IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-480

No. COA21-724

Filed 5 July 2022

Pender County, No. 17-CRS-51360

STATE OF NORTH CAROLINA,

v.

ALBERTO PEREZ, Defendant.

Appeal by Defendant from judgment entered 29 April 2021 by Judge Richard Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals 24 May 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General J.D. Prather, for the State.

Holladay Law Office, by Sarah B. Holladay, for the Defendant.

DILLON, Judge.

¶ 1 Defendant appeals from the trial court's judgment finding him guilty of assault with a deadly weapon inflicting serious injury. The sole issue on appeal is whether the trial court issued proper jury instructions.

I. Background

¶ 2 Defendant and his brother Roberto were approached by Robinson (the "Victim") in a parking lot. The Victim made a comment that offended Roberto. Roberto then followed the Victim into a store, and a fight ensued. There is no dispute that Roberto hit the Victim first and acted as the initial aggressor.

¶ 3 Defendant entered the store seconds after Roberto and joined the fight. Roberto was able to maneuver the Victim into a chokehold, where Defendant then pulled out a knife and stabbed the Victim several times.

¶ 4 Defendant was arrested and tried by a jury for attempted first-degree murder and other assault crimes based on his involvement in the stabbing of the Victim.

¶ 5 The jury was provided with, *inter alia*, a defense of another instruction on all three charges. The jury found Defendant guilty of assault with a deadly weapon inflicting serious injury, but they found him not guilty of the other charges.

Defendant gave timely oral notice of appeal.

II. Analysis

¶ 6 Defendant argues that the trial court erred because it did not provide definitions for the terms "family member," "aggressor," or "excessive force" when giving the defense of a family member instruction. Defendant did not object to the jury instructions agreed upon by both parties. Thus, we review for plain error.

¶ 7 Plain error exists when a trial court commits an error that 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).

¶ 8 Here, the trial judge charged the jury with assault with a deadly weapon *with intent to kill* inflicting serious injury, followed by charging the jury with the lesser included offense of assault with a deadly weapon inflicting serious injury. The trial court then combined the two offenses for the remainder of the instruction, where it defined "aggressor" and "excessive force." We conclude that the trial court's issuance of combined instructions on both assault charges does not constitute plain error. Assuming it was error, we conclude that Defendant failed to show that such error had a "probable impact" on the verdict rendered by the jury. *See State v. Farook*, __ N.C. __, __, 2022-NCSC-59 ¶ 32 (2022) (stating that plain error review requires the defendant to show that the error had a "probable impact" on the outcome of the case).

¶ 9 As for the term "family member" being undefined, it is self-explanatory that Defendant's brother is his family member, as a reasonable juror understands that a brother is a member of one's family.

III. Conclusion

¶ 10 We hold that the trial court did not commit plain error in its instructions to the jury because the Defendant received a complete defense of another instruction for

all offenses, including the lesser included offense. Additionally, no prejudicial error occurred by combining the instructions.

NO ERROR.

Judges STROUD and GRIFFIN concur.

Report per Rule 30(e).