off its engine.

During this scuffle Detective Foust attempted to deploy his taser, but the taser did not work. Detective Stroud also deployed his taser against defendant without effect.

After Detective Stroud stopped the truck, Detective Foust was able to open the passenger door of the truck and remove defendant. Defendant continued to struggle as he was being handcuffed. Due to minor injuries received during his scuffle with the detectives, defendant was transported to the hospital for treatment. After his release from the hospital, defendant was transported to the Pitt County jail where he was served with an arrest warrant.

During the trial, the trial court granted defendant's motion to dismiss the charge of assault with a deadly weapon on a government official (Detective Bryan), one count of resisting

a public officer (Detective Foust), and the charge of driving while license revoked. On 13 June 2013, a jury convicted defendant of three counts of resisting a public officer (Detectives Stroud, Pinner, and Bryan), and one count of assault on a government official (Detective Pinner). Defendant was sentenced to 150 days for assault on a government official and 60 days for the three counts of resisting a public officer, with the sentences to run consecutively. Defendant appeals.

On appeal, defendant raises three issues addressing whether the trial court (I) committed plain error in failing to give precautionary or curative jury instructions; (II) erred in denying defendant's motion to dismiss the charge of assault on a government official; and (III) erred in failing to dismiss all charges of resisting a public officer or, in the alternative, erred in failing to instruct the jury concerning the right to resist an unlawful arrest.

I.

Defendant argues that the trial court committed plain error in failing to give precautionary or curative jury instructions.

Where defendant fails to object to a jury instruction or the admission of evidence, this Court reviews defendant's

argument for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted).

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said 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 grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial[]" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Id. at 516–17, 723 S.E.2d at 334 (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). However, "even when the 'plain error' rule is applied, [i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 517, 723 S.E.2d at 334 (citation and quotation omitted).

Defendant contends the trial court committed plain error because it "gave no preliminary instruction on evidence that the jury could consider, and no curative instruction after it sustained defendant's or the [S]tate's objections."

Specifically, defendant argues the trial court erred in not instructing the jury that:

It is the right of the attorneys to object when testimony or other evidence is offered that the attorney believes is not admissible. When the court sustains an objection to a question, the jurors must disregard the question and the answer, if one has been given, and draw no inference from the question or answer or speculate as to what the witness would have said if permitted to answer. When the court overrules an objection to any evidence, you must not give such evidence any more weight than if the objection had not been made.

N.C.P.I.--Crim. 100.25 (2013). Defendant contends that in addition to failing to give the above preliminary instruction, the trial court further erred by failing to give curative instructions about the sustaining or overruling of an objection to the jury when either defendant or the State objected during witness testimony.

Here, defendant is correct in his assertion that the trial court did not instruct the jury about the effect of sustaining or overruling an objection to evidence during its preliminary jury instructions. The trial court also did not give curative instructions to the jury after ruling on either party's objections during the trial, other than to direct the examining party to revise the form of a question (such as to avoid leading

the witness, refrain from using the term "resisting," or to remind the witness to testify only about information of which the witness had first-hand knowledge). However, this Court has held that although it is preferable for the trial court to instruct the jury about the effect of sustaining/overruling an objection to the admission of evidence, the failure to give such instruction is not prejudicial to the defendant. See *State v. Cherry*, 55 N.C. App. 603, 607-08, 286 S.E.2d 368, 370-71 (1982) (holding that although "[i]t would be the better practice for trial courts, upon request, to tell jurors to disregard questions and the suggestions in questions to which objections were sustained[,] the trial court did not commit prejudicial error when it failed to give either a precautionary or curative instruction to the jury concerning the sustaining or overruling of evidentiary objections). As such, although we agree the better practice would have been for the trial court to give the precautionary jury instruction, we reject defendant's assertion that the trial court's failure to give this instruction constituted error. See *id.*

Moreover, assuming *arguendo* that the trial court's failure to instruct the jury in this manner was error, defendant has not demonstrated how this error rose to the level of plain error.

We reiterate that:

[t]he plain error rule applies only in truly exceptional cases. 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 probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed . . . upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

State v. Morgan, 315 N.C. 626, 645, 340 S.E.2d 84, 96 (1986)
(citations omitted).

Defendant notes that the trial court sustained many objections to the admission of evidence lodged by defendant during the trial. However, defendant does not assert that any evidence was improperly admitted by the trial court. Rather, defendant asserts only that once the trial court prevented the admission of evidence or sustained an objection to an improper question, the trial court did not give a curative instruction. Defendant's contentions do not indicate how the jury could have been prejudiced by any particular evidence that it should have not considered. Instead, defendant raises only a general

contention that the jury was exposed to incompetent or prejudicial evidence.

Here, the State presented testimony by Wilkins, Deputy Newsome, and Detectives Stroud, Pinner, and Bryan¹ that tended to show that when the detectives stopped Wilkins' truck and attempted to apprehend defendant, defendant actively resisted arrest by: pushing back against the detectives to thwart his removal from the truck; twice attempting to put the truck into drive to escape the detectives; and refusing to obey multiple verbal commands by the detectives to exit the vehicle. On this record, defendant has not shown that absent the error he alleges to have been committed the jury would have reached a different verdict. Accordingly, defendant's argument is overruled.

II.

Next, defendant contends the trial court erred in denying defendant's motion to dismiss the charge of assault on a government official. We disagree.

When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to

¹ Detective Foust did not testify at trial.

support a conclusion. This Court reviews the trial court's denial of a motion to dismiss *de novo*.

State v. Smith, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citations and quotation omitted).

During trial, the trial court granted defendant's motion to dismiss the charges of assault on a government official with a deadly weapon (Detective Bryan), driving while license revoked, and resisting a public officer (Detective Foust). The jury convicted defendant of the remaining charges, including one count of resisting a public officer (Detective Pinner) and one count on assault of a government official (Detective Pinner). Defendant concedes that there was sufficient evidence to support his conviction for resisting Detective Pinner², but contends there was insufficient evidence to show defendant assaulted Detective Pinner.

North Carolina General Statutes, section 14-33, provides that a person is guilty of a Class A1 misdemeanor if "in the course of the assault, assault and battery, or affray, he or she: . . . [a]ssaults an officer or employee of the State or any political subdivision of the State, when the officer or employee

² Defendant's indictment charging resisting a public officer as to Detective Pinner was based on defendant's "refus[al] to follow lawful commands."

is discharging or attempting to discharge his official duties[.]” N.C. Gen. Stat. § 14-33(c)(4) (2013). “To convict a defendant of this offense, the State must allege and prove: (1) an assault (2) on a government official (3) in the actual or attempted discharge of his duties.” *State v. Crouse*, 169 N.C. App. 382, 387, 610 S.E.2d 454, 458 (2005) (citation omitted). An assault can include both harmful or offensive physical contact, or the reasonable apprehension of such contact. *Id.*

The indictment against defendant for “Assault on a Government Official” stated that:

on or about the 4th day of February, 2011,
in [Pitt] County . . . defendant . . .
unlawfully and willfully did assault
Detective J. G. Pinner, a government officer
with the Pitt County Sheriff’s Office, by
kicking and flailing his arms. At the time
of the assault, the officer was performing
the following duty of that office,
attempt[ing] to arrest the defendant for
outstanding warrants, in violation of G. S.
14-[33].³

The evidence presented at trial showed that Detective Pinner, as a member of the Pitt County Sheriff’s Office, was acting as a government official in the performance of his duties

³ We note that the indictment listed the incorrect statute for this particular offense - N.C. Gen. Stat. § 13-34.2 (assault with a deadly weapon upon a government official) - rather than the correct statute, N.C. Gen. Stat. § 13-33. As it is clear from the language of the indicted offense that this error is merely a typo, we note the correction as presented above.

when he participated in the apprehension of defendant on 4 February 2011. Detective Pinner testified at trial that after he asked defendant to climb out of the truck and defendant refused, he attempted to reach into the truck to pull defendant out but that defendant used his hands and feet to push Detective Pinner away. Although defendant contends the evidence was insufficient to support a finding of assault because defendant kept his seatbelt fastened while Detective Pinner grabbed at him, the evidence, when viewed in the light most favorable to the State, showed that despite wearing his seatbelt, defendant kicked his feet and legs against Detective Pinner in an attempt to evade Detective Pinner while also trying to put the truck into drive. The evidence also showed the two men pushed at each other while trying to gain control of the truck's gearshift. At one point, defendant hit the gearshift and pressed the gas pedal, causing the motor to accelerate. However, because the vehicle was in neutral, the truck did not move. On a second attempt, defendant was able to put the vehicle into drive and move the truck into traffic before Detective Stroud was able to climb into the truck, return the gearshift to park, and turn off the truck's engine. This evidence was more than sufficient to support the

charge of assault by defendant on Detective Pinner, a government official.

Defendant also contends the trial court erred in failing to dismiss the charge of assault on a government official (Detective Pinner) because this charge was based on the same evidence as the charge of resisting a public officer (Detective Pinner) so that these convictions violate double jeopardy. A violation of double jeopardy occurs where a defendant is convicted, *on the same evidence*, of both resisting arrest and assault on a government official in the performance of his duties. See *State v. Raynor*, 33 N.C. App. 698, 701, 236 S.E.2d 307, 309 (1977) (emphasis added).

In the offense of resisting an officer, the *resisting* of the public officer in the *performance* of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense, while in the offense of assaulting a public officer in the performance of some duty, the *assault* on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. The legislative intent appears to be that if a public officer is assaulted in performing or attempting to perform any duty of his office, the provision of G.S. 14-33(c) (4) is applicable.

State v. Kirby, 15 N.C. App. 480, 488, 190 S.E.2d 320, 325 (1972). Where no "line of demarcation" can be drawn between defendant's acts of resistance and assault, the State may only pursue either the charge of resisting a public officer or assault on a government official. See *State v. Hardy*, 33 N.C. App. 722, 729, 236 S.E.2d 709, 713 (1977), *rev'd in part on other grounds*, 298 N.C. 191, 199-200, 257 S.E.2d 426, 432 (1979).

Defendant argues that he has been subjected to double jeopardy because the acts of resistance listed in both charges "concern exactly the same conduct[.]" Defendant's argument is without merit. The indictment clearly indicates that the charge of resisting a public officer was based upon defendant's failure to comply with Detective Pinner's verbal commands for defendant to exit the truck. Detective Pinner testified that when he approached Wilkins' truck, he first asked defendant to exit the truck at least twice while standing outside of the driver's side doorframe. Detective Pinner stated that after he waited for defendant to exit the vehicle and defendant remained seated with his seatbelt on, Detective Pinner then moved inside of the truck's doorframe so he could lean into the truck, across the driver's seat, to reach defendant. It was at that point that

defendant began using his hands and feet to prevent Detective Pinner from being able to subdue and arrest him. These aggressive actions by defendant formed the basis for the charge of assault on a government official. As such, there was a sufficient "line of demarcation" between defendant's refusal to comply with Detective Pinner's verbal commands, and defendant's assault upon Detective Pinner, to allow defendant to be properly convicted of both charges without being subjected to double jeopardy. Defendant's argument is, therefore, overruled.

III.

Finally, defendant argues that the trial court erred in failing to dismiss all charges of resisting a public officer. We disagree.

As discussed above in *Issue II*, the State's evidence was sufficient to show that defendant resisted Detective Pinner's verbal commands to exit the truck. Moreover, defendant conceded in his brief before this Court that the State did indeed present sufficient evidence that defendant had resisted Detective Pinner's commands.

The two other charges of resisting a public officer that reached the jury and, therefore, survived defendant's motion to dismiss, involved Detectives Stroud and Bryan and were based on

defendant's "refus[al] to follow lawful commands." A defendant who "willfully and unlawfully resist[s], delay[s] or obstruct[s] a public officer in discharging or attempting to discharge a duty of his office" has committed the offense of resisting a public officer. N.C. Gen. Stat. § 14-223 (2013). "The conduct proscribed under G.S. 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in the discharge of his duties." *State v. Lynch*, 94 N.C. App. 330, 332, 380 S.E.2d 397, 398 (1989).

At trial, Detective Stroud testified that he accompanied Detective Pinner to the driver's side of the truck and deployed his taser on defendant after defendant attempted to engage the truck's gearshift the first time. When defendant's second attempt to engage the truck's gearshift was successful, Detective Stroud stated that he leapt into the truck to apply the brake and turn off the engine. Detective Bryan testified that he, along with Detective Foust, approached the passenger side of the truck where defendant was seated. Detective Bryan stated that despite verbal commands to show his hands and open the door, defendant instead moved his hands downward. Further testimony by Detective Bryan indicated that defendant ignored additional verbal commands from Detectives Stroud and Pinner to

exit the vehicle and used his hands to flail against Detective Pinner. Detective Bryan stated that when he was finally able to unlock defendant's door, he had to use "an arm bar takedown to take [defendant] from the vehicle to the ground" after he "didn't see any signs that [defendant] was going to comply" with verbal commands to exit the truck. Defendant's argument that the trial court erred in failing to dismiss the charges of resisting a public officer as to Detectives Stroud and Bryan is, therefore, without merit, since the evidence shows that defendant clearly engaged in behavior which was intended to resist, obstruct, and delay his capture and arrest. As such, the trial court did not err in denying defendant's motion to dismiss as to these charges.

Defendant further argues that, in the alternative, the trial court erred in failing to charge the jury that one who resists an illegal arrest is not guilty of resisting a public officer. Specifically, defendant argues that because the detectives did not identify themselves or indicate their reason for apprehending him, and only served an arrest warrant on him hours later at the jail, defendant was entitled to defend himself from what was an illegal arrest.

It is well-established by our Courts that "[o]ne resisting an illegal arrest is not resisting an officer within the discharge of his official duties." *State v. Anderson*, 40 N.C. App. 318, 322, 253 S.E.2d 48, 51 (1979) (citations omitted). "An officer having a warrant for arrest in his possession may arrest the person named or described therein at any time and at any place within the officer's territorial possession." N.C. Gen. Stat. § 15A-401(a)(1) (2013). Where an officer knows that an arrest warrant has been issued but not yet executed for a defendant and does not have the warrant within his possession, the officer may still arrest that defendant. *Id.* § 15A-401(a)(2) (2013). A person arrested without a warrant must be served the warrant "as soon as possible." *Id.*

Deputy Newsome testified at trial that defendant had an outstanding arrest warrant, for failure to appear and show cause regarding child support, that was over a year old. Deputy Newsome further testified that he had attempted on multiple prior occasions to serve defendant with the warrant, but defendant had evaded him each time by fleeing. Deputy Newsome stated that he had repeatedly left notes on the door of defendant's residence in an attempt to reach him. On one occasion when Deputy Newsome saw defendant, he called out to

defendant, and defendant began to run away. As he chased after defendant on foot, Deputy Newsome said that he yelled to defendant that "you're under arrest. You know I got warrants." Defendant's actions in actively evading apprehension by Deputy Newsome, despite Deputy Newsome telling defendant that he was under arrest, indicates defendant was well-aware of his outstanding arrest warrants. Defendant's argument is without merit.

Defendant further argues that he was illegally arrested because he was not promptly served with the arrest warrant. Pursuant to N.C.G.S. § 15A-401(a)(2), an arrest warrant should be served "as soon as possible." *Id.* Deputy Newsome testified that as soon as he was notified of defendant's arrest, he "advised over the radio that I would be en route with the warrant." Upon arriving at the scene, Deputy Newsome testified that defendant was in the process of being transported to the hospital to receive treatment for injuries he had sustained during his arrest. Deputy Newsome stated that defendant was finally served with the warrant upon his arrival at the jail several hours later, after having been treated and discharged from the hospital. Defendant's contention that he was illegally arrested because he was not promptly served with an arrest

warrant is, therefore, without merit, since the evidence indicates that Deputy Newsome tried to promptly serve defendant with the arrest warrant upon his arrest but could not do so because defendant had been taken to the hospital for treatment. Moreover, based on the circumstances of the instant case, all of the evidence indicates that defendant was served by Deputy Newsome "as soon as [practically] possible." Accordingly, defendant's argument is overruled.

No error.

Judges ELMORE and ERVIN concur.

Report per Rule 30(e).