NO. COA01-945

NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2002

STATE OF NORTH CAROLINA

v. Durham County
No. 00 CRS 52459

QUINCY JEVON HUNT

Appeal by defendant from judgment entered 9 January 2001 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 14 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Brian L. Blankenship, for the State.

Lisa Anderson Williams, for defendant.

BIGGS, Judge.

Quincy Jevon Hunt (defendant), appeals from his conviction of assault with a deadly weapon on a government officer in violation of N.C.G.S. § 14-34.2. For the reasons herein, we find no prejudicial error.

In the early morning hours of 26 February 2000, Durham City Police Officer Carl Rodrigues (Rodrigues) responded to a call at 909 Berkley Street. According to the call, a dark car occupied by two people had backed into a parking space in the Berkley Street parking lot and the caller believed the car did not belong in the area.

When he arrived at the parking lot, Rodrigues saw that only one car, a burgundy vehicle, was backed into a parking space but could not determine if any individuals were in the car. As the officer walked toward the car, a man exited the passenger side and began to walk away. Rodrigues told the passenger to stop; when he refused to do so, Rodrigues identified himself as a Durham police officer and, again, asked him to stop and show his hands. When the individual refused to show his hands, Rodrigues drew his service weapon and placed it at a 45-degree angle toward the ground.

The officer then heard the car crank and realized that a person, later identified as defendant, was in the driver's seat of the vehicle. Rodrigues yelled to defendant to turn the car off; however, defendant later testified that he did not hear the officer. The passenger then made a movement which caused Rodrigues to turn toward him. As Rodrigues turned, he heard the car engine revving and saw the car moving toward him. After repeatedly instructing defendant to stop, the officer fired his weapon at the vehicle and leaped to the right of the car to avoid being hit. Rodrigues then went to the driver's window and arrested defendant; there were no injuries. Defendant later testified that he did not intend to hurt the officer but rather was trying to escape by exiting the parking lot.

Defendant was charged with assault with a deadly weapon on Officer Rodrigues. At trial, defendant moved to dismiss the charge, or in the alternative to suppress certain photographs based on the State’s failure to comply with his discovery request.

Defendant had served upon the State a motion for discovery pursuant to N.C.G.S. §15A-902 and 15A-903 (2001), on 14 August 2000, which included a request for "[a]ll photographs which purport to depict the scene of the alleged crime." On 30 October 2000, defendant filed a Motion to Compel Discovery due to the State's failure to fully comply with the previous discovery request. The motion specifically requested that the trial court order the State to provide, among other things, photographs and diagrams of the crime scene made immediately after the incident. The motion was not heard prior to trial, and no discovery order was ever entered by the court.

Prior to the beginning of trial on 8 January 2001, the State gave defense counsel crime scene photographs that it intended to use at trial. Defendant argued that the lack of opportunity to review the photographs prejudiced his preparation for trial, and moved to dismiss the charge or, in the alternative, to have the photographs suppressed. The trial court denied defendant's motions, but delayed the presentation of evidence until the following day so defense counsel would have time to review the photographs with defendant. The jury found defendant guilty as charged. The trial judge sentenced defendant within the presumptive range to a minimum term of 20 months and a maximum term of 24 months. Defendant appeals from his conviction.

At the outset, we note that while defendant sets forth twenty-six assignments of error in the Record on Appeal, those which are

not addressed in his brief are deemed abandoned pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure.

I.

In his first assignment of error, defendant contends that the trial court's failure to grant his motion to dismiss, or in the alternative, motion to suppress, violated his constitutional rights. Specifically, he argues that he was entitled to a dismissal based on the State's failure to comply with his discovery request made pursuant to N.C.G.S. § 15A-902 and 903, and that such failure denied him of his right to due process. We disagree.

In order to assert a constitutional right in our appellate courts, the right must have been asserted and the issue raised before the trial court. *See State v. Waddell*, 130 N.C. App. 488, 504 S.E.2d 84 (1998), *aff'd as modified*, 351 N.C. 413, 527 S.E.2d 644 (2000). In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court. *Adams Outdoor Advertising v. N.C. Dept. of Transportation*, 112 N.C. App. 120, 434 S.E.2d 666 (1993).

Defendant, in the case *sub judice,* having failed to raise his constitutional challenge before the trial court, has precluded appellate review of that issue. Moreover, though defendant does appear to argue a statutory violation at trial, he has failed to assign error on that basis, nor has he argued the statutory violation in his brief on appeal. The scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal. N.C.R. App. P. 10(a)(2001). It is not the

duty of this Court to create issues to be addressed on appeal. *See generally, Vaglio v. Town and Campus Int.,* 71 N.C. App. 250, 322 S.E.2d 3 (1984).

Notwithstanding, assuming for the sake of argument that defendant could demonstrate the state's failure to comply with his discovery request, he has failed to show that he was prejudiced. First, though defendant did file a motion to compel discovery several months prior to trial, he failed to request a hearing on the motion. It is the defendant's duty to pursue his own motions for discovery; his failure to do so results in a waiver of his statutory right. *See State v. Jones,* 295 N.C. 345, 245 S.E.2d 711 (1978) (concluding that defendants waived their statutory right to have the trial court order discovery when the defendants failed to seek a ruling on the motion for five months between the hearing and the trial; court held that defendants could not claim prejudicial error). Moreover, the photographs were made available to the defendant prior to being introduced at trial, and further, the trial court did delay the presentation of the State's case until the next day to allow defendant additional time to review the photographs. We find, assuming statutory error, no prejudice.

Accordingly, this assignment of error is overruled.

II.

Defendant next argues that the trial court erred in allowing his testimony on the circumstances surrounding his prior arrests and convictions. We disagree.

Defendant challenges the following testimony on cross-

examination:

> Q. . . . And also, you said you were convicted of felony speeding to allude [sic]. That was in February of 1999 that that occurred, right?
>
> A. Yes, sir.
>
> Q. And that case was a roadblock too, wasn't it?
>
> A. Yes, but I didn't attempt to run through.
>
> Q. You didn't try and run through that one? You did a U-turn and ran away from it, didn't you?
>
> A. Yes - - yes, sir.
>
> Q. Okay. And the officer took off after you, and the car you were in was stolen, right?
>
> A. Yes, sir.
>
> . . . .
>
> Q. And that that little chase actually ended when you crashed that car at a dead end . . ., didn't you?
>
> A. I didn't crash.
>
> Q. You didn't crash? Let's see. You didn't crash into a fence at the dead end . . .?
>
> A. No, sir.
>
> Q. So if an officer submitted a report and said you crashed in a fence at the end of Edith Street, that wouldn't be right?
>
> A. I didn't crash.
>
> Q. Okay. Do you remember jumping out and running after you didn't crash?
>
> A. Yes.
>
> Q. And in the drug case, you said you were in the wrong place at the wrong time. Isn't that

right?

A. Yes, sir.

Q. And the wrong place in that particular incident happened to be 1202 Berkley Street, didn't it?

A. Yes, sir.

Q. And you were over there, and the Sheriff's department, let's see, executed a search warrant?

A. Yes.

Q. And you were there near the bathroom where somebody had just flushed a bunch of drugs down the toilet, do you remember that?

A. No, when they came in the house, I was in the living room. When they busted in the door, I was just about to leave the house when they busted in the door.

Q. So you weren't near the bathroom?

A. No, sir.

Q. Okay. And you started to take off your coat, and at that time the detective took your coat and searched it and found 25 individually wrapped pieces of crack cocaine . . . , that would be false as well?

A. They found 25 rocks in the coat, but I didn't have the coat on.

Q. Okay. So it wasn't your coat?

A. No, sir.

. . . .

Generally, evidence of prior convictions is admissible for the purpose of impeaching the credibility of the defendant as long as the scope is restricted to the name of the crime, the time and

place of the conviction, and the punishment imposed. N.C.G.S. § 8C-1, Rule 609(a) (2001); *State v. Lynch,* 334 N.C. 402, 432 S.E.2d 349 (1993). However, "when a defendant, on direct examination, raises specific issues, the state may further investigate these subjects on cross-examination." *State v. Wright*, 52 N.C. App. 166, 179, 278 S.E.2d 579, 588 (1981) (citations omitted). *See also State v. Sexton,* 336 N.C. 321, 360, 444 S.E.2d 879, 901 (1994) ("[W]here one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially."). "'On cross-examination much latitude is given counsel in testing for consistency and plausibility [of] matters related by a witness on direct examination.'" *Wright*, 52 N.C. App. at 179, 278 S.E.2d at 588 (quoting *Maddox v. Brown,* 233 N.C. 519, 524, 64 S.E.2d 864, 867 (1951)).

In the case *sub judice,* defendant offered the following testimony on direct examination regarding his earlier arrests and convictions:

1999 conviction for fleeing to elude arrest:

> Q. Do you remember that incident? It was November '99?
>
> A. I had gotten in a slight chase with a State Trooper. They had a license point check, and there was a roadblock, and I run a roadblock.
>
> Q. So you were coming up on a roadblock, you knew you didn't have a license, and you turned around?

A. Yes.

Q. Did the police have to chase you down?

A. Yes.

1998 conviction for a drug offense:

> Back in '98 they had a drug bust in the neighborhood, and I was in the house, wrong place at the wrong time. They didn't find any drugs on me, I was just in the house, and they charged me with it. They knew I hung out there.

We conclude that defendant, having opened the door by discussing the details of his prior convictions on direct examination, cannot now complain when the State, on cross-examination, questions him further on the matters the defendant himself brought out on direct. The trial court did not err in allowing the State to cross-examine defendant on his earlier convictions. This assignment of error is overruled.

III.

Defendant argues next that the trial court erred in refusing to instruct the jury on the lesser-included offense of assault with a deadly weapon. We disagree.

It is well settled that a trial court must instruct the jury on a lesser-included offense only if there is evidence of defendant's guilt of the lesser-included offense. *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). A trial judge is not required to submit lesser included offenses for a jury's consideration when the State's evidence is positive as to each and every element of the crime charged, and there is no conflicting

evidence related to any element of the crime charged. *State v. Rowland*, 54 N.C. App. 458, 283 S.E.2d 543 (1981). A defendant "is 'entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). "'Where there is conflicting evidence as to an essential element of the crime charged, the court should instruct the jury with regard to any lesser included offense supported by any version of the evidence.'" *State v. Nelson*, 341 N.C. 695, 697, 462 S.E.2d 225, 226 (1995) (quoting *State v. Jones*, 304 N.C. 323, 331, 283 S.E.2d 483, 488 (1981)).

N.C.G.S. 14-34.2 (2001) provides, in pertinent part:

> any person who commits an assault with a . . . deadly weapon upon a[] . . . police officer . . . in the performance of his duties shall be guilty of a Class F felony.

See also, State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), *disc. review denied*, 318 N.C. 701, 351 S.E.2d 759 (1987). Knowledge is an essential element of this offense. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). A conviction under N.C.G.S. § 14-34.2 requires "not only that the jury find that the victim was a [police officer] but also that the defendant 'knew or had reasonable grounds to know' that the victim was a [police officer]." *Id.* at 31, 337 S.E.2d at 803.

In the case *sub judice*, defendant argues that the State failed

to present evidence that he knew, at the time of the assault, that Rodrigues was a law enforcement officer. The State presented the following evidence: the testimony of Rodrigues that he was wearing his police uniform, arrived in his patrol car, and told the passenger that he was with the Durham Police Department. In addition, the defendant testified at trial that he saw Rodrigues get out of the car, saw him in the street shining a flashlight, and saw the officer interacting with the passenger. The defendant never testified that he could not see Rodrigues or that he did not know that Rodrigues was with the Durham Police Department. In short, "[n]o evidence before the trial court tended to indicate that the defendant did not know that the [Officer] was a law enforcement officer or that he was acting in the performance of his duties." *State v. Mayberry*, 38 N.C. App. 509, 512, 248 S.E.2d 402, 404 (1978). All of the evidence was to the contrary.

Because the State's evidence was positive as to the element of knowledge, and there was no conflicting evidence presented, the trial court correctly declined to instruct the jury on the lesser included offense of assault with a deadly weapon. This assignment of error is overruled.

IV.

Lastly, defendant argues that the trial court erred by allowing the jury to look at a diagram used during the trial but not admitted into evidence. This assignment is without merit.

N.C.G.S. § 15A-1233(a) (2001) provides:

> If the jury after retiring for deliberation

> requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

In the case *sub judice,* after the jury retired to the jury room for deliberations, it submitted a note to the judge requesting review of a written statement, two pictures introduced by the State, and a diagram of the crime scene. In response to the jury's request for the diagram, the trial court stated the following:

> The diagram that was used during the course of some of the witnesses' testimony was used to some extent by both parties in direct and cross-examination. It actually was never actually marked, and we will not be able to allow you to take that back in the jury deliberation room. I'll give you a minute or two to look at it as you're looking at it here, if you care to do that, but I'm not going to be able to send that back to you in the jury deliberation room. So I'll give you just a minute or two to look at that, if you can all see it.

Thus, because the diagram had not been formally admitted into evidence, the trial court only allowed the jury to review it in open court, but not to take it bad into the jury deliberation room. The witnesses who testified at trial had previously referred to the same diagram, without objection, and the jury had a view of the diagram throughout the trial. We conclude that there is no reasonable probability that the jury would have reached a different

verdict in the absence of their additional review of the diagram, and thus, even assuming error, it was harmless. *See State v. Cannon*, 341 N.C. 79, 85, 459 S.E.2d 238, 242 (1995) (finding harmless error where trial court allowed jury to view exhibit in jury room that had not been offered into evidence; Court holds no reasonable probability that error affected verdict).

As in *Cannon*, the diagram depicted only the scene of the crime and the witnesses described the location of the participants in the crime during their oral testimony. Further, the defendant has not shown a reasonable probability that the jury would have reached a different verdict if the jury had not viewed the diagram. Accordingly, this assignment of error is overruled.

No error.

Judges GREENE and HUDSON concur.

Report per Rule 30(e).