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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-510

No. COA19-748

Filed 21 September 2021

Orange County, No. 18 CRS 50730

STATE OF NORTH CAROLINA

v.

MARIO DUPRELL CAPPS

Appeal by defendant from judgment entered 22 February 2019 by Judge R. Allen Baddour, Jr., in Orange County Superior Court. Heard in the Court of Appeals 10 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Shawn Maier, for the State.

Michael E. Casterline, P.A., by Michael E. Casterline, for defendant.

ARROWOOD, Judge.

¶ 1 Mario Duprell Capps ("defendant") appeals from judgment entered following his conviction for assault with a dangerous weapon inflicting serious bodily injury. For the following reasons, we conclude that defendant received a fair trial free of error.

I. Background

¶ 2 On 3 March 2018, defendant arrived at a residence at which Treshon Johnson ("Johnson") and others were gathered. Defendant and Johnson had tangential family ties and were familiar with one another.

¶ 3 Upon arriving, defendant exited his vehicle, placed his hand on a pistol holstered on his side, and approached Johnson. Defendant then struck Johnson in the mouth, knocking him to the ground, and returned to his car. As defendant was driving away from the scene, Johnson ran into the road and yelled, "Put the gun down and fight like a man." Defendant immediately turned the car around and returned to the residence at which point a physical altercation ensued between Johnson and defendant; defendant's gun was still in the holster during the fight. As the brawl progressed, Johnson "grabbed [defendant], punched him, [and] slung him in [a] ditch." Johnson was on top of defendant as he fell into the ditch. At this point, defendant reached for his gun, but Johnson and a bystander grabbed the weapon before it could be unclipped from the holster. Johnson's cousin and a bystander ultimately separated the two men and removed defendant from Johnson by a few yards. While Johnson was being restrained by others present, and while defendant was standing several feet away from Johnson, defendant "drew the gun off his hip" and fired three shots at Johnson, hitting him twice in the lower body. Johnson was subsequently taken to the hospital and treated for his injuries.

¶ 4 Defendant was arrested by the Burlington Police Department later that night. An examination of defendant's hand revealed gunshot residue particles. Defendant made the following statement to law enforcement during his initial interrogation: "We were fighting. Shots went off."

¶ 5 On 7 May 2018, defendant was charged with assault with a dangerous weapon with intent to kill, inflicting serious injury. Following a jury trial, the jury found defendant guilty of the lesser offense of assault with a dangerous weapon inflicting serious bodily injury. Judgment was entered on 22 February 2019 imposing an active sentence of 29 to 47 months incarceration (which was within the presumptive range for the offense). On 7 March 2019, defendant filed a *pro se* notice of appeal. Three days earlier, on 4 March 2019, defendant filed a motion for appropriate relief ("MAR"), raising essentially the same issues argued in the instant appeal. Based upon the record before us and the representations of the parties, the trial court has not ruled on the MAR.[1]

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[1] The State argues that this appeal is not ripe because at the time defendant's MAR was filed in the trial court, the jurisdiction of the trial court had not been divested under N.C. Gen. Stat. § 15A-1448(a)(3) (2019). While defendant filed a motion to hold the appeal in abeyance, this Court did not allow the abeyance. To the contrary, the Court set deadlines for the parties to file their briefs and other appellate papers, thereby evidencing its intention to expeditiously address the merits of the appeal—not to hold the appeal in abeyance pending the trial court's ruling on the MAR. Notwithstanding the pending MAR in the trial court, this Court may proceed to address the merits of defendant's appeal. *See generally State v. Rannels*, 333 N.C. 644, 665-66, 430 S.E.2d 254, 265-66 (1993).

¶ 6 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat. § 15A-1444 (2019).

II. Discussion

¶ 7 Defendant argues that the trial court erred by failing to proffer an accident-defense jury instruction, which was allegedly required given the evidence presented at trial. Defendant also argues that the trial court erred by failing to declare a mistrial *ex mero motu* following alleged misconduct by one juror during trial. We address each issue in turn.

A. Jury Instruction

¶ 8 Defendant argues that the trial court erred by failing to provide defendant's requested accident-defense instruction to the jury. We disagree.

¶ 9 "In general, a trial court is required 'to comprehensively instruct the jury on a defense to the charged crime when the evidence viewed in the light most favorable to the defendant reveals substantial evidence of each element of the defense.' " *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000) (quoting *State v. Hayes*, 130 N.C. App. 154, 178, 502 S.E.2d 853, 869-70 (1998)). "Whether the evidence presented constitutes 'substantial evidence' is a question of law." *State v. Hudgins*, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005) (citing *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982)). This Court has held that where the issue of the defense of accident was not a "substantial factor" in the case, the trial court does

not abuse its discretion by refusing to give an accident-defense instruction. *State v. Barbour*, 104 N.C. App. 793, 797, 411 S.E.2d 411, 413 (1991) (holding that defendant's requested instruction on the defense of accident was properly refused as the evidence adduced at trial did not support the requested instruction).[2]

¶ 10 Defendant argues that the trial court erred by refusing to give an instruction on the defense of accident. At trial, defendant requested a pattern jury instruction on accident. Our review of the record, transcript, and defendant's brief fails to reveal that defendant presented any evidence to the effect that the shooting was an accident. The uncontradicted evidence at trial showed that after the second physical altercation between Johnson and defendant, defendant was physically separated from Johnson, yet defendant intentionally drew his weapon from the holster and fired three shots at Johnson, hitting him twice. The defense of accident was undoubtedly not a substantial factor in this case. In fact, the record is devoid of *any* evidence that anyone other than defendant was touching the weapon at the time it was discharged by defendant. Likewise, there was no evidence that defendant inadvertently or accidentally pulled the trigger. Thus, defendant was not entitled to an accident

[2] "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citing *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999)).

instruction, and the trial court did not err in refusing his request for such an instruction.

¶ 11 Defendant cites a trio of cases in which this Court overturned convictions because the trial court failed to give an instruction on accident. However, in each of the cases relied upon by defendant, the defense of accident was a "substantial feature" of the case. In stark contrast to the facts of those cases, the evidence in this case did not warrant such an instruction, and, therefore, the jury charge was proper.

B. Mistrial

¶ 12 Defendant contends that the trial court erred by not declaring a mistrial after learning that an individual juror ("Juror Number 7") brought a replica gun to the courthouse with the intention to use the device as a visual aid during deliberations with his fellow jurors. We disagree.

¶ 13 "Defendant must show that the trial judge manifestly abused his discretion by failing, on his own motion, to declare a mistrial on all charges when the conduct of [the] juror . . . was discovered." *State v. Hill*, 179 N.C. App. 1, 24, 632 S.E.2d 777, 791 (2006). A party that fails to object or move for a mistrial based on juror misconduct waives his right to appellate review. *See State v. Lee*, 189 N.C. App. 474, 481, 658 S.E.2d 294, 300 (2008) (citation omitted). Moreover, the "determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d

145, 158 (1991) (citing *State v. Gilbert*, 47 N.C. App. 316, 319, 267 S.E.2d 378, 379 (1980)).

¶ 14 In the case *sub judice*, before jury deliberations resumed one morning, the trial court was informed that Juror Number 7 had brought a replica gun to the courthouse with the intent to use it as a visual aid for his fellow jurors. The replica gun was confiscated at the security station and was not presented or shown to any other jurors. Thereafter, the trial judge engaged in a lengthy colloquy with Juror Number 7 about his ownership of the replica gun and whether any other jurors had seen or were aware that he had planned to bring it into the jury room. Juror Number 7 denied having done any independent research, stated that he had owned the replica for years, not purchased it for any reasons related to the case, and affirmed that he could comply with the judge's instructions and serve as an impartial and fair juror in the case. He claimed that he brought the device to the court because he "thought a visual aid might be useful based on some of the items in the case." After confirming that Juror Number 7 could serve as an impartial and fair juror, the trial judge reminded Juror Number 7 of the following:

> And you have heard us talk, and we have talked to the jurors throughout about applying only the evidence that comes out of the courtroom and the law that the Court gives you. Of course, everyone comes to court with their own experiences and it's – you know, that all is part of who you are. I'm not saying, "Pretend like you haven't ever lived." But we are asking you to base the verdict only on the

> evidence in this courtroom and the law that the Court has given the jury.

¶ 15 After this colloquy, the trial court made the following oral finding and conclusion of law:

> [Juror Number 7] can remain – that he has not done any independent investigation or research other than bringing in this mock firearm and clip or holster that he had – has had in his possession; that no other jurors have seen it or are aware of it; that he did no other independent investigation or research; and that he can remain a fair and impartial juror. And I conclude that as a matter of law.

Juror Number 7 was then permitted to return to the jury room for continued deliberations. Before doing so, the trial judge asked whether any party wished to be heard. Defendant did not object or move for a mistrial. Indeed, after the court's colloquy with Juror Number 7 and before sending him back to the jury room, the trial judge expressly asked whether any party had "any objection to any of th[e] process that's occurred?" Defense counsel responded, "No objection to the process." By failing to object or move for a mistrial—or assert on appeal that the trial court's decision is subject to plain-error review—defendant has waived review of this issue, even for plain error. *See* N.C.R. App. P. 10(a)(4); *see also State v. Hinton*, 155 N.C. App. 561, 564, 573 S.E.2d 609, 612 (2002).

III. Conclusion

¶ 16 For the foregoing reasons, we hold that defendant received a fair trial free of error.

NO ERROR.

Judges MURPHY and GRIFFIN concur.

Report per Rule 30(e).