IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-205

No. COA20-397

Filed 4 May 2021

Guilford County, Nos. 18 CRS 84917–18, 19 CRS 25280

STATE OF NORTH CAROLINA

v.

JAMES EDWARD WATKINS, JR.

Appeal by defendant from judgment entered 7 November 2019 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 24 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.

Gilda C. Rodriguez for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant James Edward Watkins, Jr., appeals from a judgment entered upon a jury's verdicts finding him guilty of assault with a deadly weapon inflicting serious injury and attaining the status of a habitual felon. After careful review, we reverse and remand for a new trial.

Background

¶ 2 At approximately 2:40 a.m. on 23 September 2018, Officers K.M. Nutter and

T.L. Carver of the Greensboro Police Department responded to a reported stabbing on Huffman Street. There, the officers spoke with Nicolas Diaz-Mendez, who appeared to be suffering from deep lacerations to his forearms and head. Diaz-Mendez mentioned Defendant by name, and told Officer Carver that Defendant, Defendant's girlfriend, and three others walked up and assaulted him. Diaz-Mendez told Officer Carver that he thought Defendant "cut him with a box cutter or a broken bottle" and that "his wallet was missing." Officer Carver also spoke with Diaz-Mendez's son, who said that he had last seen Defendant "approximately two hours prior."

¶ 3 Meanwhile, a bystander directed Officer Nutter to another injured man at a nearby residence on Huffman Street. There, Officer Nutter saw Pedro Oyuqui, who was also suffering from deep lacerations and bleeding from his head, and was losing consciousness. Officer Nutter observed broken glass and beer bottles, as well as a large amount of blood on the porch and general surrounding area.

¶ 4 The bystander then directed Officer Nutter to another residence, approximately 100 to 150 yards away, where Officer Nutter encountered Defendant. Defendant initially denied any knowledge of these events, but when Officers Nutter and Carver returned later with their sergeant, Defendant claimed that one of a group of Hispanic men had asked his girlfriend if she would have sex with them for money. Defendant said that he told the men that "there would be problems if they continued

to speak to his girlfriend[,]" but denied that any further altercation occurred. Defendant gave the officers consent to search his home, and although they did not find a weapon, a wallet, or any blood inside the residence, they did find a small amount of blood on Defendant's hands and clothes.

¶ 5 On 26 November 2018, a Guilford County grand jury returned indictments charging Defendant with felony robbery with a dangerous weapon and felony assault with a deadly weapon inflicting serious injury. The robbery indictment listed Diaz-Mendez as the victim, the wallet as the stolen property, and the dangerous weapon as a "glass bottle," while the assault indictment listed Oyuqui as the victim but did not specify a deadly weapon. On 1 April 2019, a grand jury returned another indictment charging Defendant with attaining the status of a habitual felon.

¶ 6 Defendant's case first came on for the disposition of pre-trial matters on 2 October 2019 in Guilford County Superior Court before the Honorable Eric C. Morgan. The next day, before trial began and with defense counsel's consent, the State moved to continue trial of this case, which the trial court granted. On 21 October 2019, the grand jury returned superseding indictments charging Defendant with felony robbery with a dangerous weapon and felony assault with a deadly weapon inflicting serious injury. The superseding robbery indictment described the dangerous weapon as a machete rather than a glass bottle. The superseding assault indictment added a second count of felony assault, as to Diaz-Mendez, and listed a

machete as the deadly weapon for both counts.

¶ 7 On 4 November 2019, Defendant's case came on for trial in Guilford County Superior Court, the Honorable R. Stuart Albright presiding. On 7 November 2019, the jury returned its verdicts finding Defendant not guilty of robbery with a dangerous weapon and not guilty of assault with a deadly weapon inflicting serious injury as to Oyuqui, but guilty of assault with a deadly weapon inflicting serious injury as to Diaz-Mendez. Following a second phase of trial, the jury also found Defendant guilty of attaining the status of a habitual felon.

¶ 8 The trial court sentenced Defendant to a term of 100 to 132 months in the custody of the North Carolina Division of Adult Correction. Defendant gave oral notice of appeal in open court.

Discussion

¶ 9 On appeal, Defendant argues that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of assault inflicting serious injury.

I. Standard of Review

¶ 10 "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . 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). Defendant acknowledges

that his counsel did not object to the failure to instruct that he now "specifically and distinctly" contends was plain error.

> 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 the 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 and internal quotation marks omitted).

II. Analysis

¶ 11 It is axiomatic that a criminal defendant "is entitled to an instruction on a lesser[-]included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *State v. Tillery*, 186 N.C. App. 447, 450, 651 S.E.2d 291, 294 (2007) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). When considering whether to instruct the jury on a lesser-included offense, "the trial court must determine whether (1) the lesser offense is, as a matter of law, an included offense for the crime for which the defendant is indicted and (2) there is evidence in the case which will support a conviction of the lesser[-]included offense." *State v. Smith*, 186 N.C. App. 57, 65, 650

S.E.2d 29, 35 (2007) (citation and internal quotation marks omitted).

¶ 12 However, "[t]he trial court may refrain from submitting the lesser offense to the jury only where the evidence is clear and positive as to each element of the offense charged and no evidence supports a lesser-included offense." *Tillery*, 186 N.C. App. at 450, 651 S.E.2d at 294 (citation and internal quotation marks omitted). "When determining whether there is sufficient evidence for submission of a lesser[-]included offense to the jury, we view the evidence in the light most favorable to the defendant." *State v. Clark*, 201 N.C. App. 319, 323, 689 S.E.2d 553, 557 (2009) (citation omitted).

¶ 13 "Misdemeanor assault inflicting serious injury is a lesser[-]included offense of assault with a deadly weapon inflicting serious injury." *Tillery*, 186 N.C. App. at 449, 651 S.E.2d at 293. The "primary distinction" between the felony of assault with a deadly weapon inflicting serious injury and the lesser-included misdemeanor of assault inflicting serious injury is that "a conviction of felonious assault requires a showing that a deadly weapon was used *and* serious injury resulted[.]" *Id.* (citation omitted). By contrast, "if the evidence shows that only one of the two elements was present, i.e., that *either* a deadly weapon was used *or* serious injury resulted, the offense is punishable only as a misdemeanor." *Id.* (citation omitted).

¶ 14 On appeal, Defendant argues that the evidence, viewed in the light most favorable to him, "would have permitted the jury rationally to find that [he] did not use a deadly weapon during the assault" on Diaz-Mendez and thus, the trial court

should have instructed the jury on the lesser-included offense of assault inflicting serious injury. At trial, the court instructed the jury on assault with a deadly weapon inflicting serious injury and the lesser-included felony offense of assault with a deadly weapon, but not the lesser-included misdemeanor offense of assault inflicting serious injury.[1] Accordingly, at issue is whether the evidence at trial was "clear and positive" as to Defendant's use of a deadly weapon, and that serious injury resulted, such that "no evidence support[ed] a lesser-included offense." *Id.* at 450, 651 S.E.2d at 294 (citation omitted).

¶ 15 During the charge conference, the trial court concluded that the machete alleged to have been used by Defendant—which was estimated to be 12 inches long "at minimum"—was a dangerous or deadly weapon *per se*. Although the weapon itself was not admitted into evidence, the trial court based its conclusion on Diaz-Mendez's "unequivocal" testimony about the length of the blade on the weapon "that he called a machete or large knife" and on the extent of the victims' injuries as shown in photographs. The trial court reasoned that "it was obvious that [the weapon] was a very sharp object, given the injuries that were inflicted on both of the alleged victims in this case, if you believe the testimony." The trial court also cited several opinions

[1] At the charge conference, defense counsel requested that the trial court deliver an additional jury instruction regarding the identification of a defendant as the alleged perpetrator of a crime. This requested instruction did not concern the alleged weapon or any lesser-included offense.

of this Court in which we upheld conclusions that various similar knives were dangerous or deadly weapons *per se*. *See State v. Wiggins*, 78 N.C. App. 405, 407, 337 S.E.2d 198, 199 (1985) (a box cutter); *State v. Roper*, 39 N.C. App. 256, 257, 249 S.E.2d 870, 871 (1978) (a pocketknife); *State v. Parker*, 7 N.C. App. 191, 196, 171 S.E.2d 665, 668 (1970) (a steak knife).

¶ 16 In his brief on appeal, Defendant points to several discrepancies in the testimony at trial to support his contention that there was conflicting evidence as to whether a deadly weapon was used in the assault. Although Diaz-Mendez testified that Defendant attacked him with a machete, and his son testified that he saw Defendant fleeing the altercation with a machete or large knife, Officer Carver testified that, in the ambulance after the incident, Diaz-Mendez said that Defendant "had cut him with a box cutter or a broken bottle[,]" and that Diaz-Mendez's son told him that he had last seen Defendant "approximately two hours prior." Officer Nutter testified that he observed "multiple broken glass, beer bottles" and blood at the scene of the incident and that no machete was ever found. He also testified that law enforcement officers did not search for a machete or knife at Defendant's home because "no one mentioned a machete or a knife on scene." Further, Defendant and his girlfriend each testified that two men—one of whom was Diaz-Mendez—successively jumped on Defendant's back and tried to choke him, that he "flipped" the men over and off of him, and that he did not cut anyone with a machete or a knife.

¶ 17 In its brief on appeal, the State focuses on whether a box cutter or a broken bottle could also be deemed a dangerous or deadly weapon as a matter of law. The State argues that the "conflicting evidence still tends to show Defendant used a deadly weapon to assault the victim, not that Mr. Diaz-Mendez was injured by falling on broken glass or beer bottles[,]" and attempts to discredit Defendant's version of events—that Diaz-Mendez fell onto broken glass—by calling attention to other evidence regarding the seriousness of both of the victims' injuries.

¶ 18 Essentially, the State asks us to disregard as outweighed or not credible the conflicting evidence that Defendant highlights. However, it is well settled that "the credibility of the witnesses, the weight of the testimony, and conflicts in the evidence are matters for the jury to consider and pass upon, with the reviewing court lacking any responsibility for passing on the credibility of witnesses or to weighing the testimony[.]" *State v. Rodriguez*, 371 N.C. 295, 318, 814 S.E.2d 11, 27–28 (2018) (citations and internal quotation marks omitted).

¶ 19 Viewing the evidence in the light most favorable to Defendant, *see Clark*, 201 N.C. App. at 323, 689 S.E.2d at 557, we conclude that the evidence was not "clear and positive" as to the use of a deadly weapon, such that "*no evidence* support[ed] a lesser-included offense[,]" *Tillery*, 186 N.C. App. at 450, 651 S.E.2d at 294 (emphasis added). Although a jury could have found from the evidence that Defendant used a machete or large knife, it could also have found that Defendant did not. "Based on the

foregoing, the jury could have disbelieved that a weapon was involved at all . . . . There is simply no way to ascertain what verdict the jury might have reached had they been given an alternative which did not include the use of a deadly weapon." *State v. Bell*, 87 N.C. App. 626, 635, 362 S.E.2d 288, 293 (1987). Accordingly, the trial court erred when it failed to instruct the jury on the lesser-included offense of assault inflicting serious injury.

¶ 20 Having found error, we must also determine whether this error amounted to plain error; that is, whether the error was so "fundamental" that, "after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and internal quotation marks omitted). In *Bell*, this Court found plain error in a trial court's failure to instruct the jury on the lesser-included charges of simple assault or assault inflicting serious injury where there was significant conflicting evidence:

> All eyewitnesses, even witnesses for the defense, agreed that [the] defendant struck the victim with his hands. There is, however, conflicting evidence regarding whether, thereafter, [the] defendant used a firearm to further assault the victim. Only the victim himself testified that [the] defendant had a gun. [The d]efendant's eyewitness to the assault . . . stated that [the] defendant never drew a gun and was, in fact, unarmed. This was corroborated, in part, by numerous other witnesses who stated they never saw a gun on [the] defendant's person, in his vehicle, or anywhere else. In addition, some evidence suggested that if a gun was present, it may have been that of the victim himself. Moreover, the fact that the jury found that serious

> injury had been inflicted does not affect our analysis since serious injury may be inflicted without the use of a deadly weapon.

87 N.C. App. at 635, 362 S.E.2d at 293.

¶ 21 The State attempts to distinguish *Bell* by noting that "there was no evidence introduced to corroborate Defendant's description of an altercation." However, Defendant's girlfriend testified and generally corroborated his testimony. Further, as in *Bell*, the State's evidence included prior inconsistent statements by both Diaz-Mendez and his son regarding Defendant's alleged use of a machete or large knife. Finally, we note that no machete or similar weapon was ever found, and the jury ultimately acquitted Defendant of the charge of assaulting Oyuqui with a deadly weapon inflicting serious injury, where the alleged deadly weapon was a machete. In view of this conflicting—and occasionally contradictory—evidence with regard to the use of a deadly weapon, "we hold that the error prejudicially affected substantial rights of [D]efendant and probably impacted upon the verdict so as to constitute 'plain error' and mandate a new trial." *Id.* at 636, 362 S.E.2d at 294.

Conclusion

¶ 22 For the foregoing reasons, we conclude that the trial court committed plain error by failing to instruct the jury on the lesser-included charge of misdemeanor assault inflicting serious injury. Accordingly, Defendant is entitled to a new trial.

NEW TRIAL.

Judge COLLINS concurs.

Judge DILLON dissents by separate opinion.

Report per Rule 30(e).

DILLON, Judge, dissenting.

¶ 23 Defendant was convicted of assault with a deadly weapon inflicting serious injury. I agree with the majority that the trial court erred by failing to instruct on a lesser misdemeanor charge. Viewed in the light most favorable to the State, the evidence shows that Defendant used a deadly weapon (a machete or large knife with a twelve-inch blade) to injure the victim. But viewed in the light most favorable to Defendant, the evidence shows that Defendant did not use a deadly weapon during his assault of the victim. *See State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378 (1983) ("[W]hen there is conflicting evidence of the essential elements of the greater crime and evidence of a lesser included offense, the trial judge must instruct on the lesser included offense even where there is no specific request for such instruction.").

¶ 24 The majority correctly notes that since Defendant did not ask for the instruction on the lesser included offense, Defendant is not entitled to a new trial unless the trial court's error rose to the level of *plain error*. But I disagree with the majority that Defendant met his burden of showing that the error rose to the level of plain error. Accordingly, as more fully explained below, I conclude that Defendant is not entitled to a new trial, and therefore I respectfully dissent.

¶ 25 Our Supreme Court has consistently held that to prevail on plain error review, the defendant must convince the reviewing Court, not only that there was error, "but that absent the error, the jury **probably** would have reached a different result[.]" *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634 (2009) (emphasis added). *See*

also State v. Haselden, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (2003); *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12 (2000); *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

¶ 26 This language – that "the jury probably would have reached a different result" – suggests, in my mind, that it must be *more likely than not* that the jury would have a reached a different result, i.e., greater than a 50% chance.[2] In our review, we must be mindful not to conflate this plain error standard with the lower prejudicial error standard, a standard which merely requires that the defendant show a reasonable *possibility* that a different result would have been reached.

¶ 27 Here, based on the conflicting evidence, I believe it is reasonably *possible* that the jury would have convicted Defendant of a lesser included offense had they been instructed on it. But I cannot say that Defendant has met his burden of showing that the jury *probably* would have done so, based on the substantial evidence in this case

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[2] Our Supreme Court's language setting the burden for plain error is slightly different than the language used by the United States Supreme Court in setting the standard for ineffective assistance of counsel ("IAC") claims, where the defendant must show that there is a "reasonable probability" that, absent the errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 695 (1984). The Court, though, stated that under this "reasonable probability" standard, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id*. at 693 (emphasis added). In other words, for an IAC claim, a defendant's burden of showing "reasonable probability" as established by the United States Supreme Court is arguably lower than the burden set by our Supreme Court to show plain error. Indeed, it would be appropriate for one to say that there is a "reasonable probability" that an event would happen even if the chance of the event happening was only 40%, as a 40% likelihood is a "reasonable probability," though not more likely than not. But if one were to say that an event "probably" will occur, that person would be understood to say that the event, more likely than not, will occur.

that he wielded a deadly weapon during his attack of the victim. For these reasons, I respectfully dissent.