NO. COA02-410

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v. Wilson County
No. 00-CRS-54292

GREGORY J. BARNES,
Defendant

Appeal by defendant from judgment entered 18 September 2001 by Judge Thomas D. Haigwood in Wilson County Superior Court. Heard in the Court of Appeals 7 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Everett & Hite, L.L.P., by Kimberly A. Swank, for defendant-appellant.

EAGLES, Chief Judge.

Defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury and was sentenced to a minimum term of 116 months and a maximum term of 149 months.

The State presented evidence tending to show that on 9 July 2000, Garrette Knight stopped at defendant's aunt's house, where defendant was sitting on the front porch. Defendant confronted Knight about Knight's talking to defendant's girlfriend. A physical altercation took place which resulted in defendant pushing Knight to the ground. Defendant walked to a car and retrieved a

gun. After returning, defendant fired two shots at Knight. One bullet struck Knight's groin and the other bullet fractured Knight's femur. Knight underwent surgery and spent seven days in the hospital. Knight sustained permanent nerve damage in his leg.

After shooting Knight, defendant left the scene. He spent two days in a motel room before surrendering himself to the police.

Defendant testified that he shot Knight after he saw Knight digging in the front of his shirt for what defendant believed was a gun.

Defendant contends that the trial court erred by instructing the jury that defendant's flight could be considered as evidence of defendant's guilt. He argues the instruction was improperly given because it was not supported by evidence. We disagree.

An instruction on flight is proper when evidence is presented that reasonably supports the theory that the defendant fled after the commission of a crime. *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990). "The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). However, "[m]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

There is evidence in this case that after defendant fired the shots, he walked back into his aunt's house, "went out the back

door and jumped the fence." He went into another house. Upon hearing the police sirens and ambulance, he left that house and caught a ride to another place. There he called his brother to come and get him. He used his brother's cell phone to call a cousin, who obtained a motel room for him. He stayed in the motel room for two days until, persuaded by his father, he surrendered to police. Based upon the foregoing evidence, a jury could reasonably find that defendant fled from the scene of the shooting to avoid arrest or apprehension by the police. We hold the court properly submitted the instruction.

Defendant also contends that the court committed plain error by instructing the jury that defendant "denie[d]" that he fled. Defendant's argument is twofold: First, that this constituted a "mischaracterization" of defendant's contention by the trial court. Second, the statement amounted to an impermissible expression of judicial opinion because it was uncontroverted that defendant left the scene and the trial court did not define "flight."

The record shows that defendant declined the court's invitation to object or request corrections to the charge given by the court after the charge was read to the jury. Consequently, appellate review is limited to review for plain error. *State v. Nobles*, 350 N.C. 483, 514, 515 S.E.2d 885, 904 (1999). Plain error may be found only in the rare case in which a claimed instructional error is so fundamental, basic and prejudicial as to amount to a miscarriage of justice. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Here, defendant testified at trial that he left the scene because he "was afraid." He also stated that he stayed in the motel room "to try to clear [his] head." The foregoing testimony is consistent with a theory that defendant did not flee the scene to avoid arrest or apprehension by the police. Therefore, the testimony supports the court's instruction that defendant denied flight. Further, although an instruction does not explain in detail how the evidence of flight should be considered by the jury, it is proper if it reflects a correct statement of the law. *State v. Jefferies,* 333 N.C. 501, 511, 428 S.E.2d 150, 155 (1993). The charge given here was consistent in all respects with the North Carolina Pattern Jury Instruction on flight, N.C.P.I.--Crim. 104.35. Accordingly, we conclude the court did not commit error, plain or otherwise, by its statement.

We hold defendant received a fair trial, free of prejudicial error.

No error.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).