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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-418

Filed: 15 December 2015

Pitt County, Nos. 13 CRS 60236–37, 60239–40

STATE OF NORTH CAROLINA

v.

KEDRON DEVON LYONS

Appeal by Defendant from judgments dated 1 August 2014 by Judge Marvin K. Blount, III in Superior Court, Pitt County. Heard in the Court of Appeals 3 December 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Donna Elizabeth Tanner, for the State.*

*Wait Law, P.L.L.C., by John L. Wait, for Defendant-Appellant.*

McGEE, Chief Judge.

Kedron Devon Lyons (“Defendant”) was convicted on 1 August 2014, *inter alia*, for assault inflicting physical injury on a person employed at a local detention facility (“AIPIPELDF”). Defendant argues on appeal that the trial court committed plain error when instructing the jury on the charge of AIPIPELDF. We find no plain error.

STATE V. LYONS

*Opinion of the Court*

I. Background

Joe Toler (“Officer Toler”) and William Brown (“Officer Brown”), detention officers at Pitt County Detention Center, were helping to feed inmates on 19 November 2013, by distributing food trays to the prisoners. The officers had already given Defendant his tray and were in the process of retrieving the tray. Officer Toler approached Defendant’s prison cell, inserted the key, and “opened the trap” through which the tray had been passed. After the trap was opened, Defendant threw a cup of feces at the officers. The feces landed on the officers’ uniforms and on the floor. In response, Officer Toler shot a burst of pepper spray into Defendant’s prison cell and then notified his superior officer, Sergeant Craig Bounds (“Sergeant Bounds”), of the incident.

Sergeant Bounds went down to the cell block and observed Officers Toler and Brown with feces on their uniforms. Sergeant Bounds then approached Defendant’s cell and asked him to put his hands through the trap so he could handcuff Defendant. Defendant refused but eventually backed away from the cell door. Sergeant Bounds then signaled for the cell door to be opened. When the door opened, Defendant stepped out and hit Sergeant Bounds with a “roundhouse” punch to the side of his face. Officers Toler and Brown attempted to take control of Defendant, and the four men ended up on the ground with Sergeant Bounds on the bottom of the pile. Eventually, Officer Toler hit Defendant in the head several times with his radio and Defendant stopped resisting. Defendant was handcuffed and placed in a holding cell.

At trial, the jury convicted Defendant, *inter alia*, of assault inflicting physical injury on a person employed at a local detention facility. Defendant appeals.

## II. Plain Error Analysis

Defendant argues the trial court committed plain error by failing to specifically identify Sergeant Bounds as the victim of the alleged AIIPELDF in its jury instructions. Defendant contends that the trial court instead referred to Sergeant Bounds as “the victim” in the AIIPELDF instructions, and that this “opened the possibility that the jury’s verdict was not unanimous[.]” Specifically, Defendant claims that the trial court’s use of “the victim” during the instructions for AIIPELDF, instead of expressly naming Sergeant Bounds, “could have allowed some members of the jury to conclude that [Defendant] committed an assault on one of the other officers [involved in the physical confrontation with Defendant,] instead of [Sergeant] Bounds.”

As a preliminary matter, Defendant did not object to the trial court’s instructions to the jury. Therefore, we review his argument for plain error. *State v. Lawrence*, 365 N.C. 506, 517–18, 723 S.E.2d 326, 333–34 (2012). Under the plain error standard of review, “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.” *Id.* at 518, 723 S.E.2d at 334 (citations and quotation marks omitted). Moreover, “because plain error is to

STATE V. LYONS

*Opinion of the Court*

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.”

*Id.* (citations and quotation marks omitted).

In support of his contention that the trial court committed plain error, Defendant primarily directs this Court to *State v. Lyons*, 330 N.C. 298, 301, 412 S.E.2d 308, 311 (1991), which held that disjunctive jury instructions violate a defendant's right to a unanimous verdict. In *Lyons*, the trial court instructed the jury that it could convict the defendant of a particular assault charge if he committed certain acts against one person “and/or” another person. *Id.* at 302, 412 S.E.2d at 311. The North Carolina Supreme Court held that this instruction “allow[ed] the jury to find [the] defendant guilty if he commit[ted] either of two underlying acts, *either of which is in itself a separate offense*, [and therefore was] fatally ambiguous because it [was] impossible to determine whether the jury unanimously found that the defendant committed one particular offense.” *Id.* at 302–03, 412 S.E.2d at 312. This “violat[ed] [the] defendant's right to be convicted by a unanimous jury.” *Id.* at 302, 412 S.E.2d at 311. Accordingly, Defendant contends that the trial court’s use of “the victim” in its instructions for AIIPELDF also allowed the jury to convict Defendant of this charge without unanimity.

We are unpersuaded. Unlike *Lyons*, the trial court in the present case did not present the jury with an expressly disjunctive jury instruction. Instead, the trial

STATE V. LYONS

*Opinion of the Court*

court's instructions for AIIPELDF specifically referred to a single "victim[.]" In fact, those instructions not only referred to "the victim" but also indicated that "the victim" was an "officer supervisor" at the detention center. Sergeant Bounds was the only witness who testified at trial that he was a supervisor at the detention center, and he was the only witness who testified at trial that he was injured due to a physical assault by Defendant.<sup>1</sup> The State also correctly notes in its brief that the North Carolina Pattern Jury Instructions explicitly uses the term "the victim" in the pattern instructions for AIIPELDF, *see* N.C.P.I. Crim. 208.81G, and this Court has found no plain error in other cases in which the trial court "referr[ed] to the prosecuting witnesses as 'victims' in its jury charge" in accordance with the North Carolina Pattern Jury Instructions. *See State v. Richardson*, 112 N.C. App. 58, 66, 434 S.E.2d 657, 663 (1993). After examining the entire record, we find no plain error. *See Lawrence*, 365 N.C. at 517–18, 723 S.E.2d at 333–34.

NO PLAIN ERROR.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).

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<sup>1</sup> Defendant also concedes in his brief that his indictment for AIIPELDF "sufficient[ly]" identified Sergeant Bounds as the only alleged victim of a physical assault by Defendant. Moreover, at the beginning of Defendant's trial, the trial court informed the jury that the "alleged victim [of the AIIPELDF charge] is [Sergeant] Bounds."