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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-132

Filed 7 May 2025

Wilkes County, No. 21 CRS 50970

STATE OF NORTH CAROLINA

v.

NYAMBER DAWN GRIZZEL, Defendant.

Appeal by Defendant from judgment entered 27 July 2023 by Judge Lori I. Hamilton in Wilkes County Superior Court. Heard in the Court of Appeals 11 September 2024.

Attorney General Jeff Jackson, by Assistant Attorney General Allison J. Newton, for the State.

Gilles Law, PLLC, by Michelle Abbott, for Defendant-Appellant.

CARPENTER, Judge.

Nyamber Dawn Grizzel (“Defendant”) appeals from judgment entered after a jury found her guilty of misdemeanor assault with a deadly weapon. Defendant argues the trial court erred by: (1) omitting an agreed-upon self-defense jury instruction and (2) permitting testimony concerning Defendant’s child custody arrangement and failed drug test. After careful review, we discern no prejudicial

error.

I. Factual & Procedural Background

On 12 May 2021, a physical altercation occurred between Defendant and her boyfriend, Christopher Shelton. As a result, Defendant was arrested for misdemeanor simple assault. Thereafter, the State filed a misdemeanor statement of charges against Defendant for assault with a deadly weapon, alleging Defendant used a cinderblock to assault Shelton.

On 26 July 2023, Defendant's case proceeded to trial. Defendant and Shelton testified to different versions of the altercation. According to Shelton, when he returned home after work, Defendant was intoxicated and an altercation arose after Defendant became "erratic and mad" that Shelton disposed of her alcohol. Shelton also testified that, as he was attempting to flee the home, Defendant "threw [a 10-pound cinderblock] at [him] along with the record player and a bunch of other stuff" Defendant, on the other hand, testified that she defended herself after she was physically assaulted by Shelton and never threw a cinderblock.

Deputy Colby Greene with the Wilkes County Sheriff's Office arrived at the home at approximately 12:00 a.m. after both parties contacted law enforcement. Upon Deputy Greene's arrival, Shelton was waiting outside the home and Defendant was inside. When he entered the home, Deputy Greene observed Defendant crying and "several items in the house that were broken" including a television, window blinds, and a record player. Deputy Greene did not observe physical markings or

bruising on Defendant but did observe “a scratch on [Shelton’s] right forearm.” Defendant and Shelton gave Deputy Greene conflicting stories: Shelton claimed he was assaulted by Defendant, and Defendant claimed she was assaulted by Shelton.

During the charge conference, the trial court and counsel discussed a series of pattern jury instructions. The trial court inquired if Defendant wanted “to be heard on the self-defense issue.” Defense counsel responded: “Yes, your Honor, I would. I was thinking about [Defendant’s] testimony, yes, I think that would be appropriate.” The trial court explained it would work on the self-defense instruction and include it “after the assault with a deadly weapon and after the simple assault instruction.”

During the jury charge, the trial court did not instruct on self-defense. Defendant did not object when the jury was charged. After the jury left the courtroom to deliberate, the trial court asked the parties, “do I have any requests for modifications of the jury instructions?” Defense counsel replied, “No, Your Honor.”

The jury found Defendant guilty of misdemeanor assault with a deadly weapon and the trial court sentenced Defendant to thirty-days imprisonment. On 7 August 2023, Defendant entered a written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Issues

The issues are whether the trial court erred by: (1) omitting jury instructions

on self-defense and (2) allowing Shelton to testify regarding Defendant's child custody arrangement and failed drug test.

IV. Analysis

A. Jury Instructions

First, Defendant asserts the trial court reversibly or plainly erred by failing to include a jury instruction on self-defense. We disagree.

1. Preservation

As an initial matter, we consider whether Defendant's argument is properly preserved for our review. To preserve a jury instruction challenge, a party must timely object "before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection[.]" N.C. R. App. P. 10(a)(2). Defendant concedes he failed to object to the trial court's omission of the self-defense instruction. Nonetheless, Defendant contends the issue is preserved as a matter of law pursuant to *State v. Lee*, 370 N.C. 671, 811 S.E.2d 563 (2018).

According to *Lee*, "[w]hen a trial court agrees to give a requested pattern jury instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection." *Id.* at 676, 811 S.E.2d at 567. Furthermore, " '[a] request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.' " *Id.* at

676, 811 S.E.2d at 567 (quoting *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988)).

Here, the trial court indicated it would include a jury instruction on self-defense:

Trial court: These self-defense instructions are always challenging to get it all together and get it drafted, *so that's what I am doing is working on the self-defense instruction*, and this is going to take me just a little time because *we need to put self-defense in the instruction after the assault with a deadly weapon and after the simple assault instruction*. So while I am doing this, there is no reason for you guys to just sit there and look at me, so let's go ahead and take a 15-minute recess.

When the trial court instructed the jury, it did not give a self-defense instruction. By indicating that it would give a self-defense instruction and failing to do so, the trial court made an “erroneous deviation” from the agreed-upon instruction. *See Lee*, 370 N.C. at 676, 811 S.E.2d at 567. As such, the issue is preserved for our review despite Defendant's failure to object.

2. Standard of Review

“Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo*, by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). “Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d

316, 319 (2008)).

We review a trial court’s failure to include an agreed-upon jury instruction for harmless error. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citations omitted). “[H]armless-error review requires a defendant show that ‘there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises[.]’” *State v. Leaks*, 379 N.C. 57, 62, 864 S.E.2d 217, 220 (2021) (quoting N.C. Gen. Stat. § 15A-1443(a) (2019)).

3. Discussion

“It is the duty of the trial court to instruct the jury on the law applicable to the substantive features of the case arising on the evidence” *State v. Robbins*, 309 N.C. 771, 776, 309 S.E.2d 188, 191 (1983). If “a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance.” *State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995) (citations omitted).

“A defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-defense.” *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998) (citation omitted). A person may act in self-defense to prevent imminent and serious bodily harm but is not entitled to act in self-defense *after* sustaining bodily harm unless the action is to prevent further imminent and serious bodily harm. *See* N.C. Gen. Stat. § 14-51.3(a) (2023). In short,

a defendant is not entitled to self-defense when retaliating to an assault without seeking to prevent further imminent and serious bodily harm. *See id.*

As noted above, the trial court did not include the agreed-upon jury instruction on self-defense. As such, the trial court erred. *See Lee*, 370 N.C. at 676, 811 S.E.2d at 567. Thus, we must consider whether there is “ ‘ a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial.’ ” *See State v. Knight*, 262 N.C. App 121, 128, 821 S.E.2d 622, 628–29 (2018) (quoting N.C. Gen. Stat. § 15A-1443(a) (2017)).

Here, Defendant testified that she acted in self-defense *after* Shelton assaulted her. Further, Defendant did not testify that Shelton posed an imminent threat of serious harm immediately before or after her assault of Shelton. Therefore, had the agreed-upon self-defense instruction been given, there was no evidence presented to allow the jury to reasonably infer that Defendant acted in self-defense. Accordingly, the trial court’s error in failing to give the self-defense instruction was harmless. *See Allred*, 129 N.C. App. at 235, 498 S.E.2d at 206.

B. Child Custody and Drug Use Testimony

Next, Defendant argues the trial court plainly erred by permitting testimony regarding her child custody arrangement with Shelton and her failed drug test. Defendant contends this evidence was irrelevant, unduly prejudicial, and improper character evidence. We disagree.

1. Preservation and Standard of Review

Issues “not preserved by objection noted at trial . . . [or] deemed preserved by rule or law. . . 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).

Shelton testified that a child custody case regarding the child he shared with Defendant occurred at some point after 12 May 2021. Specifically, Shelton testified that he obtained custody of the child because Defendant failed a drug test for methamphetamine. Defendant did not object to Shelton’s testimony at trial. Thus, Defendant’s challenge to the trial court’s admission of Shelton’s testimony is an unpreserved evidentiary issue. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (“[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error.”). Nonetheless, because Defendant “specifically and distinctly” argues plain error, we review for plain error. *See* N.C. R. App. P. 10(a)(4).

A defendant must pass a three-part test to establish plain error:

First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict. Finally, the defendant must show that the error is an exceptional case that warrants plain error review, typically by showing that the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Reber, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (internal quotation marks and citations omitted). “Probable impact” means that, absent the error in

question, it is “almost certain[]” or “doubtless” that a different result would have been reached at trial. *Id.* at 159, 900 S.E.2d at 787.

2. Discussion

Under plain-error review, we first consider whether the trial court fundamentally erred. First, despite Defendant’s argument that Shelton’s testimony was unduly prejudicial, we are unable to address matters concerning abuse of discretion under plain-error review. *See State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) (citations omitted) (“The balancing test of Rule 403 is reviewed by this [C]ourt for abuse of discretion, and we do not apply plain error ‘to issues which fall within the realm of the trial court’s discretion.’”).

Now to Defendant’s argument concerning Rules 401 and 404. Relevant evidence has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2023). “[R]elevant evidence is generally admissible at trial, while irrelevant evidence is not admissible.” *State v. Davis*, 287 N.C. App. 456, 464, 883 S.E.2d 98, 105 (2023) (citing N.C. Gen. Stat. § 8C-1, Rule 402 (2021)). Even if it is relevant, however, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2023).

Even assuming Shelton’s testimony was irrelevant or improper character evidence, Defendant has not shown that any error was so prejudicial where, in its

absence, the jury “almost certainly” would have reached a different verdict. *See Reber*, 386 N.C. at 159, 900 S.E.2d at 787. Specifically, neither statement by Shelton casts doubt on the events of 12 May 2021 to cause a jury to reasonably infer that Defendant acted in self-defense.

Here, Defendant was charged with misdemeanor assault with a deadly weapon which provides:

any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

Inflicts serious injury upon another person or uses a deadly weapon[.]

N.C. Gen. Stat. § 14-33(c)(1) (2023). Shelton testified that Defendant assaulted him, and Defendant necessarily admitted to assaulting Shelton by arguing self-defense. Further, Deputy Greene testified that he observed physical markings on Shelton consistent with a physical assault. As this evidence tends to show that Defendant assaulted Shelton, the critical issue before the jury was whether Defendant assaulted Shelton with a deadly weapon—the cinderblock. While Defendant denied using a cinderblock, Shelton testified that Defendant threw a cinderblock at him. Deputy Greene’s observation of the cinderblock’s location corroborated Shelton’s version of events. Based on this evidence, a rational jury could conclude that Defendant assaulted Shelton with a deadly weapon. As such, Defendant has not shown that the jury “almost certainly” would have found her not guilty of assault with a deadly

weapon absent Shelton's challenged testimony. *See Reber*, 386 N.C. at 159, 900 S.E.2d at 787. Accordingly, we discern no plain error.

V. Conclusion

We conclude the trial court's failure to instruct the jury on self-defense was harmless error. Moreover, the trial court did not plainly err by allowing testimony concerning Defendant's child custody arrangement and failed drug test.

NO PREJUDICIAL ERROR.

Judges GORE and FLOOD concur.

Report per Rule 30(e).