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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1195

Filed: 6 June 2017

Pitt County, No. 14 CRS 60547-48

STATE OF NORTH CAROLINA

v.

RUTH WALKER

Appeal by defendant from judgment entered 17 February 2016 by Judge Milton F. Fitch, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 15 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

TYSON, Judge.

Ruth Walker (“Defendant”) appeals from judgments entered after a jury convicted her of assault and battery and of felonious breaking and entering to terrorize and injure. We find no error.

I. Factual Background

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Joshua Walker (“Joshua”) lived with his mother, Ebony Walker (“Ms. Walker”), Defendant’s sister, until November 2014. In November 2014, when Joshua was fourteen years old, he moved in with his father, Samuel Cogdell, Jr.; his step-mother, Megan Simmons; and their two children ages three and four. His parents hoped a change in his living situation would improve his behavioral issues.

The undisputed testimony shows on the day after Christmas, 26 December 2014, Joshua returned to his father’s home to retrieve some of his belongings. He was accompanied by Ms. Walker and his aunt, Defendant. This encounter ended in a fist fight, from which Ms. Simmons emerged with bruises on her face and right arm. The testimony presented to the jury differs and is sharply contrasting.

A. State’s Evidence

The State’s evidence tended to show after a month living in his father’s home, Joshua left and returned to live with his mother at least a week prior to the incident. Joshua’s departure was due to his behavioral issues escalating while living at his father’s house. Ms. Simmons testified she requested Ms. Walker to call Mr. Cogdell to arrange a time for Joshua to retrieve his remaining belongings.

On 26 December 2014 at approximately 11:30 a.m., Ms. Walker called Mr. Cogdell. Mr. Cogdell indicated he would check to see whether Joshua had left anything at Mr. Cogdell’s home after he got off work that day at 5:00 p.m. He asked Ms. Walker not to come to his house until after he called her that evening. In

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response, Ms. Walker stated, “We’re going to get her.” Mr. Cogdell testified he was unsure what Ms. Walker meant by the comment, but it “scared” him and he left work immediately to drive home. When he arrived home, he testified he found the door kicked in, Ms. Simmons outside and injured, and his younger children crying inside the house. Ms. Walker, Defendant, and Joshua had already left before he arrived.

Ms. Simmons testified that, on the day after Christmas around lunchtime, she and her children were in the living room watching television. She testified her “door just bust[ed] open.” Joshua, Ms. Walker, and Defendant entered her home without permission and without knocking. Ms. Simmons also testified Joshua “came on through and proceeded to go to the bedroom where he had his things[.]” Defendant and Ms. Walker stood inside the front entrance into the house, which is located in Ms. Simmons’ bedroom. Ms. Simmons told Defendant and Ms. Walker to leave. Ms. Simmons’ grandmother, who lived in an adjacent house, also entered the room.

When Joshua came back through the house with his belongings, he pushed by Ms. Simmons and she ended up against the wall. Ms. Simmons testified, at the same time, Defendant jumped on top of her and started punching her in the face repeatedly, while Ms. Walker held her feet. Ms. Simmons “remember[ed] Joshua saying get her.” Ms. Simmons “fought with everything that [she] had.”

Ms. Simmons’ grandmother testified when she entered the room, she observed Defendant standing over Ms. Simmons and “beating her, beating her all in the face

and everywhere.” When she threatened to call her son, Defendant and the others left.

Ms. Simmons called the police, who responded and took pictures of her injuries. The photos entered into evidence show Ms. Simmons’ injuries of bruising and swelling around her left eye, temple, and elbow. Ms. Simmons also testified her young children witnessed the events and were “crying hysterically.”

B. Defendant’s Evidence

Defendant did not testify at trial. Ms. Walker testified Joshua was at her house on the morning of 26 December 2014, but he was still living with his father. Ms. Walker and Joshua each testified Ms. Simmons had called that morning and asked them to come get Joshua’s belongings. Ms. Walker testified she did not speak with Mr. Cogdell that day.

Ms. Walker testified that she and Defendant waited outside, while Joshua went inside the house and returned with the first load of his belongings. After Joshua went inside the house a second time, Defendant moved to stand on the porch. Ms. Walker testified she heard Defendant say, “that’s my nephew,” and saw Defendant enter into the house. Ms. Walker heard yelling between Defendant and Ms. Simmons and heard one of them say “I’m going to get the gun.” Ms. Walker stated she never entered the house, but called 911 and told the dispatcher her son was being threatened by his step-mother.

Joshua testified when he went inside the house to get his clothes, Ms. Simmons tried to stop him from going into his room and punched him in the lip. He knocked her down, retrieved his clothes, and told Defendant that Ms. Simmons had hit him. Joshua testified when he returned for the rest of his clothes, he tripped and knocked into Ms. Simmons' grandmother. Ms. Simmons thought Joshua had hit her grandmother, and jumped on top of him.

As Joshua and Ms. Simmons were wrestling on the floor, Defendant came to aid Joshua and Ms. Simmons kicked Defendant in the stomach. Joshua testified Ms. Simmons and Defendant began fighting each other, and he heard Ms. Simmons say she was going to get a gun. After that, Joshua, Ms. Walker, and Defendant left, and Ms. Walker called the police again and "said no one was hurt and [they] were safe." No evidence of any injuries to Joshua, Ms. Walker, or Defendant was presented to the jury.

C. Procedural Background

Defendant was charged with breaking and entering to terrorize and injure, conspiracy to commit breaking and entering to terrorize, and two counts of misdemeanor assault. On 16 February 2016, Defendant and Ms. Walker's charges were tried jointly before a jury. One of Defendant's charges for assault was dismissed at the close of the State's evidence.

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The jury acquitted Defendant of conspiracy to commit breaking and entering to terrorize, but returned a verdict of guilty of breaking and entering to terrorize and injure and guilty of one count of misdemeanor assault. Defendant was sentenced to an active term of 8 to 19 months for felony breaking and entering to terrorize and injure, and to 45 days for the misdemeanor assault. Defendant appeals.

II. Jurisdiction

Jurisdiction from a final judgment in a superior court criminal case lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2015).

III. Issues

Defendant argues the trial court erred when it denied her motion to dismiss her charge for breaking and entering to terrorize and injure for insufficient evidence. Defendant also contends the trial court erred by giving instructions to the jury, which (1) failed to define “terrorize,” and (2) failed to instruct on defense of a family member where sufficient evidence supported such an instruction.

IV. Motion to Dismiss for Insufficient Evidence

Defendant argues the trial court erred by failing to grant her motion to dismiss after the State presented insufficient evidence to show she possessed the intent to terrorize and the intent to injure at the time of the breaking and entering.

A. Standard of Review

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The standard of review for a trial court's denial of a motion to dismiss for insufficient evidence is *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). This Court must determine whether the State has offered "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation and quotation marks omitted). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993).

B. Analysis

N.C. Gen. Stat. § 14-54(a1) (2015) provides:

Any person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony.

While this Court has not yet addressed what constitutes "intent to terrorize or injure" under this statute, "terrorize" has been repeatedly defined for the purposes of kidnapping as, more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension. *State v. Surrentt*,

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109 N.C. App. 344, 349, 427 S.E.2d 124, 127 (1993) (internal citations and quotation marks omitted); *State v. Watson*, 169 N.C. App. 331, 337-38, 610 S.E.2d 472, 477 (2005) (defining terrorize as “[t]o fill or overpower with terror; terrify” for the purposes of the felony stalking statute).

Under N.C. Gen. Stat. § 14-54(a1), the intent to terrorize or injure must exist at the time of entry. *See State v. Ly*, 189 N.C. App. 422, 430, 658 S.E.2d 300, 306 (2008) (“An essential element of the crime is that the intent exist at the time of the breaking or entering.” (citation and quotation marks omitted)); *State v. Costigan*, 51 N.C. App. 442, 444, 276 S.E.2d 467, 468 (1981).

If a defendant does not have the requisite intent to terrorize or injure at the time of entry, she cannot be found guilty under N.C. Gen. Stat. § 14-54(a1). *See e.g., State v. Montgomery*, 341 N.C. 553, 566, 461 S.E.2d 732, 739 (1995) (holding if the defendant does not possess the intent to commit a felony at the time of entry, he may only properly be convicted of misdemeanor breaking or entering).

To sustain the charge and survive dismissal, “the State must offer substantial evidence that defendant broke or entered the building with the requisite criminal intent.” *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015). Our Court has held:

Intent is a mental attitude and can seldom be proved by direct evidence and is most often proved by circumstances from which [it] can be inferred. . . . Under G.S. 14-54, if a person breaks or enters one of the buildings described

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therein with intent to commit the crime . . . he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent[.]

Costigan, 51 N.C. App. at 444, 276 S.E.2d at 468 (internal citations and quotation marks omitted); see *Montgomery*, 341 N.C. at 566, 461 S.E.2d at 739 (holding intent “can but need not be inferred from the defendant’s subsequent actions.”).

Here, the State’s evidence tended to show Ms. Walker stated to Mr. Cogdell, “[w]e’re going to get her” during her call to him around 11:30 a.m., prior to Ms. Walker, Defendant, and Joshua’s arrival at his home. While Mr. Cogdell admitted he did not know exactly what Ms. Walker meant by the statement, it scared him enough that he immediately left work and drove home to check on his family.

The State’s evidence further showed (1) Ms. Walker, Defendant, and Joshua burst through the door without knocking, entered the home without permission, and the door of the house had been broken; (2) Joshua said “get her” while Defendant was on top of Ms. Simmons; (3) Ms. Simmons was badly beaten by Defendant without provocation; and (4) Ms. Simmons’ two young children witnessed the entire event and were “crying hysterically.” Viewed in the light most favorable to the State, this evidence was sufficient for the jury to answer the question of Defendant’s intent to terrorize and injure Ms. Simmons.

V. Failure to Define Terrorize in Jury Instructions

Defendant argues the trial erred committed plain error by failing to instruct the jury on the definition of “terrorize.”

A. Standard of Review

When a defendant fails to object to the jury instructions, this Court reviews for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012); N.C. R. App. 10(a)(2). To demonstrate plain error, the appealing party must not only show that an error occurred in the jury instruction, but also “that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334; see *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (holding the error must be “so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached”). Only in rare cases will improper instructions “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)).

B. Analysis

Defendant argues the trial court erred when it failed to define “terrorize” in the jury instructions. Defendant failed to object to the instruction for breaking and

entering with intent to terrorize and injure, and she did not request the court to define “terrorize” in the jury instructions. We review her argument for plain error.

The trial court carries “the affirmative duty to explain the law of the case sufficiently enough for the jury to understand it, and make an intelligent determination of the evidence with respect to the law.” *State v. Patton*, 18 N.C. App. 266, 268, 196 S.E.2d 560, 561 (1973). The trial court is not required “to instruct with any greater particularity upon any element of the offense than is necessary to enable the jury to apply that law to the evidence bearing on the element.” *Id.* In the absence of a request for special instructions, the trial court does not err when it fails “to define and explain words of common usage and meaning to the general public.” *Id.*; see *Watson*, 169 N.C. App. at 337, 610 S.E.2d at 477 (applying the “common usage” of the word terrorize, which is defined as “[t]o fill or overpower with terror; terrify,” to conclude the felony stalking statute was not unconstitutionally vague).

The trial court instructed the jury as agreed upon by the parties and as set out in the pattern jury instructions. While the pattern jury instruction for N.C. Gen. Stat. § 14-54(a1) includes a footnote on the definition of terrorize, unlike the pattern jury instruction for kidnapping, “terrorize” is not defined within the body of the instruction for breaking and entering with intent to terrorize. Absent an objection or request for specific instructions, Defendant has failed to show the trial court’s failure to define “terrorize” constitutes plain error.

VI. Defense of Family Member

Defendant also argues the trial court erred by failing to instruct on “assault in lawful defense of a family member.” *See* N.C.P.I. Crim. 308.47 (2012).

A. Standard of Review

Defendant provided the State prior written notice of her intent to raise the affirmative defenses of self-defense and defense of a family member. The parties stipulated in the record on appeal that at the close of the first day of trial: (1) defense counsel requested the jury be instructed on defense of a family member and handed the judge a copy of the instruction; (2) the transcript includes a statement from the assistant district attorney stating he did not have any objection to that request, and (3) the transcript records the judge stating: “All right. We’ll do it.”

The parties further stipulated that the trial court denied defense counsel’s request to instruct the jury on defense of a family member at an unrecorded bench conference the following morning. The trial court stated its decision was based upon his notes, which showed Joshua was the initial aggressor. Defense counsel disagreed and re-counted her view of the testimony showing the facts supported such an instruction. The trial court repeated his decision to deny the request, but told defense counsel she could “put it on the record when the jury came in.”

The stipulation notes the trial court never stated on the record that he had denied to give the instruction, and defense counsel failed to formally object to the

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court's decision on the record or to "put it on the record when the jury came in." The jury charge did not include Defendant's requested instruction.

Following the jury charge, the trial court asked all parties whether there were any deletions or corrections that needed to be made. Defendant did not raise any objection or request further corrections to the jury charge. The trial court concluded, "both defendants are satisfied with the charge as given. The State is, likewise, satisfied with the charge as given."

Despite Defendant's failure to raise any further objection or to request corrections following the jury charge, Defendant's request for the instruction on defense of a family member properly preserved this argument on appeal. *See State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984) (holding the defendant, whose request for particular jury instructions was denied by the trial court, was "not required . . . to repeat his objection to the jury instructions, after the fact, in order to properly preserve his exception for appellate review"); *see also State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992) ("The defendant's written request for a particular instruction . . . met the requirements of Appellate Rule 10[(a)(2)] and constituted a sufficient objection to the different instruction actually given to preserve this issue for appellate review."). A trial court's decision regarding jury instructions are reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

B. Analysis

“It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence.” *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). “Failure to instruct upon all substantive or material features of the crime charged is error.” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). Where a requested instruction is correct in law and supported by the evidence, the instruction must be granted at least in substance. *State v. Williams*, 98 N.C. App. 68, 71, 389 S.E.2d 830, 832 (1990).

“For a jury instruction to be required on a particular defense, there must be substantial evidence of each element of the defense when the evidence is viewed in the light most favorable to the defendant[.]” *State v. Hudgins*, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005) (brackets, internal quotation marks, and citation omitted).

This Court has held:

A family member has the right to come to the defense of a fellow family member when that member is faced with an assault. The law allows this interference to prevent injury. However, unless there is evidence defendant had a well-grounded belief that an assault was about to be committed by another on the family member, he is not entitled to an instruction on defense of that person. Moreover, the assistant’s act may not be in excess of that which the law would allow the assisted party.

State v. Hall, 89 N.C. App. 491, 494, 366 S.E.2d 527, 529 (1988) (internal quotation marks and citations omitted). Where the evidence is insufficient to support an

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instruction on defense of a family member, the trial court is not required to instruct the jury thereon. *See State v. Watkins*, 283 N.C. 504, 509, 196 S.E.2d 750, 754 (1973).

The jury instruction for “assault in lawful defense of a family member” included in the record, provides, in relevant part:

If from the evidence you find beyond a reasonable doubt that the defendant assaulted the victim and that the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or apparently necessary to protect a [family member] from bodily injury or offensive physical contact, and the circumstances did create such belief in the defendant’s mind at the time the defendant acted, such assault would be justified by defense of a [family member].
...

A defendant may only do in defense of a [family member] what that other person might do in that person’s own defense. Further, a defendant does not have the right to use excessive force. *This means that the defendant had the right to use only such force as reasonably appeared to the defendant to be necessary under the circumstances to protect that [family member] from bodily injury or offensive physical contact.*

Furthermore, defense of a [family member] is justified only if the [defendant] [family member] was not the aggressor. Justification for defensive force is not present if a person voluntarily enters into the fight or, in other words, initially provokes the use of force against [himself] [herself].

N.C.P.I. Crim. 308.47 (2012) (emphasis supplied).

The evidence, viewed in the light most favorable to Defendant, tends to show during Joshua’s initial trip inside the house, Ms. Simmons punched him in the lip.

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When Joshua returned outside, he told Defendant that Ms. Simmons had hit him, but Defendant “ignored it and went back to the car to go put the clothes in there.” When Joshua returned inside for the rest of his clothes, he tripped and knocked into Ms. Simmons’ grandmother. Ms. Simmons thought Joshua had hit her grandmother, and jumped on top of him.

Ms. Walker testified she heard Defendant say, “that’s my nephew,” and saw Defendant enter into the house from the front porch. As Joshua and Ms. Simmons were wrestling on the floor, Joshua testified Defendant intervened and began to fight Ms. Simmons. Joshua “got out of the tussle,” collected his belongings, went outside, and told Ms. Walker that Defendant and Ms. Simmons were fighting.

Viewed in the light most favorable to Defendant, it could be argued that neither Joshua nor Defendant was the initial aggressor of the fight. However, the uncontested evidence demonstrates Defendant used excessive force in her asserted defense of Joshua.

No evidence was presented to show Joshua or Defendant was injured by Ms. Simmons as a result of this fight. Ms. Walker testified that after Joshua, Ms. Walker, and Defendant left the house, Ms. Walker called the police again and “said no one was hurt and [they] were safe.”

However, Ms. Simmons emerged from the situation with bruising on her face, temple, and arms. Furthermore, Defendant kept fighting Ms. Simmons even after

Joshua was able to remove himself, collect his belongings, and go outside. *Hall*, 89 N.C. App. at 494, 366 S.E.2d at 529 (“[T]he assistant’s act may not be in excess of that which the law would allow the assisted party.”). Both the disproportionate injuries—none to Joshua or Defendant, but bruising to Ms. Simmons—and Defendant’s prolonged attack on Ms. Simmons undermine Defendant’s theory that she was acting in defense of another at the time of the assault. The trial court properly denied Defendant’s request for an instruction on defense of a family member.

VII. Conclusion

The trial court did not err by denying Defendant’s motion to dismiss the breaking and entering with intent to terrorize and injure charge for insufficient evidence. The State’s evidence was sufficient to overcome Defendant’s motion to dismiss.

Defendant failed to object to any portion of the jury instructions, and acknowledged agreement with the jury’s instructions as provided. Defendant failed to demonstrate the trial court’s failure to more specifically define “terrorize” constituted plain error.

Defendant’s request to instruct the jury on defense of a family member was preserved for appellate review. Viewed in the light most favorable to Defendant, the evidence presented did not support an instruction on defense of a family member. The trial court properly denied Defendant’s request for this instruction.

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Defendant received a fair trial, free from prejudicial errors she preserved and argued. We find no error. *It is so ordered.*

NO ERROR.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).