An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1251

Filed: 17 April 2018

Guilford County, Nos. 15 CRS 84868-69

STATE OF NORTH CAROLINA

v.

ROBERT O'NEAL DICK

Appeal by defendant from judgments entered 19 July 2017 by Judge V. Bradford Long in Guilford County Superior Court. Heard in the Court of Appeals 12 April 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John G. Batherson, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

ZACHARY, Judge.

Defendant Robert O'Neal Dick appeals from judgments entered upon his convictions for assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. After careful consideration, we conclude that defendant received a fair trial, free from prejudicial error.

On 6 September 2015, defendant shot Kendrick McBride multiple times with a .357 magnum handgun outside a residence on Lake Avenue, High Point, North Carolina, where defendant's fiancée, Mary Prince, lived. Mr. McBride was not armed at the time of the shooting. The State's evidence at trial tended to show that defendant shot Mr. McBride in retaliation for something Mr. McBride said to him, and that Mr. McBride neither threatened nor made physical contact with defendant during the altercation. Defendant testified on his own behalf and claimed that he shot Mr. McBride in self-defense after Mr. McBride threatened him, tried to punch him, and refused to leave the premises.

On 9 November 2015, defendant was indicted for possession of a firearm by a felon and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was later charged with attempted first-degree murder. The case came on for trial during the 26 June 2017 criminal session of the Guilford County Superior Court. On 30 June 2017, the jury convicted defendant of possession of a firearm by a felon and assault with a deadly weapon inflicting serious injury, which is a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury. The jury acquitted defendant of attempted murder. The trial court sentenced defendant to consecutive terms of 22 to 36 and 44 to 65 months' imprisonment. Defendant gave oral notice of appeal in open court.

As his sole issue on appeal, defendant contends that the trial court erred by failing to excuse certain jurors or declare a mistrial after some jurors saw defendant being restrained and led into the courtroom by officers during a recess. The facts relevant to defendant's issue on appeal are as follows: During a brief recess near the end of trial, the trial court instructed the sheriff that defendant was to remain in the courtroom. The trial court was then informed that defendant had already left the courtroom. Defendant was seen exiting the courtroom with a younger man in a baseball hat and walking down the sidewalk away from the courthouse. A Guilford County Sheriff's Office sergeant who had been asked to locate defendant saw defendant walking across a parking lot. The sergeant yelled to defendant by name. After defendant ignored the sergeant and continued his conversation with an individual inside a vehicle in the parking lot, the sergeant went to defendant and apprehended him. Defendant was handcuffed and brought back to the courthouse.

Before resuming the trial, the trial court was informed by one of the deputies that "when [defendant] was exiting or being placed on the elevator or being taken off the elevator, that the [deputy] observed a female individual getting off the elevator who had on some type of red badge that was similar to a juror badge. . . ." The trial court asked the jurors if any of them had seen anyone involved in the case, including defendant, during the break. Four jurors acknowledged having observed defendant with officers during the break. The trial court examined the jurors individually to

discern what each observed, and gave the prosecution and defense counsel opportunity to examine the jurors as to whether they could remain fair and impartial or whether they should be excused. Defense counsel moved to excuse all four jurors and for a mistrial. The trial court did excuse one juror, finding her assertion that she could remain fair and impartial to be "equivocal," and finding that, while the other three jurors saw defendant in custody, the fourth juror also "made observations that could be interpreted as [defendant] taking flight from the trial." The trial court denied the motion to excuse the other three jurors, and denied the motion for mistrial.

As an initial matter, while defendant contends that the trial court's failure to excuse jurors or declare a mistrial violated defendant's Sixth Amendment right to an impartial jury and Fourteenth Amendment due process right to a fair trial, defendant did not raise this constitutional argument at trial when moving to excuse jurors and for a mistrial. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error[.]" *State v. Gobal*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007) (citations omitted), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008). Thus, defendant has not preserved his constitutional arguments for this Court's review.

Moreover, defendant has not shown, and could not show, that he was prejudiced by the trial court's rulings on his motions. "Even when it is error to deny defendant's motion for mistrial, it is incumbent upon an appellant not only to show

error but also to show that the error was prejudicial to him." *State v. Carr*, 61 N.C. App. 402, 411, 301 S.E.2d 430, 436-37 (citing *State v. Smith*, 301 N.C. 695, 697, 272 S.E.2d 852, 855 (1981); N.C. Gen. Stat. § 15A-1443(a)), *disc. review denied*, 308 N.C. 545, 304 S.E.2d 239 (1983). It is well established that "[w]here the error claimed could not have made the difference between a guilty verdict and an acquittal, no prejudice results to the defendant." *Id.*

At trial, the State produced overwhelming evidence that, on 6 September 2015, defendant shot Mr. McBride with a firearm, which the law considers a deadly weapon. *State v. Smith,* 187 N.C. 469, 470, 121 S.E. 737, 737 (1924). Furthermore, defendant admitted to the fact that he was previously convicted of a felony offense. Thus, all the elements of the offenses of possession of a firearm by a felon and assault with a deadly weapon inflicting serious injury were supported by the evidence. *See* N.C. Gen. Stat. § 14-415.1 (2017) (possession of a firearm by a felon); N.C. Gen. Stat. § 14-32(b) (2017) (assault with a deadly weapon inflicting serious injury). Defendant testified and admitted that he possessed the firearm and that he used it to shoot Mr. McBride. However, defendant claimed that he shot Mr. McBride in self-defense. The trial court instructed the jury that it could only find defendant guilty of assault with a deadly weapon inflicting serious injury if the State proved beyond a reasonable doubt that defendant's action was not in self-defense. The court instructed, in pertinent part:

> If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the -- that the assault was necessary or appeared to be necessary to protect that person from imminent death or great bodily harm and the circumstances did create such a belief in the defendant's mind at the time the defendant acted, such assault would be justified by self-defense.
>
> You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time.
>
> . . . .
>
> A defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm.
>
> In making this determination you should consider the circumstances as you find them to have existed from the evidence, including the size, age, and strength of the defendant as compared to Mr. McBride; the fierceness of the assault, if any, upon the defendant; whether Mr. McBride possessed a weapon; and the reputation, if any, of Mr. McBride for danger and violence.

Even accepting defendant's version of events as true, it is improbable any reasonable juror would find that defendant's actions were justified by self-defense. Defendant testified that, on the day in question, he came outside of the residence on Lake Avenue and found Mr. McBride with his arm around Ms. Prince. When Mr. McBride saw defendant, he stepped toward him and threw a punch, accusing defendant of "beat[ing] up" Ms. Prince. Defendant blocked the punch. Defendant told

Mr. McBride to leave, but Mr. McBride refused. Defendant went inside to change clothes before he "physically put [Mr. McBride] out of the yard." Once inside the house, defendant grabbed Ms. Prince's gun. Defendant returned outside, coming within five feet of Mr. McBride and Ms. Prince. Defendant fired a shot in the air and again told Mr. McBride to leave. After two or three seconds, Mr. McBride let go of Ms. Prince. Mr. McBride "threw his arms out like he was ready to fight," and defendant then shot him in the arm. Mr. McBride "stepped over towards the sidewalk, but he was still in the yard," and defendant again told him to leave. Defendant then fired at Mr. McBride again, hitting him in the side of his torso. Four or five seconds passed between defendant shooting Mr. McBride in the arm and shooting him in the side.

Important to note in defendant's narrative is the fact that, the one time Mr. McBride attempted to punch defendant, defendant was successfully able to block it. Defendant then walked inside to change clothes so he could "physically put [Mr. McBride] out of the yard," stating that "if you ever had to spar in some dress clothes, it's uncomfortable." Defendant never claimed to have seen Mr. McBride with a weapon or contended that he otherwise had reason to believe Mr. McBride was armed. Defendant admitted that there was a telephone in the house, and that he could have called law enforcement to have Mr. McBride removed. Defendant instead chose to pick up the gun because he had been "assaulted" and "threatened," and he

"t[ook] it personally[.]" These facts cast serious doubt on the notion that shooting Mr. McBride "was necessary or appeared to be necessary to protect [defendant] from imminent death or great bodily harm[.]" Moreover, defendant testified that four or five seconds passed between the time he shot Mr. McBride in the arm and when he shot him in the side, and defendant provided no explanation for why he decided to shoot Mr. McBride again. Even if defendant's action of shooting Mr. McBride in the arm could have been considered necessary to protect defendant from great bodily harm, it is likely that a jury would consider defendant shooting Mr. McBride a second time to constitute the use of excessive force, thereby rendering the second shot not justified as an act of self-defense.

More importantly, even if defendant's testimony could support a finding that he acted in self-defense, there were multiple eyewitnesses whose testimony contradicted defendant's testimony and provided overwhelming evidence that defendant did not act in self-defense. Mr. McBride testified that he was walking to the store when he saw defendant and Ms. Prince in a "physical altercation." Mr. McBride told defendant "not to put his hands on no female." Defendant walked inside the residence, and Mr. McBride continued walking to the store. Shortly thereafter, Mr. McBride heard someone say "[w]atch out, he got a gun," and turned around just as defendant shot at him three or four times in rapid succession.

Ms. Prince's next-door neighbor, Thomas Logan, testified that he was with Mr. McBride when Mr. McBride argued with defendant over assaulting Ms. Prince. Defendant went back into the residence, and Mr. McBride and Mr. Logan continued walking. Defendant came back outside and fired three shots at Mr. McBride. Mr. Logan testified that Mr. McBride never assaulted or threatened defendant. Mr. McBride's cousin, Sunya Goins, lived on Lake Avenue and testified that she saw defendant "hitting on his wife[,]" and saw Mr. McBride say something to defendant. Defendant went into the residence, returned with a gun, and shot in the air before walking toward Mr. McBride and shooting him. Ms. Goins never saw Mr. McBride make physical contact with anyone. Another one of Mr. McBride's cousins, Deshawn Goins, also testified to witnessing Mr. McBride being shot by defendant, and stated that he never witnessed Mr. McBride put his hands on anyone. Ms. Prince testified that she had too much to drink on the day of the shooting to remember much of what occurred. Ms. Prince did testify that defendant had not pushed her, but also testified that she never saw an argument or altercation between Mr. McBride and defendant. Ms. Prince did not see Mr. McBride with a gun, nor did she see him push defendant. Given that several witnesses testified, none of whom saw Mr. McBride brandish a weapon or initiate contact with defendant, and none of whom heard Mr. McBride threaten defendant, it is extremely unlikely another jury would have acquitted defendant of assault inflicting serious injury or possession of a firearm by a felon.

Finally, further undercutting any contention by defendant that he was prejudiced by the trial court's failure to declare a mistrial or excuse the other three jurors is the fact that the jury *did* acquit him of the most serious charges, attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury, despite substantial evidence to support convictions on those charges. In sum, it is highly unlikely defendant would have gotten a better result had a mistrial been declared, and altogether possible he would have gotten a worse one. Defendant has not shown that he was prejudiced by the trial court's decision not to declare a mistrial or excuse certain jurors. As a result, we conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).