NO. COA01-691

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Forsyth County
No. 00 CRS 43722
ISHMON MYERS 00 CRS 56987

Appeal by defendant from judgment dated 28 February 2001 by Judge Michael E. Helms in Superior Court, Forsyth County. Heard in the Court of Appeals 27 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jill F. Cramer, for the State.

Robert W. Ewing for defendant-appellant.

McGEE, Judge.

Ishmon Myers (defendant) was indicted for possession of a firearm by a convicted felon in violation of N.C. Gen. Stat. § 14-415.1 and for being an habitual felon in violation of N.C. Gen. Stat. § 14-7.1.

At trial, Officer W.A. Polk (Officer Polk) of the Winston-Salem Police Department testified that on the night of 8 September 2000 he received a dispatch call at 1:27 a.m. concerning a shooting in the 600 block of Gill Street, where public housing units and Alder Park are located. When Officer Polk arrived, he saw six or more people standing around a man, "who was laying partially on the

sidewalk with his legs in the street and his left foot propped on a pillow." Officer Polk testified defendant had "a small hole with blood coming from it on the top of his foot with what appeared to be [a] burned area of the skin near the wound -- around the wound."

Officer Polk spoke with two people at the scene and following those conversations he went to Alder Park to "look[] for a handgun." He testified that he searched the park for about twenty minutes but did not locate anything in the park. Officer Polk visited defendant at Baptist Hospital and asked him what happened. Officer Polk testified that defendant responded that he was using a pay phone located around the corner from the park, and

> that three subjects in a black Taurus pulled into the parking lot where he was using the telephone and asked him if he had any "green[,]" and he said that meant marijuana, and he told them no. He said they called him over to the car and he told them no and he asked them what -- he said when he walked up to the car the subject in the back seat had a gun and he began running and heard three shots.

Officer Polk testified that he did not believe defendant's explanation due to "[i]nformation [he] had received and also [the] location of the wound." Officer Polk asked defendant how, if he was running away, he received the wound in the top of his foot. Defendant replied that "the subject in the back seat pointed the gun like this (witness indicating) and fired a shot and [defendant] ran away and then heard two more shots." Officer Polk testified that defendant said he believed the first shot was the one that hit him in the foot.

Officer Polk told defendant that he did not believe his story

and offered a gunshot residue test to defendant. Defendant then told Officer Polk that he had shot himself with a "twenty-five caliber semi-automatic pistol." Defendant indicated to Officer Polk that he was not shot near the pay phone but in a different location about 350 feet away from the pay phone. Officer Polk testified that defendant told him "that he dropped the gun because he ran to get help because he felt like he was going to pass out."

Officer Polk testified that he had received specific training as a police officer concerning firearms and he described what a twenty-five caliber gun looked like. The State asked Officer Polk if, "[o]ther than this case, have you ever seen an injury on someone that resulted from a .25 caliber handgun?" Officer Polk replied that he had. The State then asked Officer Polk if, in his opinion, the injury he saw on defendant was consistent with an injury "that someone could sustain with a .25 caliber handgun." The defense objected for lack of foundation and because the question asked for speculation by Officer Polk. The trial court stated that, "I think this officer [] by training and/or experience probably has the necessary degree of expertise to be allowed to give an opinion on it." Officer Polk stated that the wound on defendant's foot could have resulted from a twenty-five caliber handgun.

On cross-examination, Officer Polk testified that on two later occasions he searched the area where defendant said he was shot. On the second occasion, he and other officers searched for about forty minutes and then called for a canine to assist "because the

area there is real thick. The kudzu area is real thick." No weapon was recovered from the second search. In the third search, a canine also assisted but the canine handler would not allow the dog into the area of thick kudzu. Again, no weapon was recovered.

At the close of the State's evidence, defendant moved to dismiss the charge of possession of a firearm by a convicted felon. The trial court denied defendant's motion. Defendant did not present evidence. At the close of all evidence, defendant again moved to dismiss the charge against him, which was denied.

The jury found defendant guilty of possession of a handgun by a felon and defendant thereafter pled guilty to habitual felon status. The trial court sentenced defendant to 100 to 129 months in prison. Defendant appeals.

Defendant raised six assignments of error on appeal but, in his brief to our Court, did not address assignment of error number six, which is therefore deemed abandoned. N.C.R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.").

I.

By his first two assignments of error, defendant argues the trial court erred in denying his motion to dismiss the charge of possession of a firearm by a felon because there was insufficient evidence to submit the charge to the jury.

A motion to dismiss is properly denied if there is substantial evidence (1) of each essential element of the offense charged and

(2) that the defendant is the perpetrator of the offense. *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994) (citing *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992)). Substantial evidence is such relevant evidence as a reasonable juror might accept as adequate to support a conclusion. *Id.* Upon consideration of a motion to dismiss, "all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

> The essential elements of the crime of "possession of a firearm by a felon" are: (1) the purchase, owning, possession, custody, care, or control; (2) of a "handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c)"; (3) by any person having a previous conviction of any crime defined in N.C. Gen. Stat. § 14-415.1(b); and (4) provided the owning, possession, *etc.* occurs "within five years from the date of [the previous] conviction, or the unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later."

State v. Alston, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998) (quoting N.C.G.S. § 14-415.1(a) (Supp. 1997)). *See also* N.C. Gen. Stat. § 14-415.1 (1999).

Defendant concedes the third and fourth elements of the offense were proven by the State. However, defendant argues that his alleged confession to possession of the twenty-five caliber handgun was not sufficient to prove the first two elements of the

offense. As support for his argument, defendant relies on *State v. Jenerett*, 281 N.C. 81, 85-86, 187 S.E.2d 735, 738 (1972), in which our Supreme Court reiterated the long-standing rule that "a felony conviction may not be based upon or sustained by a naked extrajudicial confession of guilt uncorroborated by any other evidence." Defendant contends "[t]here must be independent proof, either direct or circumstantial, of the *corpus delicti* in order for the conviction to be sustained." *State v Green*, 295 N.C. 244, 248, 244 S.E.2d 369, 371 (1978). Defendant argues that because no weapon or bullet was produced, there is no evidence, independent of his alleged confession, to show that defendant shot himself and used a twenty-five caliber handgun. We disagree.

Our Supreme Court's decision in *Jenerett* has been modified by *State v. Parker*, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985), such that

> when the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime. . . . [H]owever, . . . when independent proof of loss or injury is lacking, there must be *strong* corroboration of *essential* facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice . . . because although we have relaxed our corroboration rule somewhat, we remain advertent to the reason for its existence, that is, to protect against convictions for crimes that have not in fact occurred.

In the case before us, considering the evidence in a light most favorable to the State, there is sufficient evidence that closely parallels defendant's confession and further establishes its trustworthiness. *See State v. Shook*, 327 N.C. 74, 80, 393 S.E.2d 819, 822-23 (1990). Officer Polk testified that defendant confessed that he shot himself in the foot with a twenty-five caliber semi-automatic pistol at a specified location inside Alder Park. Defendant also told Officer Polk that after shooting himself, he dropped the handgun and went to look for help. Sufficient evidence was presented at trial which closely parallels this confession. Defendant was found lying on the ground with his foot propped up approximately 350 feet from the location where he said he dropped the gun and then went to get help because he was about to pass out.

After looking at defendant's wound, Officer Polk testified that in his opinion defendant used a twenty-five caliber handgun to shoot himself. The gunpowder residue showed defendant was shot at close range and defendant's wound was on the top of his foot and fired at close enough range to cause a burn mark around the wound. This independent evidence as testified to by Officer Polk closely parallels defendant's confession and is sufficient to further establish its trustworthiness.

The trial court did not err in denying defendant's motion to dismiss. Defendant's first two assignments of error are overruled.

II.

Defendant contends by his third, fourth and fifth assignments

of error that the trial court erred in allowing Officer Polk to testify as to his opinion that defendant's injury was consistent with an injury caused by a twenty-five caliber handgun because (1) an insufficient foundation was laid for said testimony, (2) Officer Polk was not qualified to render this opinion, and (3) the testimony was inadmissible speculation by a lay witness.

"If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (1999).

> "Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge. . . .
>
> "A finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it. . . ."

State v. King, 287 N.C. 645, 658, 215 S.E.2d 540, 548-49 (1975) (quoting 1 Stansbury's N.C. Evidence § 133 (Brandis Rev. 1973)), *judgment vacated in part*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976).

Defendant argues a proper foundation was not laid for Officer Polk to qualify as an expert witness because Officer Polk's "one time experience" in viewing an injury caused by a twenty-five caliber handgun does "not make him better qualified than the jury to form an opinion as to [] defendant's injury." Further, defendant argues there was no evidence of Officer Polk's training

or background in the area of ballistics, nor did the trial court inquire as to whether Officer Polk had testified as a ballistics expert in other cases. Finally, defendant argues no evidence was presented as to how many gunshot wounds Officer Polk "had actually witnessed."

We disagree that there is no evidence to support the trial court's qualification of Officer Polk as an expert witness and his subsequent testimony. Officer Polk testified under oath that he had specific training in the area of firearms. He testified as to what a twenty-five caliber gun looked like and that he had previously seen an injury on someone who had been shot with a twenty-five caliber gun. Therefore, the trial court did not err in qualifying Officer Polk as an expert witness in the area of ballistics because there is evidence to support the trial court's determination. Defendant's third, fourth and fifth assignments of error are overruled.

No error.

Judges WALKER and CAMPBELL concur.

Report per Rule 30(e).