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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1005

Filed: 2 May 2017

Washington County, No. 13 CRS 50002-50005

STATE OF NORTH CAROLINA

v.

AILKEEM ANTHONY NORMAN

Appeal by defendant from judgment entered 13 April 2016 by Judge J. Carlton Cole in Washington County Superior Court. Heard in the Court of Appeals 6 April 2017.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Douglas W. Corkhill, for the State.*

*Irons & Irons, P.A., by Ben G. Irons II, for defendant-appellant.*

TYSON, Judge.

Ailkeem Anthony Norman (“Defendant”) appeals from judgment entered after a jury convicted him of misdemeanor carrying a concealed weapon, felony carrying a concealed gun, resisting a public officer, and assault with a firearm on a law enforcement officer. We hold the trial court erred by failing to instruct the jury on

the assault element of assault on a law enforcement officer. That cause is reversed and remanded to the trial court for a new trial on that charge.

We further vacate Defendant's conviction for felony carrying a concealed gun and remand for entry of judgment and resentencing for the lesser-included offense of misdemeanor carrying a concealed weapon.

### I. Factual Background

On 3 January 2013, North Carolina State Patrol Trooper Buddy Alan Davis ("Trooper Davis") stopped Defendant's vehicle for speeding and approached the vehicle to speak with Defendant, the driver. Defendant appeared to be nervous, fidgety, and was talking fast. When Defendant produced his driver's license, Trooper Davis noticed Defendant had what appeared to be a marijuana cigarette placed behind his ear and asked Defendant about it. Defendant stated, "it was weed," and handed the cigarette to Trooper Davis. After securing the marijuana cigarette in his patrol vehicle, Trooper Davis decided to detain Defendant.

Trooper Davis walked back to Defendant's vehicle, noticed Defendant was "digging" through the glove box, and asked what Defendant was doing. Defendant responded he was looking for his driver's license and registration, even though he had already given these documents to Trooper Davis. Trooper Davis became concerned for his safety and requested Defendant to stop "digging" and to pay attention to him. When Defendant did not listen to these instructions, Trooper Davis reached inside

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the window and pulled Defendant away from the glove box. Defendant then tried to open the car door.

Trooper Davis testified he continued to struggle with Defendant and repeatedly asked Defendant to calm down or else he would use force. When Defendant finally calmed down, Trooper Davis opened the car door and told Defendant to exit his vehicle. When he tried to turn Defendant towards the car, Defendant “immediately tried to jerk away and attempted to . . . run[.]” Trooper Davis tried to restrain Defendant and instructed him to again stop resisting.

Trooper Davis testified Defendant “was trying to get his right hand into his coat pocket. He was trying very hard[.]” Defendant successfully reached his hand into his pocket, but Trooper Davis grabbed Defendant’s wrists. At that point, Defendant and Trooper Davis tumbled down an embankment. Trooper Davis landed on top of Defendant, who was face down upon the ground. Defendant continued to struggle with Trooper Davis and continued to reach into his pocket. He told Trooper Davis that law enforcement officers kept “bothering” him.

Trooper Davis then observed a .22 caliber revolver on the ground underneath where they were struggling. Trooper Davis testified “[a]t that point [he] knew that [he] was fighting for [his] life.” Trooper Davis grabbed the revolver and threw it out of reach.

Trooper Davis eventually was able to handcuff Defendant with the aid of a passing motorist. Trooper Davis patted down Defendant and found two knives and multiple .22 caliber bullets inside of Defendant's pockets. Trooper Davis secured the revolver, which contained two loaded rounds and one spent bullet. During a search of the vehicle, Trooper Davis also found another knife, a set of brass knuckles, and an ice pick in the passenger area.

A video camera mounted in Trooper Davis' patrol vehicle recorded this entire incident and was played before the jury. Trooper Davis testified he did not hear a gunshot during the struggle and never saw the revolver in Defendant's hands. However, Trooper Davis testified he was able to hear a "very distinctive gunshot" on the recording approximately fifteen seconds after he and Defendant had rolled down the embankment. When asked why he did not hear a gunshot during the struggle, Trooper Davis explained in a combat setting one of the body's defensive techniques involves losing certain senses, such as hearing.

Defendant was charged with misdemeanor counts of carrying a concealed weapon, resisting arrest, and possession of drug paraphernalia. He was also charged with the felony counts of carrying a concealed gun and assault on a law enforcement officer with a firearm. On 22 January 2013, Defendant had his first court appearance in district court, during which he waived a probable cause hearing on the felonies, pled guilty to both misdemeanors, and appealed the misdemeanors to superior court.

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On 22 April 2013, Defendant was indicted for felony offenses of carrying a concealed weapon and assault on a law enforcement officer with a firearm. The indictment for the felony offense of carrying a concealed weapon stated:

The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above, the defendant named above unlawfully, willfully and feloniously did knowingly carry concealed about his person while off the defendant's premises a deadly weapon, Rohm .22 caliber revolver. The defendant was previously convicted of carrying a Concealed Weapon in violation of N.C.G.S. 14-269(A)(1) on January 27, 2008 in Washington County District Court.

After trial on 13 April 2016, the jury convicted Defendant on all counts. Defendant was sentenced to an active term of 33 to 49 months on the assault of law enforcement officer with a firearm. The remaining charges were consolidated for judgment and the trial court sentenced Defendant to a consecutive term of 6 to 17 months, which was suspended and Defendant was placed on supervised probation for 36 months. As a condition of his probation, Defendant was required to serve an active term of 4 months following the time served for the assault charge. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in the Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444(a) (2015).

III. Issues

Defendant contends the trial court: (1) erred or plainly erred when it failed to define the assault element of assault on a law enforcement officer; (2) lacked jurisdiction to impose judgment and sentence for the felony offense of carrying a concealed gun, and (3) erred when it failed to arraign Defendant upon a special indictment after the commencement of the trial.

#### IV. Jury Instruction

Defendant contends the trial court erred or plainly erred when it failed to define the assault element of assault on a law enforcement officer in its initial instruction to the jury and subsequently when the jury asked for clarification. Defendant argues this alleged error was properly preserved under Rule 10(a)(2) of the North Carolina Rules of Appellate Procedure.

##### A. Standard of Review

Appellate Rule 10(a)(2) provides:

*Jury Instructions.* A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

When a defendant fails to object to the jury instruction, this Court reviews for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). To demonstrate plain error, the “defendant must show that the erroneous jury

instruction was a fundamental error—that the error had a probable impact on the jury verdict.” *Id.*

The appealing party must not only show that an error occurred in the jury instruction, but also “that such error was likely, in light of the entire charge, to mislead the jury.” *State v. Barrow*, 216 N.C. App. 436, 446, 718 S.E.2d 673, 679 (2011) (citations and quotation marks omitted), *aff’d*, 366 N.C. 141, 727 S.E.2d 546 (2012). Only in rare cases will improper instructions, when viewed in their entirety, “justify reversal of a criminal conviction when no objection has been made in the trial court.” *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378 (1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed.2d 203, 212 (1977)).

Here, Defendant contends he relied upon the court’s assurances during the charge conference that the pattern jury instructions would be given, which includes a definition of assault. As such, he did not have an opportunity to object when the court read the instruction without including the agreed upon definition of assault. However, the transcript shows, once the jury retired after hearing the instructions, the trial court asked counsel for both parties whether there were any corrections or additions to the jury instructions. Defense counsel indicated he did not propose any corrections.

Furthermore, when the jury later requested clarification on what constitutes assault on an officer, the trial court suggested the previously given instruction be

read again to the jury. At no point did Defendant object to this re-instruction nor request any additional or different instruction to be given. With the lack of any objection where several opportunities were provided, we review Defendant's contention for plain error.

B. Plain Error Analysis

When instructing the jury, the trial court

is not required to follow any particular form and has wide discretion as to the manner in which the case is presented to the jury, but it has the duty to explain, without special request therefor, each essential element of the offense and to apply the law with respect to each element to the evidence bearing thereon.

*State v. Mundy*, 265 N.C. 528, 529, 144 S.E.2d 572, 573 (1965).

This Court has noted “[a]n assault is a legal term with which jurors are not apt to be familiar. We think it incumbent upon the trial judge to define or otherwise explain to a jury the meaning of the legal term ‘assault.’” *State v. Hickman*, 21 N.C. App. 421, 423, 204 S.E.2d 718, 719 (1974). As such, a new trial is required where a challenged jury instruction failed to include any instruction defining the element of assault or which acts constitute an assault. *See id.* (ordering a new trial where the instruction stated the jury must return a guilty verdict if it finds “the defendant assaulted the victim with a knife”); *State v. Lineberger*, 115 N.C. App. 687, 690, 446 S.E.2d 375, 377 (1994) (ordering a new trial where the jury instruction failed to

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properly define assault, but stated “defendant assaulted [victim] intentionally and without justification or excuse, striking or bumping against him with his shoulder”).

However, our courts have held a jury instruction is sufficient where it “otherwise explain[s] an assault to the jury so that they [have] no question as to the meaning of the term,” even if it fails to include a definition of assault. *State v. Springs*, 33 N.C. App. 61, 64, 234 S.E.2d 193, 196 (1977); see *State v. Hewitt*, 34 N.C. App. 152, 153, 237 S.E.2d 338, 339 (1977) (upholding the instruction, “defendant assaulted [victim] by intentionally shooting him with a pistol”).

Here, the pattern jury instruction agreed upon by the parties provides that in order for a jury to find a defendant guilty of assault on a law enforcement officer, the State must prove beyond a reasonable doubt “defendant assaulted the victim intentionally . . . (*describe assault*).” N.C.P.I. Crim. 208.95 (2016). When instructing the jury, the trial court stated: “First, that the defendant assaulted the victim by intentionally and without justification and/or excuse with a deadly weapon and handgun[.]” These instructions do not define assault nor do they otherwise explain to the jury what acts constituted the assault. See *Hickman*, 21 N.C. App. at 423, 204 S.E.2d at 719; *Hewitt*, 34 N.C. App. at 153, 237 S.E.2d at 339.

Under plain error review, we must also determine whether this error, in light of the entire charge, “had a probable impact on the jury verdict.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Prior to the instruction on assault on a law enforcement

officer, the trial court instructed the jury on both actual and constructive possession. Defendant acknowledges this instruction by itself was not erroneous. However, Defendant argues the instruction on possession, combined with the failure to instruct on the definition of assault, left the jury with the impression that actual or constructive possession of a pistol and the discharge of it constituted an assault.

The trial court may exercise its discretion when the jury requests clarification or additional instructions. *See State v. Hockett*, 309 N.C. 794, 802, 309 S.E.2d 249, 253 (1983) (holding the trial court erred by refusing to, at the very least, review the elements of the offense where the “jury did not understand the differences in the degrees of the offenses and did not understand how the presence or absence of a gun would affect the degree of guilt as to both offenses”).

However, a key question for the jury’s determination was whether Defendant had assaulted Trooper Davis. The jury could not make that determination without the trial court providing a definition of assault or explaining what act or acts constituted the assault. *See id.*; *Hickman*, 21 N.C. App. at 423, 204 S.E.2d at 719; *Lineberger*, 115 N.C. App. at 691-92, 446 S.E.2d 375, 378-79.

Furthermore, as in both *Hockett* and *Lineberger*, the instruction’s failure to define assault apparently confused the jury. This confusion is demonstrated by the jury’s note to the trial court: “[w]e also need to know what constitutes an assault on an officer?” The trial court never answered this question, but instead re-read its

previous instructions to the jury, which did not sufficiently define or otherwise explain what acts constituted an assault. The jury instructions in this case constituted plain error with sufficient prejudice to award Defendant a new trial. We reverse and remand for new trial on assault of a law enforcement officer.

V. N.C. Gen. Stat. § 15A-928 Violations

Defendant argues the indictment charging felony carrying a concealed weapon is fatally defective for failure to include a separate indictment for Defendant's prior conviction as required by N.C. Gen. Stat. § 15A-928. Defendant further contends the trial court did not properly arraign him under N.C. Gen. Stat. § 15A-928(c).

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Special Indictment Requirement

The State acknowledges this Court is bound by our previous decision in *State v. Brice* and must hold Defendant's indictment on this charge to be fatally defective. See *State v. Brice*, \_\_ N.C. App. \_\_, \_\_, 786 S.E.2d 812, 815 (holding where the indictment did not comply with the requirements of N.C. Gen. Stat. § 15A-928, the trial court was without jurisdiction to enter judgment against defendant for habitual misdemeanor larceny), *disc. review allowed*, \_\_ N.C. \_\_, 793 S.E.2d 868 (2016).

Based upon this binding precedent, to charge a defendant with felonious carrying a concealed weapon, the State must comply with N.C. Gen. Stat. § 15A-928 and allege the prior misdemeanor conviction in a special indictment or a separate count. Here, the trial court lacked jurisdiction to enter judgment upon the felony conviction, because the indictment for felony carrying a concealed gun incorporated the prior misdemeanor in the same count, “effectively rendering the indictment one which charged only a misdemeanor[.]” *State v. Sullivan*, 111 N.C. App. 441, 443-44, 432 S.E.2d 376, 378 (1993).

As the State concedes, the indictment charging Defendant with felony carrying a concealed weapon was invalid. *See Brice*, \_\_ N.C. App. at \_\_, 786 S.E.2d at 815. The indictment was not accompanied by a separate indictment nor did it allege the prior misdemeanor conviction in a separate count. We vacate Defendant’s conviction for felony carrying a concealed weapon and remand for entry of judgment and resentencing on the misdemeanor offense of carrying a concealed weapon.

### C. Failure to Properly Arraign

Defendant also argues the error in his indictment was compounded when the trial court failed to arraign him outside the presence of the jury and advise him according to N.C. Gen. Stat. § 15A-928(c).

The purpose of N.C. Gen. Stat. § 15A-928 “is to insure that the defendant is informed of the previous convictions the State intends to use and is given a fair

opportunity to either admit or deny them or remain silent.” *State v. Jernigan*, 118 N.C. App. 240, 244, 455 S.E.2d 163, 166 (1995). Before the close of the State’s case, the trial court must arraign the defendant in the absence of the jury upon the special indictment. N.C. Gen. Stat. § 15A-928(c) (2015). The court must advise the defendant that he may admit the previous conviction, deny it, or remain silent. *Id.* If the defendant admits the previous conviction, that element of the higher grade offense is established, and no evidence in support thereof may be adduced by the State. N.C. Gen. Stat. § 15A-928(c)(1). If the defendant denies the previous conviction or remains silent, the State may prove that element of the higher grade offense before the jury as a part of its case. N.C. Gen. Stat. § 15A-928(c)(2).

The failure to arraign a defendant pursuant to N.C. Gen. Stat. § 15A-928(c) is not always reversible error. *Jernigan*, 118 N.C. App. at 244, 455 S.E.2d at 166. “Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding.” *Id.* (quoting *State v. Smith*, 300 N.C. 71, 73, 265 S.E.2d 164, 166 (1980)).

Defendant argues this error was prejudicial, because the trial court never made him aware of his right to keep his previous conviction for carrying a concealed weapon from being presented to the jury. Defendant asserts when the State presented evidence of his prior offense, it allowed the jury to infer that he was guilty

of all the other offenses for which he was tried and this inference is impermissible under Rule 404(b) of the North Carolina Rules of Evidence. He argues this error affected the assault on a law enforcement officer charge where the trial court failed to adequately instruct the jury on the definition or actions constituting the assault.

It is unnecessary for us to address Defendant's contention that he was prejudiced when the trial court failed to properly arraign and advise him under N.C. Gen. Stat. § 15A-928(c), since we vacate Defendant's felony carrying a concealed gun conviction and remand the assault on a law enforcement officer charge for a new trial based on the erroneous jury instruction.

Presuming, *arguendo*, that the evidence of his previous conviction was inadmissible, Defendant has not shown that "he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded." *State v. Harper*, 96 N.C. App. 36, 42, 384 S.E.2d 297, 300 (1989).

#### VIII. Conclusion

The trial court's failure to define or otherwise explain the assault element in its instructions on assault on a law enforcement officer constituted plain error. Defendant's conviction is vacated and remanded for new trial on that charge.

Furthermore, we vacate Defendant's conviction and judgment entered thereon for felonious carrying a concealed gun and remand for resentencing on misdemeanor carrying a concealed weapon.

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Our review of the record concludes any asserted errors do not prejudicially affect Defendant's other convictions for misdemeanor carrying a concealed weapon or resisting a public officer. Those convictions remain undisturbed.

VACATED AND REMANDED FOR NEW TRIAL IN 13 CRS 050005;  
REVERSED IN PART AND REMANDED FOR RESENTENCING IN 13 CRS  
50004.

Judges McCULLOUGH and DILLON concur.

Report per Rule 30(e).

Judge McCULLOUGH concurred in this opinion prior to 24 April 2017.