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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-541

Filed: 20 March 2018

Yancey County, No. 15 CRS 50003

STATE OF NORTH CAROLINA

v.

JON SHEPHERD

Appeal by defendant by petition for writ of certiorari from judgments entered 25 May 2016 by Judge Alan Z. Thornburg in Yancey County Superior Court. Heard in the Court of Appeals 10 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Larissa S. Williamson, for the State.

Michael E. Casterline, for defendant-appellant.

CALABRIA, Judge.

Jon Shepherd ("defendant") appeals by petition for writ of certiorari from judgments entered upon jury verdicts finding him guilty of felonious child abuse inflicting serious physical injury and misdemeanor assault on a child under 12. On appeal, defendant argues that the trial court committed plain error by failing to instruct the jury that defendant had a fundamental right to administer corporal

punishment to his six-month-old son. After careful review, we conclude that defendant received a fair trial, free from error.

I. Background

In January 2015, defendant, his wife ("Katelyn"), and their six-month-old son ("J.S.") were living with Katelyn's parents in Burnsville, North Carolina. At the time, defendant was 21 years old and Katelyn was 19. When Katelyn's father ("Mr. Carpenter") arrived home from work on 3 January 2015, J.S. was sitting in a chair in front of the television. As Mr. Carpenter approached the baby, he noticed "significant bruising" on both sides of J.S.'s face. After he removed the baby's onesie, Mr. Carpenter observed large bruises across J.S.'s abdomen. Since he knew that the bruises were new, Mr. Carpenter questioned Katelyn and defendant about their origin. At first, defendant provided unsatisfactory answers. However, after continued questioning, defendant eventually admitted that "maybe he squeezed [J.S.'s] face too hard." Mr. Carpenter contacted law enforcement and the Department of Social Services, and instructed defendant to leave the home. A subsequent medical examination of J.S. revealed a skull fracture, significant bruising, and two fractured ribs, with two additional ribs showing possible signs of healing.

On 5 January 2015, Detective Brian Shuford interviewed defendant at the Yancey County Sheriff's Office. Defendant told Detective Shuford that J.S. cried more than most babies, due to his premature birth. Defendant admitted to punching

J.S. in the stomach above his diaper, because he was frustrated that the baby would not stop crying.

Following the interview, Defendant was arrested and charged with felonious intentional child abuse inflicting serious physical injury and misdemeanor assault on a child under 12. On 23 February 2015, defendant was indicted for the same charges. On 23 May 2016, a jury trial commenced in Yancey County Superior Court. Defendant did not present evidence or request any particular jury instructions. In addition to the charged offenses, the trial court instructed the jury on misdemeanor child abuse as a lesser-included offense of felonious child abuse. On 25 May 2016, the jury returned verdicts finding defendant guilty of both of the charged offenses. The trial court entered separate judgments sentencing defendant to 51 to 74 months for felonious child abuse and 60 days for misdemeanor assault, to be served concurrently in the custody of the North Carolina Division of Adult Correction.

II. Petition for Writ of Certiorari

Defendant failed to timely appeal the trial court's judgments. *See* N.C.R. App. P. 4(a)(1)-(2) (providing that a criminal defendant "may take appeal by: (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment"). However, on 24 October 2016, defendant filed a petition for writ of certiorari with this Court, requesting review of the trial court's judgments. We

granted defendant's petition on 8 November 2016; therefore, we have jurisdiction over his appeal. *See* N.C.R. App. P. 21(a)(1) (providing, *inter alia*, that "[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action").

III. Analysis

Defendant's sole argument on appeal is that the trial court erred by failing to provide a jury instruction recognizing defendant's fundamental right to use physical force to discipline his son. However, since he did not challenge the jury instructions at trial, defendant acknowledges that he is only entitled to plain error review of this issue.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have

been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted). "Under the plain error rule, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

North Carolina courts have long recognized the constitutionally protected, "paramount right of parents to custody, care, and control of their children[,]" *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994), which includes the authority to administer "moderate" corporal punishment:

> One of the most sacred duties of parents, is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits; and to enable him to exercise this salutary sway, he is armed with power *to administer moderate correction*, when he shall believe it to be just and necessary.

State v. Pendergrass, 19 N.C. 365, 365-66 (1837) (emphasis added).

In administering corrective discipline, "[t]he welfare of the child is the main purpose for which pain is permitted to be inflicted." *Id.* at 366. Accordingly, "[a]ny punishment . . . which may seriously endanger life, limbs or health, or shall disfigure the child, or cause any other permanent injury" is inconsistent with that objective. *Id.* "But any correction, however severe, which produces temporary pain only, and no permanent ill," is permissible. *Id.*

As this Court recently observed, "[o]ur Supreme Court has never disavowed the principles set forth in *Pendergrass* regarding a parent's right to discipline their child." *State v. Varner*, __ N.C. App. __, __, 796 S.E.2d 834, 837, *disc. review allowed*, __ N.C. __, 804 S.E.2d 188 (2017). Consequently, "as a general rule, a parent (or one acting *in loco parentis*) is *not* criminally liable for inflicting physical injury on a child in the course of lawfully administering corporal punishment." *Id.* at __, 796 S.E.2d 836 (citing *State v. Alford*, 68 N.C. 322, 323 (1873)). However, this general rule does not apply:

> (1) where the parent administers punishment "which may seriously endanger life, limb or health, or shall disfigure the child, or cause any other *permanent* injury[,]" *Alford*, 68 N.C. at 323; (2) where the parent does not administer the punishment "honestly" but rather "to gratify his own evil passions[,]" irrespective of the degree of the physical injury inflicted, *State v. Thornton*, 136 N.C. 610, 615, 48 S.E. 602, 604 (1904); or (3) where the parent uses "cruel or grossly inappropriate procedures . . . [or] devices to modify" a child's behavior, N.C. Gen. Stat. § 7B-101(1)(c) (2013).

Varner, __ N.C. App. at __, 796 S.E.2d at 836 (alterations in original).

On appeal, defendant contends that "[b]ecause the evidence showed that [he] used physical force to correct his child's behavior, the trial court had a duty to instruct the jury consistent with the rule in *Pendergrass*." We disagree.

This Court considered a similar issue in *State v. Varner*, __ N.C. App. __, 796 S.E.2d 834 (2017). After his son refused to eat the pizza that was served for dinner, the *Varner* defendant retrieved a paddle and struck the ten-year-old boy's thigh three

times. __ N.C. App. at __, 796 S.E.2d at 835. The following morning, the defendant's son was bruised from his knee to his waist. *Id.* For several days, he experienced pain, walked with a slight limp, and was unable to participate in gym class at school. *Id.*

At the charge conference during the defendant's trial for felonious child abuse, the judge indicated that he intended to instruct the jury that it could not convict the defendant if it determined that his son's injuries resulted from the defendant's "moderate punishment to correct his child." *Id.* (brackets omitted). The State objected to the trial court's suggested definition of "moderate punishment," contending that the term "should not be limited to that which produced lasting injuries." *Id.* The court omitted the definition over the defendant's objection, and the jury subsequently found the defendant guilty of the lesser-included offense of misdemeanor child abuse. *Id.*

On appeal, the defendant argued that by leaving "moderate punishment" undefined, the trial court's "instruction impermissibly allowed the jury to convict him simply because they thought [his] *degree* of punishment was excessive, even if they thought [he] was acting in good faith and did not inflict a lasting injury upon his child." *Id.* We agreed. Although the evidence supported a reasonable finding of malice, we concluded that the jury *also* could have reasonably found that the defendant "administered the paddling without malice and that the punishment was

not *grossly* inappropriate, regardless of whether the jury might have believed that the paddling was otherwise excessive." *Id.* at __, 796 S.E.2d at 837. "Without the clarification, the jury was free to convict [the d]efendant of misdemeanor child abuse even if it determined that [he] acted honestly but, in their minds, excessively." *Id.*

The instant case is easily distinguishable. Unlike in *Varner*, here, there was no evidence to support that defendant was acting pursuant to his parental authority to discipline his child. *Contra id.* To the contrary, defendant admitted to punching and squeezing his six-month-old son's abdomen and face because he was frustrated by the baby's incessant crying. While perhaps challenging for a young father, crying is a normal, healthy behavior for a six-month-old baby; corporal punishment is neither effective, nor appropriate in this context.

Even assuming, *arguendo*, that defendant was attempting to administer "moderate correction," he far exceeded the bounds of his parental right to discipline his son. It is axiomatic that skull and rib fractures "may seriously endanger [the] life, limbs or health" of a six-month-old baby. *Pendergrass*, 19 N.C. at 366. That J.S.'s injuries healed does not lessen the seriousness of their infliction, and it certainly does not entitle defendant to a jury instruction on that basis.

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186,

191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.*

Here, there was no evidence that defendant was administering lawful corporal punishment to his six-month-old baby. Therefore, we hold that the trial court did not commit plain error by failing to provide an unrequested jury instruction concerning defendant's fundamental right to discipline his son.

NO ERROR.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).