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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-384

Filed 17 December 2024

Forsyth County, Nos. 22CRS223, 22CRS54824

STATE OF NORTH CAROLINA

v.

JACKY D. JONES, Defendant.

Appeal by Defendant from Judgment entered 16 November 2023 by Judge Aaron Berlin in Forsyth County Superior Court. Heard in the Court of Appeals 8 October 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Rebecca E. Lem, for the State.

W. Michael Spivey for Defendant.

GRIFFIN, Judge.

Defendant Jacky D. Jones appeals from the trial court's judgment entered after a jury found him guilty of assault with a deadly weapon with intent to kill inflicting serious injury in violation of section 14-32(a) of the North Carolina General Statutes. Defendant contends the trial court committed plain error by instructing the jury that

a gunshot wound is a serious injury, and by failing to instruct the jury on the lesser included offenses of assault with a deadly weapon with intent to kill and assault with a deadly weapon. We hold the trial court did not err.

I. Factual and Procedural Background

Tatiana Jones and Defendant met while employees at the Forsyth County Correctional Center. They began dating in late 2021 and dated for six months until Defendant ended their relationship. Six weeks after their relationship amicably ended, Defendant showed up to Ms. Jones's birthday party uninvited, came through the back door, screamed about his power being out, and walked out. That same night, between 10 and 11 p.m., Defendant asked his friend and neighbor, Roger Brown, to borrow a firearm. At the time, Defendant was subject to a domestic violence protective order unrelated to Ms. Jones and therefore could not possess a firearm. Mr. Brown provided Defendant with a loaded 9mm firearm.

Later that night, on 18 June 2022, Defendant called Ms. Jones several times making bizarre statements and asking unclear questions. During their last phone conversation of the night, Defendant asked Ms. Jones to take him to get gas because he had run out of gas in his driveway. Ms. Jones agreed. On the way to the gas station, Ms. Jones noticed unusual behavior by Defendant. Defendant would repeat everything she said, and he did not wear his seatbelt as he usually would.

Defendant suddenly told Ms. Jones to stop the car, and he pushed the gear lever into "park" as she was slowing down. Defendant said he was "so sick and tired,

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sick and tired,” and that Ms. Jones was going to be “the last woman to ever shit on [him].” Defendant then pulled the firearm wrapped in a gray plastic bag from his right side, told her he was going to kill her, and he pointed the firearm at her stomach and then at her temple. After pleading for him to put the firearm away, Ms. Jones knocked the firearm away from her temple with her right hand and lunged at him. This resulted in Ms. Jones breaking her fingernails while pushing the firearm away from her and towards Defendant. Ms. Jones could still see the firearm in his hand and continued to plead for him to stop, saying, “Jacky, please don’t do this. Don’t do this.” In return, Defendant said, “I’m about to kill you. You’re about to die. I’m about to kill you.” He then stated, “when I get out of this car, you better hope and pray you’re fast enough ‘cause I’m about to kill you. You’re about to die.” As a result of these statements, Ms. Jones flung the car door open, jumped out of the passenger side of the vehicle, and attempted to take off running. Defendant shot Ms. Jones twice, once in the arm and once in the side, as she was attempting to flee.

The two circled the car in a chase, and Ms. Jones ran to the driver’s side of the car, retrieved her concealed firearm from under the driver’s seat, and fired it in the air twice while she was screaming for help. Defendant attempted to shoot her again, but his firearm jammed. As Defendant was getting into Ms. Jones’s car to drive away, Ms. Jones reached into the car, attempting to get her cell phone to call EMS, and Defendant noticed he shot her. Defendant then got out of the car and pulled his firearm out, and Ms. Jones ran because she believed Defendant was going to “finish

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the job.”

Ms. Jones tried knocking on the doors of several nearby houses, but no one answered. She then ran to a nearby gas station and asked the store clerk for help, saying she had been shot and needed to use the phone. Ms. Jones put her firearm down on the counter and called 911. The clerk, Tatyana Noel, testified she could see blood coming through Ms. Jones’s shirt, and that Ms. Jones appeared frantic and disheveled when she arrived at the gas station. An ambulance transported Ms. Jones from the gas station to Baptist Hospital. Ms. Jones’s friend, Barbara Ann Midgette, saw Ms. Jones in the hospital and testified Ms. Jones was in pain.

On 1 August 2022, Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. On 30 January 2023, Defendant was charged with possession of a firearm in violation of a domestic violence protective order. Defendant’s matter came on for trial on 13 November 2023 in Forsyth County Superior Court before the Honorable Aaron Berlin. Defendant did not offer any evidence at trial and stipulated to the domestic violence protective order violation. Regarding his other charges, Defendant did not request an instruction on lesser-included offenses, nor did he object to the court’s proposed instructions during the charge conference. Without objection, the trial court instructed the jury on possession of a firearm in violation of a domestic violence protective order, assault with a deadly weapon with intent to kill inflicting serious injury (“AWDWIKISI”), and assault with a deadly weapon inflicting serious injury (“AWDWISI”). The court instructed the jury

that a gunshot wound is a serious injury for purposes of AWDWIKISI and AWDWISI.

The jury found Defendant guilty of possession of a firearm in violation of a domestic violence protective order, and AWDWIKISI. The court entered judgment on 16 November 2023. Defendant gave notice of appeal in open court.

II. Analysis

Defendant alleges the trial court plainly erred by (1) instructing the jury that a gunshot wound is a serious injury and (2) failing to instruct the jury on lesser-included offenses. Specifically, Defendant contends the trial court should have instructed the jury on the lesser-included offenses of assault with a deadly weapon with intent to kill and assault with a deadly weapon, both of which lack the serious injury element. Defendant argues the jury, rather than the trial court, should have determined whether Ms. Jones’s injuries were “serious.” We hold the trial court did not err.

This Court reviews unpreserved issues with jury instructions for plain error. N.C. R. App. P. 10(a)(4); *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Our Supreme Court recently clarified the plain error standard in the case of *State v. Reber*, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024). The Court doubled down on the standard set forth in *Lawrence*, the case where our Supreme Court first issued its “doctrinal statement” on plain error. *Id.* For an instructional error to amount to plain error, the defendant must satisfy a three-part test. *Id.* First, the defendant must demonstrate that a “fundamental error occurred at trial.” *Id.* (citing

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334). Second, “that the error had a ‘probable impact’ on the outcome, meaning that ‘absent the error, the jury probably would have returned a different verdict.’” *Id.* (quoting *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 334). Third, “that the error is an ‘exceptional case’ that warrants plain error review . . . showing that the error seriously affects ‘the fairness, integrity or public reputation of judicial proceedings.’” *Id.* (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

Here, Defendant’s counsel did not object when given the opportunity at the charge conference nor after the charge had been given. When the trial court stated it was going to instruct the jury that the gunshot wound was a serious injury, Defendant’s attorney said, “I don’t object.” Defendant’s counsel affirmed the instruction a second time, stating, “That [instruction] sounds appropriate, Your Honor.” Thus, because Defendant failed to object at trial and Defendant challenges the trial court’s instruction for the first time on appeal, we review for plain error.

A. Serious Injury

Defendant argues the trial court committed plain error by instructing the jury Ms. Jones’s gunshot wounds to the arm and side were serious injuries as a matter of law. Specifically, Defendant contends the jury, rather than the trial court, should have determined whether Ms. Jones’s injuries were “serious.” Because Defendant did not properly object to the jury instruction at trial, we must consider whether the jury instruction was error, and if it was error whether “the jury *probably* would have returned a different verdict had the error not occurred.” *Lawrence*, 365 N.C. at 507,

723 S.E.2d at 327 (citation omitted). In other words, if we determine the jury instruction was error, we must evaluate whether the jury *probably* would have found Ms. Jones’s gunshot wounds were not serious if allowed to decide.

Our courts have not explicitly defined “serious injury” for assault statutes, but precedent indicates “[t]he injury must be serious but it must fall short of causing death . . . [w]hether such serious injury has been inflicted must be determined according to the particular facts of each case.” *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). Whether a serious injury exists is usually a factual issue for the jury to decide, but the judge “may remove the element of serious injury from consideration by the jury by peremptorily declaring the injury to be serious.” *State v. Bagley*, 183 N.C. App. 514, 527, 644 S.E.2d 615, 623–24 (2007) (citation omitted). A judge may peremptorily declare an injury “serious” as a matter of law where “the evidence is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted[.]” *State v. Pettiford*, 60 N.C. App. 92, 97, 298 S.E. 2d 389, 392 (1982).

Defendant contends reasonable minds could differ as to the seriousness of Ms. Jones’s injuries because Ms. Jones was not “physically disabled by her injuries” as she was able to run around her car and run to seek help; Ms. Jones did not testify at trial she “suffered any pain, received any treatment, or sustained any disability related to her injuries[;]” and there was no evidence reflecting “how long [Ms. Jones] was at the hospital or that she suffered any disability from her injuries.” Despite

Defendant's contention, we disagree with Defendant that reasonable minds could differ as to the seriousness of Ms. Jones's injuries.

Though not exhaustive, our courts consider a variety of factors in determining whether a serious injury has been inflicted, including: "(1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work." *State v. Morgan*, 164 N.C. App. 298, 303, 595 S.E.2d 804, 809 (2004) (citing *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991)). This Court has indicated competent evidence supporting "any one of these factors is sufficient in itself to constitute substantial evidence of serious injury." *State v. McLean*, 211 N.C. App. 321, 325, 712 S.E.2d 271, 275 (2011) (emphasis added) (citation omitted). Additionally, our Supreme Court has considered the location of the victim's gunshot wound in determining a serious injury. *See Hedgepeth*, 330 N.C. at 55, 409 S.E.2d at 319.

In *Hedgepeth*, our Supreme Court held the trial court did not err by instructing the jury the victim's injuries were serious as a matter of law when the victim "was struck by a bullet which traveled through the thickness of her ear." *Id.* at 54, 409 S.E.2d at 319. There, the trial court stated the following to the jury: "a bullet wound which is through and through, that [] enters the flesh and exits the flesh is a serious injury." *Id.* at 52–53, 409 S.E.2d at 318. Unlike the present case, the defendant in *Hedgepeth* objected to the jury instruction at trial, properly preserving the argument for appeal. *Id.* at 55, 409 S.E.2d at 319. Our Supreme Court adopted the standard set forth in *Pettiford* and held the trial court did not err because "reasonable minds

could not differ as to the seriousness of [the victim's] physical injuries.” *Id.* at 55, 409 S.E.2d at 319. The Court reasoned there was no error in the serious injury jury instruction because “[a] bullet ripped through her ear mere inches from her skull[,]” she required emergency room treatment, and her testimony indicated her physical injuries may have some permanency. *Id.*

Here, Ms. Jones’s injuries satisfy several of the factors used in determining the seriousness of an injury, including evidence she went to the hospital, evidence of blood seeping through her shirt as she was begging for EMS, and Ms. Midgette’s testimony that Ms. Jones was in pain when Ms. Midgette saw her in the hospital. Although we acknowledge there is no evidence in the record of time lost at work, the list of factors in determining whether a serious injury has been inflicted is non-exhaustive, and any one factor is sufficient in and of itself. *McLean*, 211 N.C. App. at 325, 712 S.E.2d at 275.

Here, unlike *Hedgepeth*, Defendant failed to object to the jury instruction at trial which requires this Court to review for plain error. While considering our standard of review, we still find *Hedgepeth* analogous. Although not directly stated in *Hedgepeth*, the location of the injury was a factor considered by the Court in its evaluation of the trial court’s serious injury instruction by stating, “[a] bullet ripped through her ear mere inches from her skull.” *Id.* at 55, 409 S.E.2d at 319. The location of Ms. Jones’s injuries is significant here because Ms. Jones was shot in the arm and in the side, both of which are inches from her heart, lungs, and other vital

organs, much like the victim's brain in *Hedgepeth*. Additionally, like in *Hedgepeth*, Ms. Jones went to the emergency room, and she was bleeding and in pain when she arrived. Though the record lacks extensive medical information about Ms. Jones's gunshot wounds, images of Ms. Jones's injuries admitted into evidence show the degree and detail of the injuries inflicted by Defendant. The images show gruesome gunshot wounds in Ms. Jones's arm and side, where flesh and blood were protruding through her skin. The wounds were still emitting blood and fluid when the photos were taken of her injuries in the emergency room, even after she had run to several homes, run to the gas station, waited on EMS, and been treated by EMS staff on the way to the hospital.

Defendant has not shown how this instruction was error. Even assuming it was error, Defendant fails to show the error was so fundamental "the jury *probably* would have returned a different verdict had the error not occurred." *Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327 (citation omitted). Because the evidence is not conflicting and reasonable minds could not differ as to the seriousness of the injuries inflicted, we hold the trial court did not err in instructing the jury that Ms. Jones's injuries were serious as a matter of law.

B. Lesser Included Offense

Because we hold the trial court did not err in instructing Ms. Jones's injuries were serious as a matter of law, we need not address Defendant's argument regarding lesser-included offenses.

III. Conclusion

For the foregoing reasons, we hold Defendant failed to meet his burden of demonstrating the trial court committed error, much less plain error.

NO ERROR

Judge MURPHY concurs in result only.

Judge THOMPSON concurs.

Report per Rule 30(e).