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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-634

Filed: 3 July 2018

Duplin County, No. 15CRS051856

STATE OF NORTH CAROLINA

v.

CHARLIE JUNIOR JOHNSON, Defendant.

Appeal by defendant from judgment entered 1 December 2016 by Judge Phyllis M. Gorham in Duplin County Superior Court. Heard in the Court of Appeals 9 January 2018.

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

*Winifred H. Dillon for defendant-appellant.*

BERGER, Judge.

A Duplin County jury found Charlie Junior Johnson (“Defendant”) guilty of assault with a deadly weapon inflicting serious injury, misdemeanor assault, and breaking or entering a motor vehicle. Defendant subsequently pleaded guilty to attaining habitual felon status, and the trial court sentenced him to seventy-two to ninety-nine months in prison. Defendant appeals, arguing the trial court committed

plain error by allowing the State's witnesses to testify about prior out-of-court statements made by the victim, and by instructing the jury on both misdemeanor and felony assault for the same incident. We disagree.

Factual and Procedural Background

On September 3, 2015, Warren Smith returned to Deborah Levine's home to finish repair work he had started on a prior visit. While inside Levine's home, he heard a noise outside and checked on his vehicle. Smith found Defendant, who had previously been in a relationship with Levine, rummaging through his vehicle. When Smith asked Defendant what he was doing, Defendant "sucker punched" Smith, striking him in the face with a hard object. Defendant began hitting Smith with his fists after Smith tripped over a planter and Defendant jumped on top of him. Smith suffered injuries to his head and face because of Defendant's actions.

Officers with the Wallace Police Department investigated the incident. Smith told officers he had been hit with a beer bottle or car keys. After being transported to a local hospital, Smith provided officers information consistent with his earlier statements. Smith was asked to provide a written statement describing the assault at a later time because he could not see, and thus was unable to write.

Smith subsequently spoke with Sergeant Jason Brigman, and provided him with a written statement that was consistent with the information provided to officers

at the scene and medical personnel. Smith also informed Sergeant Brigman that a camera and a guitar were taken from his vehicle on the night he was attacked.

On September 6, 2016, Defendant was indicted for habitual misdemeanor assault, assault with a dangerous weapon inflicting serious injury, breaking and/or entering of a motor vehicle, and misdemeanor larceny. The State alleged in the indictment for habitual misdemeanor assault that Defendant struck Smith with “a bottle and/or his hands.” The State alleged in the assault with a deadly weapon inflicting serious injury indictment that the deadly weapon was “a beer bottle.”

Without objection at trial, officers testified Smith informed them that he was hit with a beer bottle or keys. Sergeant Brigman also testified without objection that that he collected a beer bottle at the scene as evidence because Smith “thought he possibly could have been hit with a beer bottle or some keys.” Smith testified that Defendant initially struck him with keys or “a bottle of something,” but admitted he was not certain if the bottle was a beer bottle. Smith also testified that the object Defendant struck him with “was either a can or it was something hard.”

Angel Tyndall, an EMT, testified that she assisted Smith at the scene. Smith informed her that he was hit with a beer bottle. Tyndall also testified that the laceration on Defendant’s forehead was consistent with being stuck by an object.

Smith was treated in the hospital by Dr. Kerren Elder, who determined Smith suffered “bilateral, periorbital edema and hematoma around both eyes,” and suffered

a “blowout fracture of the medial bone of the left eye.” According to Dr. Elder, Smith’s injuries were consistent with being struck with a bottle and fists. Dr. Elder testified that EMS personnel informed him Smith had been struck by a bottle and hit with fists. Defense counsel objected to this testimony from Dr. Elder. The trial court allowed the testimony because it was corroborative, and gave the following limiting instruction to the jury: “[T]he testimony you’re about to hear is to be considered only for corroborating the testimony of another witness’s testimony, and that is the only reason for which you shall consider this testimony.”<sup>1</sup>

On December 1, 2016, Defendant was found guilty of misdemeanor assault, assault with a deadly weapon inflicting serious injury, and breaking and entering of a motor vehicle. Defendant pleaded guilty to attaining habitual felon status, and was sentenced to seventy-two to ninety-nine months imprisonment. Defendant timely appealed.

#### Standard of Review

“In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.” *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (citation omitted); *see also* N.C.R. App. P. 10(a)(1). “In criminal cases, an issue that was not preserved by

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<sup>1</sup> Defendant does not argue the trial court erred in admitting Dr. Elder’s testimony, or in providing the limiting instruction.

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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Defendant concedes that trial counsel failed to preserve both issues presented in this appeal and that these matters are reviewed for plain error.

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).

For error to constitute plain error, 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 defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted). “Under the plain error rule, 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) (citation omitted). Plain error review “requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error.” *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

### Analysis

#### I. Corroborating Statements

Defendant initially contends that the trial court committed plain error by admitting, as corroborative evidence, testimony regarding Defendant’s use of an object to assault Smith. Defendant alleges the testimony was not consistent with Smith’s prior statements.

“Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.” *State v. Adams*, 331 N.C. 317, 328-29, 416 S.E.2d 380, 386 (1992) (citation omitted). The threshold test is whether there is substantial similarity between the witness’s testimony and the prior statement. *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980). Thus, slight variations do not render the prior statement inadmissible, but rather go “to the statement’s corroborative weight, not its admissibility.” *State v. Easterling*, 300 N.C. 594, 603, 268 S.E.2d 800, 806 (1980) (citations omitted). “It is the responsibility of the jury to decide if the proffered testimony does, in fact, corroborate the testimony of another witness.” *Adams*, 331 N.C. at 329, 416 S.E.2d at 386 (citation omitted).

The evidence introduced at trial tended to show that Smith was attacked by Defendant after he was found rummaging through Smith's vehicle. Smith was initially "sucker punched" by Defendant with a hard object and then beaten with his fists. Officers recovered a beer bottle at the scene as evidence. At trial, Smith testified Defendant hit him with "a bottle of something." He also testified that Defendant could have used keys or a can. Smith's oral and written statements to law enforcement, EMS, and medical personnel that Defendant initially struck him with a beer bottle or keys were substantially similar to his testimony at trial.

We do not find the variances in the statements Smith made to law enforcement, EMS, or medical personnel to be so material as to render the statements inadmissible as they were substantially similar to his testimony that he was struck with a bottle or other hard object. *See Easterling*, 300 N.C. at 603, 268 S.E.2d at 806. It was for the jury to determine if the prior statements corroborated Smith's testimony. Accordingly, we hold that the trial court did not commit plain error by admitting the corroborative statements.

## II. Jury Instructions

Defendant next asserts that the trial court committed plain error when it instructed the jury on, and convicted Defendant of, both misdemeanor assault and assault with a deadly weapon inflicting serious injury stemming from the same incident. Essentially, Defendant argues that if the trial court provided erroneous

instructions, then his constitutional right to be free from double jeopardy was violated.

The relevant portions of the trial court's instructions to the jury concerning misdemeanor assault were as follows:

The defendant has been charged with misdemeanor assault. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt: First, that the defendant assaulted the victim by *hitting him with a bottle about his head*.

Second, that the defendant acted intentionally and without justification or excuse.

Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

And, third, that the defendant hereby caused the victim physical injury. Physical injury includes cuts, scrapes, bruises, and other physical injury which does not constitute serious injury. Physical injury is an injury that causes any pain and suffering.

. . . .

If you find from the evidence beyond a reasonable doubt that the defendant *intentionally hit the victim with a bottle or his hands* and thereby caused the victim physical injury, nothing else appearing, it would be your duty to return a verdict of guilty.

(Emphasis added).

The trial court's instruction for the offense of assault with a deadly weapon inflicting serious injury was as follows:



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The defendant has been charged with assault with a deadly weapon inflicting serious injury. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant assaulted the victim by intentionally and without justification or excuse *hitting the victim with a bottle*.

I refer you to the misdemeanor assault instruct[ion] for the definition of intent.

And, second, that the defendant inflicted serious injury upon the victim.

Serious injury is injury that causes great pain and suffering.

....

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant *intentionally hit the victim with a bottle*, thereby inflicting serious injury upon the victim, nothing else appearing, it would be your duty to return a verdict of guilty.

(Emphasis added).

In reviewing the entire record, the evidence tended to show that Defendant committed two separate assaults against Smith: (1) the initial sucker punch with the bottle, and (2) the attack with his fists after Smith had fallen over the planter. We note that although the trial court's instruction concerning misdemeanor assault tracked the language of the indictment and the evidence presented, the trial court mistakenly excluded a reference to Defendant's use of his hands or fists from the body of the instruction on misdemeanor assault. However, the mandate for this instruction included the missing words as the trial court stated, "If you find from the evidence

beyond a reasonable doubt that the defendant intentionally hit the victim with a bottle *or his hands . . .*, it would be your duty to return a verdict of guilty.” (Emphasis added).

The trial court’s instructions were “not internally contradictory, but [were], at most, incomplete at one important point.” *State v. Stevenson*, 327 N.C. 259, 266, 393 S.E.2d 527, 530 (1990). Further, Defendant does not argue that the jury was not properly instructed on the elements of each offense. *See State v. Skinner*, 162 N.C. App. 434, 442, 590 S.E.2d 876, 883 (2004) (holding no plain error where the jury was fully instructed on the elements of larceny, even though there was a discrepancy in the mandate).

Given the overwhelming evidence in the record against Defendant, the trial court’s error was not “so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him.” *State v. Roseboro*, 344 N.C. 364, 378, 474 S.E.2d 314, 322 (1996) (cleaned up). Because we find no plain error in the jury instructions, we need not reach Defendant’s argument concerning double jeopardy.

#### Conclusion

The trial court did not commit plain error by admitting testimony from the State’s witnesses that corroborated Smith’s statements. Further, Defendant has failed to show plain error in the jury instructions.

NO PLAIN ERROR.

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Judges BRYANT and MURPHY concur.

Report per Rule 30(e).