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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-211

Filed: 6 November 2018

Transylvania County, No. 16 CRS 50807

STATE OF NORTH CAROLINA

v.

JAMES DAREN SISK

Appeal by defendant from judgment entered 16 August 2017 by Judge Charles Malcolm Viser in Transylvania County Superior Court. Heard in the Court of Appeals 19 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant.

ELMORE, Judge.

Defendant James Daren Sisk appeals from judgment entered upon a jury verdict finding him guilty of malicious conduct by a prisoner. On appeal, defendant contends the trial court plainly erred by failing to instruct the jury on the defense of

accident, where a substantive feature of defendant's case was that his spitting on a law enforcement officer was unintentional.

Although we conclude the trial court erred in failing to instruct the jury on the defense of accident, we hold that this failure does not rise to the level of plain error.

I. Background

On 24 October 2016, a grand jury indicted defendant for malicious conduct by a prisoner. The evidence presented at trial tended to show the following.

Lieutenant Kevin Holden of the Transylvania County Sheriff's Office (TCSD) testified that on 26 May 2016, he arrested defendant and took him into custody for reasons unrelated to this appeal. At the time, defendant appeared to have been drinking and was not wearing a shirt.

Upon their arrival at the detention center's booking area, defendant was handcuffed to a bench while Lieutenant Holden obtained arrest warrants from the magistrate's office. After removing the handcuffs and having defendant stand to be arraigned in front of the magistrate, Lieutenant Holden re-secured defendant to the bench so that he could complete the necessary paperwork. It was then that defendant became verbally abusive toward Lieutenant Holden by cursing at him, asking him why he hated defendant, and making derogatory comments about Lieutenant Holden's wife.

Lieutenant Holden went on to testify that he had a "type of rapport" with defendant, who had been in school with him, and that he attempted to calm defendant prior to leaving him with detention center staff. However, when Lieutenant Holden told defendant "it was time to calm down and be a man," defendant responded by standing up and declaring, "If you'll take this handcuff off, I will beat your ass like a man." Defendant then took a step forward and drew his arm back as if to strike Lieutenant Holden, who used a "pressure point technique" to subdue defendant while other officers responded to the scene. As Lieutenant Holden attempted to remove himself from the situation, defendant sat up on the bench, cleared his throat, and spit at Lieutenant Holden from two to three feet away, hitting him in the chest.

Corporal Sean Metcalf and Sergeant Joshua Laughter, also of the TCSD, were the first to respond to the confrontation between defendant and Lieutenant Holden, and both corroborated Lieutenant Holden's testimony at trial. On direct examination by the prosecutor, Sergeant Laughter specifically testified as follows:

> Q. And when you entered the booking area what did you hear?
>
> A. A loud commotion, cussing from the defendant towards Lieutenant Holden. And then whenever I c[a]me around the corner, I s[aw] Corporal Metcalf had [defendant's] right side and . . . Lieutenant Holden was on his left side.
>
> Q. And . . . what was happening at that time?
>
> A. At that time [defendant] was resisting a little bit. And then Lieutenant Holden had to pressure point right here

> and was over top of him applying pressure to cause discomfort.
>
> Q. Okay. And what did you do?
>
> A. As soon as I got there I stood between Lieutenant Holden and [defendant] and grabbed [defendant's] left side.
>
> Q. And when you grabbed his left side what happened?
>
> A. Whenever Lieutenant Holden started to back up, the defendant raised up and kind of gurgled his throat a little bit and then spit.
>
> Q. And where did he spit?
>
> A. In the direction of Lieutenant Holden. . . . . I believe it hit him in the chest region.

Corporal Metcalf likewise testified that as he and Sergeant Laughter attempted to control defendant, he "heard the sound of someone . . . getting their phlegm up in their throat. And right as that happened, [Corporal Metcalf] looked up and [defendant] spat." Corporal Metcalf went on to testify that he "actually saw it strike Lieutenant Holden in the chest."

In addition to the testimony of Lieutenant Holden, Sergeant Laughter, and Corporal Metcalf, the State presented video footage from the detention center's security cameras, which was admitted into evidence without objection. The silent video shows the shirtless defendant being escorted into the booking area, handcuffed to a bench, and given a striped jail shirt by another officer. After his arraignment before the magistrate, defendant lies down on the bench. Lieutenant Holden then

approaches defendant, who stands up and takes a step forward so that the two men are chest-to-chest, and Lieutenant Holden suddenly extends his arm toward defendant's throat. Defendant appears to push Lieutenant Holden's arm away before being overcome by Corporal Metcalf and Sergeant Laughter, at which time Lieutenant Holden steps back and walks away. Additional officers arrive and escort defendant out of the booking area while defendant inexplicably removes his striped jail shirt.

Testifying in his own defense, defendant admitted that he had been agitated and had told Lieutenant Holden to remove his handcuffs so he could "whip ass," but he denied attempting to strike or spit on Lieutenant Holden. According to defendant, when he stood up from the bench, Lieutenant Holden grabbed him by the throat and pushed him back against the wall. Defendant testified that he was unable to breathe, began coughing, and unintentionally spat on Lieutenant Holden.

During the charge conference, defendant did not request a jury instruction on the defense of accident, nor did he object to the instructions as given by the trial court. Following the guilty verdict, the trial court sentenced defendant to an active term of twenty-two to thirty-six months' imprisonment. Defendant entered oral notice of appeal.

II. Discussion

In his sole argument on appeal, defendant contends the trial court erred by failing to instruct the jury on the defense of accident, where a substantive feature of defendant's case was that his spitting on Lieutenant Holden was unintentional. Defendant asserts that he suffered prejudice because the error "tilted the scales" in the State's favor and "caused the jury to reach its verdict convicting [ ] defendant." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

A. Standard of Review

"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 plain error standard of review applies "to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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 the defendant was guilty." *Id.* (citation and internal quotation marks omitted). 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).

B. Analysis

We note as an initial matter that the trial court's failure to give an instruction on the defense of accident constitutes error. Our Supreme Court has held on numerous occasions that it is the duty of the trial court to instruct the jury on all of the substantive features of a case. *State v. Brock*, 305 N.C. 532, 290 S.E.2d 566 (1982); *State v. Ferrell*, 300 N.C. 157, 265 S.E.2d 210 (1980). "This is a duty which arises notwithstanding the absence of a request by one of the parties for a particular instruction." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988) (citations omitted). Moreover, "[a]ll defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Id.* (citations omitted).

We agree with defendant's contention that accident was a substantive feature of his case. Defendant testified that Lieutenant Holden grabbed him by the throat and pushed him back against the wall, at which point defendant was unable to breathe and began coughing. According to defendant, it was while he was coughing that he unintentionally spat on Lieutenant Holden. This "coughing" theory of the case was such as to clearly make the defense of accident a substantive feature arising from the evidence presented below. Accordingly, even in the absence of a specific

request, the trial court had a duty to instruct the jury on the defense of accident, and its failure to do so was error.

Having concluded that the trial court erred in failing to instruct the jury on the defense of accident, we hasten to add that we do not find the failure to constitute plain error. As explained above, "to hold that plain error occurred at trial, we must be convinced that, but for the error, the jury probably would have reached a different verdict." *Loftin*, 322 N.C. at 382, 368 S.E.2d at 617 (citation omitted). We are not so convinced.

Here, not only did the officer directly involved in the incident testify, but two responding officers corroborated his version of events. In complete contradiction to defendant's testimony, none of the officers observed defendant coughing or attempting to catch his breath. Rather, Sergeant Laughter testified that the "pressure point technique" used by Lieutenant Holden causes pain without affecting the subject's breathing, while Corporal Metcalf testified that defendant continued to talk and curse during the incident. Having received the testimony of all three officers as well as defendant, and having viewed the silent video footage from the detention center's security cameras, the jury convicted defendant of malicious conduct by a prisoner after approximately two hours of deliberation.

III. Conclusion

The trial court erred in failing to instruct the jury on the defense of accident. However, because we conclude that the failure did not have a probable impact on the jury's finding of guilt, we find no plain error occurring at the trial court.

NO PLAIN ERROR.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).