NO. COA01-1414

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Alexander County
No. 00 CRS 1890

RONNIE LEE BARNES

Appeal by defendant from judgment entered 11 July 2001 by Judge Charles C. Lamm, Jr., in Alexander County Superior Court. Heard in the Court of Appeals 21 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Joseph Ellis Herrin, for the State.

Michael E. Casterline for defendant appellant.

McCULLOUGH, Judge.

Defendant Ronnie Lee Barnes was tried before a jury at the 9 July 2001 Criminal Session of Alexander County Superior Court after being charged with one count of assault with a deadly weapon with intent to kill inflicting serious injury, in violation of N.C. Gen. Stat. § 14-32(a) (2001). Evidence for the State showed that the victim, Ms. Janet Pinkerton, had been friends with defendant for a number of years. At the time the crime occurred, Ms. Pinkerton lived with defendant's mother and had been dating Mr. Oren Spencer for several months.

Around 1:30 p.m. on 4 May 2000, Ms. Pinkerton accompanied

defendant as he looked for Mr. Spencer. Defendant believed Mr. Spencer had taken a car from his house the day before and wanted it back. The two men had disagreements in the past about other matters and were still angry with each other. Ms. Pinkerton and defendant eventually found Mr. Spencer at the home of Mr. Ricky Campbell. Defendant and Mr. Spencer began arguing, and Mr. Spencer jumped on defendant and began beating him. Ms. Pinkerton yelled for Mr. Spencer to stop because defendant was "turning colors" and she feared he was seriously hurt. After Ms. Pinkerton pulled Mr. Spencer off defendant and broke up the fight, defendant took the car and left Mr. Campbell's house. He suffered two black eyes and a swollen face. Ms. Pinkerton and Mr. Spencer remained at Mr. Campbell's house overnight. Ms. Pinkerton was present while Mr. Spencer and defendant talked on the phone and resolved their differences that evening.

The next day Ms. Pinkerton and Mr. Spencer returned to defendant's mother's house, where Ms. Pinkerton lived. Around 1:00 p.m., Ms. Pinkerton called defendant, and he invited both her and Mr. Spencer to his mobile home. Ms. Pinkerton and Mr. Spencer walked to defendant's mobile home, which was a short distance away from his mother's house. Ms. Pinkerton reached defendant's porch just ahead of Mr. Spencer and knocked on the front door. When defendant opened the door, he was holding a five-gallon bucket of gasoline and an unlit torch. Defendant threw the gasoline outside, then ignited it with the torch. The gasoline splashed onto the porch, Ms. Pinkerton's legs, and Mr. Spencer. Ms. Pinkerton

realized the porch was on fire and ran down the stairs, then noticed her legs were on fire. The fire on her left leg extinguished itself; she smothered the flames on her right leg using her arm. The gasoline on Mr. Spencer did not ignite because he was standing farther away from defendant and the burning porch.

After Ms. Pinkerton extinguished the flames on her body, she looked at the porch and saw defendant extinguish the fire on it with a water hose. She also saw Mr. Spencer pointing a gun at defendant. She testified she did know Mr. Spencer had a gun with him, though he mentioned that he had a gun on previous occasions. Mr. Spencer kept the gun pointed at defendant; in response, defendant began beating his chest and yelling, "shoot me, you S.O.B., shoot me." Ms. Pinkerton ran back to Mrs. Barnes' home and got into a tub of cold water. An ambulance later took her to the Baptist Hospital Burn Unit in Winston-Salem, North Carolina, where she remained for eighteen days for treatment of her second- and third-degree burns. During the trial, both Ms. Pinkerton and her daughter testified regarding Ms. Pinkerton's pain and suffering and the course of treatment she received after sustaining her burns. Ms. Pinkerton also testified her medical bills were in excess of $50,000.00.

After Ms. Pinkerton left the witness stand, the State called Mr. Spencer to testify. At the time of trial, Mr. Spencer was incarcerated at the Piedmont Correctional Institution, where he was serving a sentence for kidnapping, strong arm robbery and a gun charge. When questioned, Mr. Spencer stated he did not remember

the altercation with defendant on 4 May 2000, going to defendant's trailer on 5 May 2000, or giving a statement to any law enforcement officers.

The State then called Detective Keith Warren, a seventeen-year veteran of the Alexander County Sheriff's Department, to testify. He stated that he and several officers were sent to Mrs. Barnes' residence on 5 May 2000 and found Ms. Pinkerton with burns on her arm and legs. The officers proceeded to defendant's mobile home, where they noted burn patterns on the porch and on the porch steps leading to the front yard. Detective Warren located the bucket of gasoline in defendant's front yard; the torch was in the passenger seat of a small blue pickup truck parked directly in front of defendant's mobile home.

On 9 May 2000, Detective Warren interviewed Mr. Spencer at the Alexander County Sheriff's Department. Detective Warren's handwritten notes were marked as State's Exhibit 5. Because Mr. Spencer testified that he did not remember anything regarding the events of 4 and 5 May 2000, the State requested that the trial court treat him as a hostile witness and permit Exhibit 5 to be admitted for impeachment purposes and also as an exception to the hearsay rule under N.C.R. Evid. 804(a)(3). Defendant objected. The trial court stated:

> I'm going to allow it [Exhibit 5] in as substantive evidence and find that the witness is unavailable and that you have had substantially the same amount of notice as the State had, that he is unavailable under 804(a)(3), and that it fits the exception to the hearsay rule, and the detective may

> testify as to the contents of the statement before the jury.

The trial court later stated that

> the Court has determined that the testimony it let in through Detective Warren concerning Oren Spencer's statement he took does come under the catch-all exception to Rule 804 being 804(b)(5) and the Court considered the following in allowing it to be admitted as substantive evidence.

The trial court confirmed that the State provided defendant with a copy of the statement Detective Warren took well in advance of trial, and that the substance of the statement was of no surprise to defendant. In light of those facts, the trial court excused the State from giving written notice to defendant in advance of trial because the State did not know Mr. Spencer was going to testify to a lack of memory of the events he was asked about under oath. Finally, the trial court concluded that Mr. Spencer was unavailable as a witness under Rule 804(a).

Detective Warren testified his notes reflected Mr. Spencer's verbatim statement as follows:

> Me and Janet were at Rick Campbell's house Friday. Ronnie Barnes called sometime that morning and talked with Janet. I don't know what was said. We went to Ronnie's mother's house and Janet talked me into going down to Ronnie's trailer. Janet knocked on the door and Ronnie came to the door. Ronnie was carrying a five-gallon bucket of gas, opened the door and threw it on us. I saw a blow torch and hauled ass. Ronnie had the blow torch in his hand and it was lit. I ran to the corner of the trailer and he came after me with the blow torch. I ran around the trailer because I had gas all over me. When I got back to the front of the trailer Ronnie had a water hose spraying his legs and the

> porch. I helped Janet up to [Mrs. Barnes'] house and called for help.

State's Exhibit 5 was then admitted into evidence over defendant's objection. On cross-examination, Detective Warren stated Mr. Spencer was not at Mrs. Barnes' residence when the officers arrived. He also stated defendant was at his trailer and had bruises on his face and flash burns on his legs. He did not resist the officers.

Defendant moved to dismiss the case at the close of the State's evidence on the grounds that the State failed to show specific intent to kill the victim and failed to show evidence of a deadly weapon. The trial court denied the motion. During the charge conference, defendant requested a jury instruction on self-defense and objected to the jury instruction on the doctrine of transferred intent. The trial court gave the instruction on transferred intent and denied defendant's request for a self-defense instruction. Thereafter, the jury found defendant guilty of one count of assault with a deadly weapon inflicting serious injury. The trial court determined that defendant had a prior record level of IV, sentenced him to 42-60 months' imprisonment, and ordered him to pay $50,122.67 in restitution. Defendant gave notice of appeal in open court.

On appeal, defendant argues the trial court committed prejudicial error by (I) not instructing the jury on self-defense; and (II) admitting a hearsay statement under N.C. Gen. Stat. § 8C-1, Rule 804 (2001). For the reasons set forth herein, we disagree

with defendant's arguments and conclude he received a trial free from prejudicial error.

Instruction on Self-Defense

By his first assignment of error, defendant contends the trial court erred by declining to instruct the jury on self-defense because there was evidence in the record to support such an instruction. We disagree.

"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); *State v. Spaulding*, 298 N.C. 149, 156, 257 S.E.2d 391, 395 (1979). "If, however, there is no evidence from which the jury reasonably could find that the defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, the defendant is not entitled to have the jury instructed on self-defense." *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982), *aff'd*, 826 F.2d 1059 (1987).

> In other words, before the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction

should not be given.

Id. at 160-61, 297 S.E.2d at 569. "We consider the facts in the light most favorable to Defendant in determining whether the trial court should have instructed the jury on self-defense." *Allred*, 129 N.C. App. at 235, 498 S.E.2d at 206.

In support of his argument, defendant points out that Mr. Spencer had a history of violent crime and severely beat defendant on 4 May 2000, the day before the crime at issue in this case. Defendant sustained apparent injuries and left Mr. Campbell's house immediately after his fight with Mr. Spencer. Defendant maintains he was recuperating at his trailer the following day when Ms. Pinkerton contacted him and told him she and Mr. Spencer were a few minutes away from his house. Defendant contends he reasonably believed it was necessary to protect himself from a deadly assault at the hands of Mr. Spencer, based on the events of 4 May 2000. Defendant also points to his long friendship with Ms. Pinkerton for the proposition that she was not the intended victim.

Upon review of the record, we discern no evidence which supported an instruction on self-defense. During his telephone conversation with Ms. Pinkerton, defendant invited both her and Mr. Spencer to come to his trailer. Defendant knew they would arrive soon, due to the short distance between his trailer and his mother's house. Though defendant and Mr. Spencer had an altercation on 4 May, Ms. Pinkerton's testimony indicated that she broke up the fight and that the two men resolved their differences

during their telephone conversation on the evening of 4 May. Significantly, there is no evidence that either Ms. Pinkerton or Mr. Spencer acted in a threatening manner toward defendant on 5 May 2000. While it is true that Mr. Spencer brandished a gun after defendant doused him and Ms. Pinkerton with gasoline, there is no evidence that defendant saw the gun prior to the time Mr. Spencer pointed it at him *after* defendant attacked them. Ms. Pinkerton testified she did not see the gun until Mr. Spencer pointed it at defendant; this fact supports the inference that defendant did not see the gun before he doused Ms. Pinkerton and Mr. Spencer with gasoline and therefore did not possess a reasonable belief that he had to act in self-defense.

Based on the foregoing, we conclude defendant did not reasonably believe that he needed to act in self-defense to protect himself from death or great bodily harm at the hands of Mr. Spencer. Thus, the trial court did not err in denying defendant's request for an instruction on self-defense, and defendant's first assignment of error is overruled.

Hearsay Statement

By his second assignment of error, defendant contends the trial court erred by admitting into evidence a statement made by Mr. Spencer and taken down by Detective Warren on 9 May 2000. Again, we disagree.

N.C. Gen. Stat. § 8C-1, Rule 802 (2001) provides that hearsay is inadmissible unless an exception is applicable to the situation. In the present case, Mr. Spencer was called to testify about the

events on 4 and 5 May 2000, but refused to answer questions posed to him. Mr. Spencer had previously given Detective Warren a statement on 9 May 2000. In light of Mr. Spencer's uncooperative testimony at trial, the State sought to have his statement admitted for impeachment purposes and also as an exception to the hearsay rule under N.C. Gen. Stat. § 8C-1, Rules 804(a)(3) and 804(b)(5) (2001).

Statements made shortly after a crime was committed have been deemed admissible as a hearsay exception under Rule 804(b)(5) where the declarant refuses to testify against the defendant at trial and is therefore an "unavailable" witness. *State v. Bullock*, 95 N.C. App. 524, 383 S.E.2d 431 (1989). Under Rule 804(a)(3), a witness is "unavailable" when he "testifies to a lack of memory of the subject matter of his statement[.]" In the present case, when the State called Mr. Spencer to testify, he was serving a sentence for committing a violent crime. In response to questions posed by the State, Mr. Spencer said he did not remember the events of 4 and 5 May 2000 and did not recall giving a statement to Detective Warren at the Alexander County Sheriff's Office on 9 May 2000. Thus, under Rule 804(a)(3), Mr. Spencer was an "unavailable" witness.

Rule 804(b)(5) provides that, if the declarant is unavailable as a witness, the following statements are admissible:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other

> evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Before hearsay testimony can be admitted under Rule 804(b)(5), the trial court must first find that the declarant is unavailable, and then engage in the six-part inquiry set forth in *State v. Triplett*, 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986), to determine the unavailability of a witness and the propriety of allowing his prior statement into evidence at trial. Under *Triplett*, the trial court must:

> (1) Determine that the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
>
> (2) Determine that the statement is not covered by any of the exceptions covered in 804(b)(1)-(4);
>
> (3) Include in the record his findings of fact and conclusions of law that the statement possesses "equivalent circumstantial guarantees of trustworthiness." *State v. Smith*, 315 N.C. 76, 93, 337 S.E.2d 833, 844-45 (1985);
>
> (4) Include in the record a determination that the proffered statement is offered as evidence of a material fact;
>
> (5) Consider whether the hearsay statement "is more probative on the point for

> which it is offered than any other evidence which the proponent can produce through reasonable efforts." N.C. Gen. Stat. § 8C-1, Rule 804(b)(5); and
>
> (6) Whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence." N.C. Gen. Stat. § 8C-1, Rule 804(b)(5).

Triplett, 316 N.C. at 9, 340 S.E.2d at 741.

Defendant contends the trial court made at least three incorrect determinations: (1) that Mr. Spencer's statement to Detective Warren exhibited trustworthiness; (2) that defendant had "substantially the same" notice as did the State so that the State was not required to give advance written notice of its intention to admit the statement as an exhibit at trial; and (3) that the trial court's findings of fact and conclusions of law supported admission of the statement.

Upon examination of the record, we conclude the trial court made appropriate findings concerning the six *Triplett* factors. As to factor one, the trial court found that proper notice was given under the circumstances because defendant had a copy of the statement well in advance of trial and both he and the State were unaware that Mr. Spencer would prove to be an unavailable witness. We note, in passing, that the notice provision should be flexibly construed "in light of the express policy of providing a party with a fair opportunity to meet the proffered evidence." *Triplett*, 316 N.C. at 12-13, 340 S.E.2d at 743; *see also State v. Nichols*, 321 N.C. 616, 622, 365 S.E.2d 561, 565 (1988). As to factor two, the

trial court correctly concluded the statement did not fall within any of the exceptions listed in N.C. Gen. Stat. § 8C-1, Rule 804(b)(1)-(4) (former testimony, a statement made under belief of impending death, a statement against interest, or a statement of personal or family history).

With regard to factor three, the trial court determined the statement was trustworthy and specifically stated:

> That the declarant in the statement professed to have personal knowledge of the underlying events about which he spoke;
>
> That there is no evidence that the declarant at that time had any reason or desire to falsely accuse the person of the actions described in the statement that he made to the detective, especially the actions that he witnessed resulting in injury to the alleged victim, Janet Pinkerton;
>
> That the declarant, until he took the stand under oath and testified as to a lack of memory and possibly during the lunch hour right before he took the stand, never recanted his statement and never made any inconsistent statements, and even then, he substantially did not recant the statement or make an inconsistent statement, but it was generally that he could not recall or did not remember.

Moreover, the testimony of Detective Warren and Ms. Pinkerton and the physical evidence at defendant's trailer (burns on the porch and the porch steps, and flash burns on defendant's body) supported Mr. Spencer's explanation of the events that took place on 5 May 2000.

We believe the trial court also considered *Triplett* factors four through six and properly determined that Mr. Spencer's statement to Detective Warren was offered as evidence of a material

fact, that it was more probative on the point for which it was offered than any other evidence the State could have produced through reasonable efforts, and that the interests of justice would best be served by admission of the statement into evidence. Indeed, the trial court made findings of fact and conclusions of law to this effect on each of the remaining three *Triplett* factors.

Lastly, even if the trial court erred in admitting Mr. Spencer's statement, defendant has failed to show the admission was harmful beyond a reasonable doubt, given the overwhelming evidence of his guilt. *See* N.C. Gen. Stat. § 15A-1443(b) (2001). Accordingly, this assignment of error is overruled.

After careful examination of the proceedings below and the arguments of the parties, we conclude defendant received a fair trial, free from prejudicial error.

No error.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).