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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-23

Filed 05 July 2023

Pitt County, No. 21CRS56504

STATE OF NORTH CAROLINA

v.

HARRY JUNIOR FORD, Defendant.

Appeal by defendant from judgment entered 2 June 2022 by Judge Marvin K. Blount, III in Pitt County Superior Court. Heard in the Court of Appeals 24 May 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Ashley B. Weathers for the State-appellee.*

*The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for defendant-appellant.*

GORE, Judge.

Defendant, Harry Junior Ford, appeals his conviction of simple assault. Defendant was sentenced to forty-five days custody suspended to twelve months supervised probation with special conditions to not go within 2,000 feet of any property of the victim, Michael Rivera. Upon review of the parties' briefs and the record, we determine no error in part and vacate in part and remand for resentencing.

**I.**

Michael Rivera, the self-reported victim in this case, rented out an additional house and camper on his property through AirBNB. Rivera had been renting the camper to defendant and the neighboring house to defendant's daughter, Latifah Lipford, for over a year. Prior to the date of the incident, Rivera testified the relationship between he and defendant was poor for multiple reasons. According to Rivera, defendant had a rottweiler that was threatening to him and his fiancée, Lisa Peacock, and defendant did not pay rent for multiple months; defendant testified the camper was rodent infested, and Rivera did nothing to remedy the issue. Additionally, at the time of the incident, there was an eviction proceeding pending against defendant.

On the morning of 22 October 2021, defendant was placing dead mice on his car, as had been his habit in protest of the rodent complaint, when Rivera came outside to walk his fiancée to her car. Rivera began recording a video of defendant's actions, while defendant "yelled" at Rivera about the mice. Lipford came out of her house after hearing her father arguing with Rivera and Rivera began recording her as well. Lipford became angry as Rivera continued to record her and her father, and seemingly followed them with his camera phone. Lipford told Rivera to get the

camera away from her face and then began walking toward Rivera and grabbed the phone out of Rivera's hand.

Defendant testified his daughter, Lipford, has "a few issues as far as she's dealing with ADHD and she sees therapy for that locally." He further testified "she can get triggered." Defendant testified he attempted to stop her as she started walking towards Rivera, but Lipford snatched Rivera's phone before defendant could stop her. Lipford ran from Rivera, and he chased after her. Defendant stepped in between and held onto Rivera to "shield his daughter" and according to defendant, Rivera "hit [his] arm [and] bounced back."

Rivera testified defendant "pushed [him] back several feet" and "[held him] against [his] will for several seconds while [defendant's] daughter deleted the videos that [Rivera] had just taken." Once Lipford deleted the videos, she handed Rivera's phone back to him and defendant let him go at that point. The police were called, but they declined to file charges after interviewing both parties. Rivera acquired the video footage from his security camera and took it to the magistrate to initiate criminal charges against defendant.

Defendant was first tried in the Pitt County District Court and found guilty of simple assault, but he appealed his conviction to the superior court. A de novo jury trial took place on 31 May 2022. The trial court discussed the jury instructions during the charge conference and determined the trial court would utilize the North Carolina Pattern Jury Instructions ("N.C.P.I.") Crim 208.41 for simple assault. After

STATE V. FORD

*Opinion of the Court*

instructing the jury, the trial court asked counsel if they had any additions or corrections, and defense counsel requested an instruction to the jury on the definition of intent but did not request any further instruction for the definition of assault. The jury returned a unanimous guilty verdict for simple assault in less than one hour of deliberation.

On 2 June 2022, the trial court sentenced defendant to 45 days imprisonment, suspended for twelve months of supervised probation. The trial court also ordered defendant to have no contact with Rivera or Peacock, and to stay a minimum of 2,000 feet away from Rivera's properties. The trial court asked defendant's court-appointed attorney for the number of hours he incurred on this case and entered a civil judgment for defendant to pay court costs and \$500.00 in attorney's fees. Defendant filed a timely written notice of appeal of the final judgment on 8 June 2022.

**II.**

Defendant argues the trial court plainly erred by not defining the assault element according to the definition provided in the N.C.P.I. during the jury charge. Additionally, he argues the trial court erred by awarding the court-appointed defense attorney \$500.00 in attorney's fees without first providing defendant notice and opportunity to be heard.

Defendant concedes he failed to properly object to the trial court's jury instructions but seeks plain error review on appeal. Under plain error review:

[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 affect[s] the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citations omitted). Additionally, we review defendant’s argument regarding attorney’s fees de novo. *See generally State v. Jacobs*, 172 N.C. App. 220, 235–36, 616 S.E.2d 306, 316–17 (2005) (applying de novo review to whether the defendant was given sufficient notice and opportunity to be heard concerning the civil judgment against him for the court-appointed attorney’s fees).

A.

Defendant first contests the trial court’s jury instructions for simple assault. Specifically, he argues the trial court failed to properly define the “assault” element for simple assault according to the N.C.P.I. We disagree. Because defendant did not object to the jury instructions as provided, we review this issue for plain error.

The N.C.P.I. Crim. 208.41 includes jury instructions for simple assault. Within these instructions is a footnote that defines assault as follows:

Provided there is a battery involved, choose the most appropriate definition of assault as follows: (An assault is an intentional application of force, however slight, directly or indirectly, to the body of another person without that person’s consent.) (An assault is an intentional, offensive touching of another person without that person’s consent.)

STATE V. FORD

*Opinion of the Court*

N.C.P.I. - Crim. 208.41. We previously stated, “An assault is a legal term which jurors are not apt to be familiar. We think it incumbent upon the trial judge to define or otherwise explain to a jury the meaning of the legal term ‘assault.’” *State v. Springs*, 33 N.C. App. 61, 63–64, 234 S.E.2d 193, 195 (1977) (citation omitted). In *State v. Lineberger*, we determined the trial court committed prejudicial error by failing to define assault further than to say, “by intentionally and without justification or excuse, striking or bumping against him with his shoulder.” 115 N.C. App. 687, 689, 692, 446 S.E.2d 375, 377, 379 (1994). Key to the decision in *Lineberger* was the defendant’s timely objection and this Court’s reasoning that the jury asked for a definition of assault while deliberating, but it only received the same instruction previously given. *Id.* at 690–91, 446 S.E.2d at 378. *But see State v. Campos*, 248 N.C. App. 393, 401–02, 789 S.E.2d 492, 498 (2016) (distinguishing *Lineberger* and determining the trial court sufficiently “otherwise explained” the assault definition because the jury did not ask for a definition prior to returning a verdict).

In the present case, defendant aligns his case with *Lineberger*. However, we applied a different standard of review in *Lineberger*, and the jury requested a definition, which the trial court essentially failed to provide, prior to reaching a verdict. We read *Lineberger*’s outcome as distinguishable from the case at hand. The trial court provided the following charge for simple assault:

Now, ladies and gentlemen, the Defendant is being charged with simple assault. For you to find the Defendant guilty of this offense, the State must prove two things beyond a reasonable doubt. First, that the

STATE V. FORD

*Opinion of the Court*

Defendant assaulted the victim *by pushing the victim* on or about the alleged date. And, second, that the Defendant acted intentionally and without justification or excuse.

The trial court did not provide the footnoted definition, but it did state “assaulted . . . by pushing the victim.” The jury returned a unanimous verdict in less than one hour and did not request a definition of assault to reach its verdict. Further, defendant fails to provide evidence that the trial court’s “otherwise explaining” the term assault produced a fundamental error. Nor that it would have resulted in a different outcome had the jury heard the footnoted definition in Crim. 208.41. The jury had access to review the video footage of the altercation between defendant and Rivera and it could determine defendant committed a simple assault against Rivera. Accordingly, the trial court did not plainly err by failing to further define assault during the jury charge.

**B.**

Next, defendant argues the trial court erred by entering a civil judgment against him for the fees of his court-appointed attorney because he was not first provided the notice and opportunity to be heard. We agree. Accordingly, we vacate the civil judgment and remand for further proceedings not inconsistent with this opinion.

Both parties recognize the trial court has statutory authority pursuant to section 7A-455 to enter a civil judgment against a convicted indigent defendant for the “fees incurred by the defendant’s court-appointed attorney.” *Jacobs*, 172 N.C.

App. at 235, 616 S.E.2d at 316; *see* N.C. Gen. Stat. § 7A-455(b) (2022). However, prior to entering such judgment, the trial court must provide the defendant with notice and an opportunity to be heard. *Jacobs*, 172 N.C. App. at 235, 616 S.E.2d at 316. “Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard [is] satisfied only if there is other evidence . . . that the defendant received notice, was aware of the opportunity to be heard . . . and chose not to be heard.” *State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018).

In the present case, the trial court asked the defense attorney about his hours spent on the case but did not address defendant. The following exchange occurred:

THE COURT: How much time do you have?

MR. LIMBERT: It would be two hours. After recalling it would be approximately four hours.

THE COURT: Anything further from the State?

MR. VISSER: No, Your Honor.

MR. LIMBERT: Your Honor, may the State and I approach?

THE COURT: You may.

. . .

THE COURT: All right. Mr. Clerk, in file number 21 CRS 56504, Defendant found guilty to one count of simple assault. . . . Attorney fees in the amount of \$500 for court costs and fees will be paid under supervision direction of the probation office. And the Court will remit the jail fees. All right.

The State asserts that although the record appears to exclude the required colloquy, there is also no indication defendant was “prevented from being heard on the issue or



not provided proper notice.” This is an incorrect application of the law, and we are unwilling to entertain such reasoning in contradiction to binding precedent. Because the trial court did not provide defendant with notice nor opportunity to be heard on the issue of the imposed \$500.00 in attorney’s fees, we vacate this civil judgment and remand for resentencing.

**III.**

For the foregoing reasons, we conclude the trial court did not err in its jury instructions for simple assault, but it erred during sentencing by not providing defendant with notice nor the opportunity to be heard on the issue of court-imposed attorney’s fees. Therefore, we vacate in part and remand for resentencing.

NO ERROR IN PART, VACATED IN PART AND REMANDED FOR RESENTENCING.

Judge ARROWOOD and Judge WOOD concur.

Report per Rule 30(e).