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NO. COA00-1457

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v.

Beaufort County
No. 99 CRS 4613

WILLIAM GERALD EVANS

Appeal by defendant from judgment entered 26 July 2000 by Judge Clifton W. Everett, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 7 November 2001.

Attorney General Roy A. Cooper, by Assistant Attorney General Staci Tolliver Meyer, for the State.

McCotter, McAfee & Ashton, P.L.L.C, by Kirby Smith, III, and Rudolph A. Ashton, III, for defendant-appellant.

TIMMONS-GOODSON, Judge.

William Gerald Evans ("defendant") appeals a judgment entered after a jury verdict convicting him of assault with a deadly weapon inflicting serious injury. We hold that defendant received a fair trial, free from prejudicial error.

The State's evidence at trial tended to show the following: On 4 July 2000, defendant offered Oscar Smith ("Smith") a ride to the workplace of Smith's girlfriend. While in route to the girlfriend's place of work, defendant stopped the vehicle at his home. Smith stepped out of the vehicle and waited for defendant to come out of the house. When defendant returned to the vehicle, he

was carrying a .22 rifle pointed towards Smith. Defendant began crying and said, "I told you I wasn't no punk, no joke . . . I told you to let everybody know I ain't no punk." Defendant then fired the rifle, striking Smith in his right and left ankles. Immediately upon shooting Smith, defendant offered to take Smith to the hospital. Defendant proceeded to drive towards Washington, North Carolina, at a speed of 100 miles per hour. When he stopped at a convenient store to purchase cigarettes and alcohol, the police arrived. Defendant was arrested and taken into custody.

Following the denial of defendant's motion to dismiss, the jury convicted defendant of assault with a deadly weapon inflicting serious injury. After sentencing defendant to an active term of imprisonment, the trial court imposed as a condition of defendant's post-release supervision, that defendant pay restitution in the amount of \$8,172.29. Defendant appeals.

In his first assignment of error, defendant contends that the trial court erred by denying his *pro se* motion for continuance and/or motion for substitute counsel.

Normally, our review of a denial of a motion for continuance is restricted to whether the trial court abused its discretion; and the denial will not be disturbed absent a showing of abuse of that discretion. *State v. Barnard*, 346 N.C. 95, 104, 484 S.E.2d 382, 387 (1997). However, when the motion is based on a constitutional issue, "the trial court's action involves a question of law which is fully reviewable on appeal." *Id.* Here, defendant argues that

the trial court violated both his federal and state constitutional rights by denying his motion for new or substitute counsel and/or allowing defendant additional time to retain other counsel. The crux of defendant's argument is that the trial court erred by failing to appoint substitute counsel when his court-appointed counsel provided ineffective assistance. Defendant contends his counsel was ineffective because he failed to subpoena an officer as requested by defendant. We disagree with defendant's contention.

The Sixth Amendment guarantees that an accused shall have the right to have effective assistance of counsel for his defense. *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981), cert. denied, 464 U.S. 1065, 79 L. Ed. 2d 207 (1984). "The right of an indigent defendant charged with a criminal offense to have counsel appointed to represent him at his trial is not 'an empty formality' but is intended to guarantee effective assistance of counsel." *State v. Robinson*, 290 N.C. 56, 65, 224 S.E.2d 174, 179 (1976) (quoting *State v. Sneed*, 284 N.C. 606, 612, 201 S.E.2d 867, 871 (1974)). This constitutional right, however, does not include the right to "insist that competent counsel . . . be removed and replaced with [substitute counsel] just because the defendant has become dissatisfied with his services." *Id.* at 66, 224 S.E.2d at 179. "In order to be granted substitute counsel, defendant must show "'good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict.'" *State v. Gary*, 348 N.C. 510, 516, 501 S.E.2d 57, 62 (1998) (quoting *State v. Sweezy*, 291

N.C. 366, 372, 230 S.E.2d 524, 528-29 (1976)). Our Supreme Court has stated that, a disagreement between the defendant and his court-appointed counsel over trial tactics is not sufficient to require the trial court to replace court-appointed counsel with another attorney. *Robinson*, 290 N.C. at 66, 224 S.E.2d at 179. "[T]he type of defense to present and the number of witnesses to call is a matter of trial tactics, and the responsibility for these decisions rests ultimately with defense counsel." *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 211 (1991).

In the instant case, the decision to subpoena the arresting officer rather than the officer who impounded defendant's vehicle upon arrest was a trial tactic properly decided by defendant's counsel. The fact that defendant did not agree with his counsel's decision does not provide a basis for replacement of counsel.

Defendant further argues that because a disagreement over his counsel's trial tactics existed, a detailed inquiry was necessary to determine whether counsel could effectively represent defendant at trial. This argument is without merit.

It has been well established that when faced with claims of conflicts or requests for dismissal of counsel, the trial court "must satisfy itself *only* that present counsel is able to render competent assistance and that the nature or degree of conflict is not such as to render that assistance ineffective." *State v. Thacker*, 301 N.C. 348, 353, 271 S.E.2d 252, 256 (1980) (emphasis added). The trial court is only obligated to inquire into defendant's reasons "to the extent necessary to determine whether

defendant will receive effective assistance of counsel." *State v. Poole*, 305 N.C. 308, 312, 289 S.E.2d 335, 338 (1982). "Once it becomes apparent that the assistance of counsel has not been rendered ineffective, the trial judge is not required to delve any further into the alleged conflict." *Id.* at 311-12, 289 S.E.2d at 338. When it "appears to the trial court that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent that defendant, denial of defendant's request to appoint substitute counsel is entirely proper. *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255.

In the instant case, the record reveals that the trial judge adequately inquired into defendant's reasons for wanting substitute counsel. Defendant expressed dissatisfaction with his attorney because he felt that his attorney "[did not] seem to have [his] best interest at heart" and . . . "[did not] seem to want to do the things that [he] asked him." Although defendant contends that distrust and hostility existed between he and his attorney which ultimately led to a breakdown of communications, he expressed to the trial court that his counsel "did fine" up until his decision to not subpoena the impounding officer. Clearly, the inquiry into defendant's reasons for wanting substitute counsel was based merely upon a trial tactic and nothing more.

Further, the trial court was provided with detailed information regarding the defense counsel's decision not to

subpoena the impounding officer. The prosecution noted that the decision not to subpoena the impounding officer was based on the fact that the officer had no knowledge nor jurisdiction over the incident in question. With this information, the trial court determined that defendant's assertion for wanting substitute counsel was nothing more than an attempt to have his case continued. While some situations may require an in-depth inquiry and detailed findings of fact, the conflict in the present case is clearly not one of them. The trial court made sufficient inquiry to learn that the conflict in the present case was not such as to render defense counsel's assistance ineffective. This assignment of error is therefore overruled.

In his second assignment of error, defendant contends the trial court committed plain error by allowing the State to repeatedly ask leading questions during the direct examination of Smith. Defendant concedes that he objected only once to the questions posed by the prosecutor; however, he argues that this Court should review the entire direct examination of the victim under plain error.

Plain error is "fundamental error, something so basic so prejudicial, so lacking in its elements that justice cannot have been done, or . . . grave error which amounts to a denial of a fundamental right of the accused[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). For an error at trial to amount to plain error,

the "appellate court must be convinced that absent the error the jury would have reached a different verdict." *State v. Reid*, 322 N.C. 309, 313, 367 S.E.2d 672, 674 (1988). Therefore, in order to prevail under a plain error analysis, defendant must show that "(1) there was error and (2) without this error, the jury would probably have reached a different verdict." *State v. Najewicz*, 112 N.C. App. 280, 294, 436 S.E.2d 132, 141 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

A leading question is defined as one "which suggests the desired response and one which may frequently be answered 'yes' or 'no.'" *State v. Mitchell*, 342 N.C. 797, 805, 467 S.E.2d 416, 421 (1996) (citation omitted). "However, a question is not necessarily leading simply because it may be answered yes or no." *Id.* Further, a ruling on the admissibility of a leading question is left to the sound discretion of the trial court and will not be reversed in the absence of an abuse of discretion. *Id.* at 806, 467 S.E.2d at 421.

Having carefully reviewed the entire direct examination of Smith, we conclude that the trial court did not abuse its discretion in the manner in which it permitted the State to proceed. The questions posed merely directed Smith toward the specific matter being addressed without suggesting the desired answer. Assuming arguendo that the questions were leading, defendant has failed to demonstrate how the admissibility of these questions resulted in prejudicial error. This assignment of error is overruled.

By his next assignment of error, defendant contends that the trial court committed plain error by allowing the State to introduce inadmissible hearsay. Defendant challenges Smith's testimony that "[t]he doctors told me I'm going to have arthritis and arthritis pain for the rest of my life[.]" Defendant argues that the admission of this hearsay testimony was error in that it was offered to prove the truth of the matter asserted, that the victim had been seriously injured. We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (1999). Assuming for the purpose of this argument that the statement was hearsay, we find no prejudicial error in its admission because the statement adds little to the State's evidence. The fact that Smith suffered from arthritis pain after the incident did not go to the severity of the injury. We do not believe that there is a reasonable probability the trial court would have reached a different outcome had the statement been excluded. At trial, Smith testified that defendant fired a shot wounding him in his right and left ankles. Smith further testified to the loss of blood he sustained, the weakness he suffered and to the surgery required. This was sufficient evidence for a jury to determine that Smith sustained a serious injury, therefore, the admission of Smith's statement regarding arthritis was harmless. This assignment of error is overruled.

In his next assignment of error, defendant contends that the

trial court committed plain error by allowing irrelevant testimony regarding a subsequent event between defendant and Smith. At trial Smith testified that after the 5 July 1999 incident, he and defendant got into an altercation at Belhaven City Hall. Defendant did not object to this testimony at trial, but argues that this evidence was irrelevant and inadmissible under N.C. Gen. Stat. § 8C-1, Rule 401 as it demonstrates the defendant's propensity to harm. We disagree.

The admission of "irrelevant evidence is harmless unless defendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded." *State v. Moctezuma*, 141 N.C. App. 90, 93-94, 539 S.E.2d 52, 55 (2000). Defendant has the burden of demonstrating that he was prejudiced by the admission of the evidence. *Id.* In light of the other evidence of the seriousness of the injury against him, defendant has failed to show that there was a reasonable probability that the outcome of the trial would have been different without the error. We therefore conclude that the admission of the altercation testimony does not rise to the level of plain error and this assignment of error is overruled.

In his fifth assignment of error, defendant contends that the trial court erred by denying his motion to dismiss at the close of all the evidence. We disagree.

"In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged has been presented, and that defendant was the

perpetrator of the offense." *State v. Carr*, 122 N.C. App. 369, 371-372, 470 S.E.2d 70, 72 (1996). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Rogers*, 109 N.C. App. 491, 504, 428 S.E.2d 220, 228 (1993) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)), *disc. review denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert denied*, 511 U.S. 1008, 128 L. Ed. 2d 54 (1994). "If the trial court determines that a reasonable inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979). All the evidence, whether direct or circumstantial, is to be considered in the light most favorable to the State, with the State being entitled to every reasonable inference to be drawn from the evidence. *Carr*, 122 N.C. App. at 372, 470 S.E.2d at 72.

Defendant contends that there was insufficient evidence to support a finding that the victim was seriously injured. We disagree.

The elements of the charge of assault with a deadly weapon with intent to kill inflicting serious injury under N.C. Gen. Stat. § 14-32(a) (1999) are: (1) an assault (2) with a deadly weapon (3) with intent to kill (4) inflicting serious injury (5) not resulting in death. See *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990). "Serious injury is a 'physical or bodily injury'

that is 'serious,'" but falls short of causing death. *State v. Streeter*, ___ N.C. App. ___, 553 S.E.2d 240, 242 (2001) (quoting *State v. Williams*, 29 N.C. App. 24, 26, 222 S.E.2d 720, 721, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976)). Whether such serious injury has been inflicted must be determined according to the particular facts of each case. *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991), cert. denied, 529 U.S. 1006, 146 L. Ed. 2d 223 (2000). "A jury may consider such pertinent factors such as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious." *Id.*

In the instant case, the evidence revealed Smith suffered a wound resulting when a bullet entered his right and passed through his left ankle requiring hospital treatment. At trial, Smith testified as to the pain he sustained at the time of injury, the blood loss, the weakness, his inability to walk, his surgery and the use of pain medication for a period of one month after surgery. We hold that this evidence was sufficient for a jury to determine that Smith suffered a serious injury. This assignment of error is overruled.

In his final assignment of error, defendant contends that the trial court erred by ordering him to pay restitution. This argument is without merit.

At the sentencing hearing the prosecutor recommended the entry of an order for restitution in the amount of \$8,172.29 to cover Smith's medical expenses and lost wages. The court then specifically asked defendant if he had "anything to say" about the

recommendation and defendant replied "no sir."

The court proceeded to recite the basis for the restitution recommendation in open court. The recommended restitution sum was then entered on defendant's judgment and commitment and at no time prior to the entry did defendant object to the recommendation.

To preserve a question for appellate review, a party must present the trial court with a timely objection or motion stating the specific grounds for the ruling the party desired the court to make. See N.C.R. App. P. 10(b)(1) (2002). Defendant has failed to preserve the restitution issue for appeal and therefore this assignment of error is dismissed.

Based upon the foregoing analysis, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).