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NO. COA02-69

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Guilford County
No. 92 CRS 17788
SHANTU JENKINS, 93 CRS 20004
Defendant.

Appeal by defendant from judgment entered 10 September 1993 by Judge Preston Cornelius in Guilford County Superior Court. Heard in the Court of Appeals 9 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General H. Dean Bowman, for the State.

William H. Dowdy for defendant-appellant.

BRYANT, Judge.

Defendant appeals from his convictions of first-degree murder and robbery with a firearm. The State's evidence tended to show the following:

On 8 December 1992, defendant Shantu Jenkins met with five others persons, German Grace, Donald White, Jermaine McKiver, Larry Leverett and Timothy Rice, at the Farmington Apartment complex in High Point, North Carolina. They discussed stealing a car. At some point, White retrieved two handguns from his house and gave a .38 caliber to Grace, keeping a .9mm for himself. Grace wanted to buy a pizza but had little money so they got in the car and drove

to the north side of town. Grace suggested robbing a Handy Pantry convenience store, but a police car was at the store, so they did not stop. After passing a Domino's Pizza take-out and delivery store, Leverett, who was driving, parked the car at a nearby apartment complex. Leverett remained in the car. Defendant, Grace and Rice proceeded to Domino's, followed by McKiver and White. Rice attempted to open the door to Domino's so they could rob the store, but the door was locked. As the five retreated toward the car, someone spotted a Domino's delivery truck returning to the store. The five backtracked to the store.

Grace pointed a gun at the driver's head and demanded money and the keys to the store. Either Rice or defendant punched the driver, who reeled back into the truck. Defendant pulled the driver out of the truck, picked him up and body slammed him to the ground. Grace took the driver's wallet and Rice pulled a briefcase out of the truck. When several cars approached, the five fled back to the car. Before fleeing, Grace fatally shot the driver three times. When the six returned to Farmington Apartments, the money was divided between them, with each person receiving approximately \$20.

On 20 January 1992, defendant was indicted on one count each of first degree murder and robbery with a dangerous weapon. The case came on for trial at the 6 September 1993 regular Criminal Session of the Guilford County Superior Court. On 10 September 1993, the jury returned verdicts of guilty on both charges and defendant was sentenced to life imprisonment. Defendant gave

notice of appeal on 20 September 1993. Defendant's trial counsel, however, failed to perfect the appeal. On 27 August 2001, defendant filed a Petition for Writ of Certiorari in this Court. By order entered 13 September 2001 defendant's petition was allowed.

Defendant presents three assignments of error: I) the trial court erred by repeatedly sustaining the State's objections to defendant's cross-examination of a State witness, thereby violating defendant's Sixth Amendment right to effective assistance of counsel and Fifth Amendment rights to due process and a fair trial; II) the trial court erred by granting the State's request to cross-examine and impeach defendant's alibi witness with her juvenile delinquency adjudications; and III) defendant's trial counsel rendered such poor advocacy and legal representation that defendant was denied his Sixth Amendment right to effective assistance of counsel and Fifth Amendment rights to due process and a fair trial, such that the resulting constitutional error was harmful *per se*. We disagree as to each and find no error.

I.

Defendant first argues that the trial court erred by repeatedly sustaining the State's objections to defendant's cross-examination of a State's witness, thereby violating defendant's Sixth Amendment rights to effective assistance of counsel and Fifth Amendment right to due process and a fair trial. Defendant argues that he had an absolute right to cross examination and that the

denial of that right was "prejudicial and fatal error." Specifically, defendant objects to the trial court's sustaining the State's objections during cross-examination of confederate Jermaine McKiver regarding McKiver's statement to police that Raheem Gray participated in the robbery.

"The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal trial to confront the witnesses against him." *State v. McAllister*, 132 N.C. App. 300, 302, 511 S.E.2d 660, 662 (citing *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347 (1974)), *aff'd*, 351 N.C. 44, 519 S.E.2d 524 (1999). The right to confront adverse witnesses, however, is not absolute. *Id.* The trial court "retain[s] broad discretion to preclude cross-examination that is repetitive or that is intended to merely harass, annoy or humiliate a witness." *State v. Mason*, 315 N.C. 724, 730, 340 S.E.2d 430, 434 (1986) (citations omitted).

In the case *sub judice*, defense counsel extensively cross-examined McKiver regarding the misstatement.

Q. Mr. McKiver, do you recall making the statement that Mr. Gray participated in this crime?

A. Yes, sir, I did.

Q. How do you explain that?

A. He was prior hanging out with me after this crime took place, and he was there at that moment when they was -- crime event occurred. I misinterpreted him with Mr. Rice.

Q. Do you confuse your friends a lot?

A. No, sir, I don't. Just at this particular moment when this happened.

Q. He's a close friend of yours. How close are you to Mr. Rice?

A. Not that very close. I was close to his cousin that died.

Q. So you were actually closer to Mr. Gray than you were Mr. Rice?

A. Yeah. You could say that.

Q. And while you're sitting here giving a statement to the police that could change the life of Mr. Raheem Gray forever, you got him confused with someone else?

A. Yes, did.

Q. And placed him at the scene of a crime for which he could have had the death sentence imposed, if he had been found guilty? It's an awful lot of confusion. How do you explain that, Mr. McKiver?

A. After a while, after I had sat down and notified the case, I got back in touch with the detective, you know, follow up on investigation that he wasn't there. It was prior to the time that -- from the crime event had been committed, about the car larceny, he was out there in the vicinity. And after the crime was committed, he was with me hanging out for a while.

Q. Do you know whether Mr. Gray was arrested?

A. Yes. I heard later he was.

Q. And he's a good friend of yours?

A. Yes.

Q. The police talked to you about the seriousness of the statements you were about to give to them and what they would do with that information, did they not?

A. They spoke to me about it, yeah, and the nature of the crime.

Q. But you still made a mistake of this magnitude, of this size, that resulted in a friend of yours going to jail?

A. Yes, I did.

Thereafter, the trial court sustained the State's objections during the following cross-examination of McKiver by the defense counsel:

Q. You expect to have to deal with the charges that are in front of you after this trial is completed?

A. Yes. I'm willing to deal with my charges.

Q. And you feel that by participating and testifying and giving statements to the police that that will assist you in the handling of your case; is that correct?

A. I don't know about assisting, but I hope so.

Q. No promise, no one has offered you anything, but that's your understanding: that helping here might help you down the road?

A. Yes.

Q. Is that what you had in mind when you placed Mr. Raheem Gray at the scene of the crime?

A. No, sir.

Q. It wasn't your idea to try to get as many other people involved with this thing as possible so as to make the heat a little bit less for you?

A. No, sir.

Q. Just have a difficult time understanding, if the relationship between you was as close as it was, how you could have ended up placing his name in a statement made to police on a crime of this nature. Could you explain that to the Court *once again*?

[PROSECUTOR]: Object. Once again. He's already explained it once, Judge.

THE COURT: Sustained.

Q. Is it possible for you to help us understand the motivation behind doing that?

A. No, sir, I can't.

[PROSECUTOR]: Objection. Already went over that once.

THE COURT: Sustained to form.

Q. How do you explain what happened in giving an incorrect statement to the police at that time?

A. Excuse me?

Q. How do you explain giving Raheem Gray's name when he was not there?

A. It was just a mistake.

Q. Pretty serious mistake?

A. Yes, it was.

Q. As serious of a mistake would be if [defendant] were convicted of this with his not being there; is that correct?

[PROSECUTOR]: Objection. That's hypothetical.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Nothing further, [y]our Honor.

(Emphasis added.). Clearly defendant had ample opportunity to cross-examine McKiver about his statement to police that Gray participated in the robbery. His contention that the trial court denied him effective assistance of counsel and violated his due process rights is unsupported by the record.

Defendant also argues that the trial court erred in sustaining the State's objections to defendant's cross-examination of Jeff Russell of the High Point Police Department. Russell testified that he photographed the crime scene and collected physical evidence. Defendant asked Russell if any of the evidence was linked to any specific individual. Russell answered that he did not know because he merely collected the evidence. Defendant then asked, "Did you find anything in that physical evidence which would suggest that the defendant on trial today, Shantu Jenkins, did or did not have any involvement with this particular crime?" The State objected and the trial court sustained the objection.

As we stated above, the trial court retains broad discretion to preclude repetitive testimony. *Mason*, 315 N.C. at 730, 340 S.E.2d at 434. Here, defendant had already asked the witness if the physical evidence could be linked to a specific individual and Russell testified that he merely collected the evidence at the crime scene and did not analyze it. It can be inferred that Shantu Jenkins, as one of the six individuals charged with perpetrating the robbery, was included in defendant's question. Any further questions regarding specific individuals were cumulative. Therefore, any questions regarding the analysis of the evidence were outside the personal knowledge of the witness. Accordingly, this assignment of error is overruled.

II.

Defendant next argues that the trial court erred in granting the State's request to cross-examine and impeach defendant's alibi

witness with her juvenile delinquency adjudications. Generally, evidence that a witness was convicted of a felony or Class A1, Class 1 or Class 2 misdemeanor is admissible to impeach a witness on cross-examination. N.C.G.S. § 8C-1, Rule 609(a) (2001). However,

[e]vidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

N.C.G.S. § 8C-1, Rule 609(d). "The final decision rests within the discretion of the trial judge as to whether the admission of the evidence is 'necessary for a fair determination of the issue of guilt or innocence.'" *State v. Whiteside*, 325 N.C. 389, 401, 383 S.E.2d 911, 918 (1989) (citation omitted). Such discretionary rulings may be reversed "'only upon a showing that [the trial court's] ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.'" *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992) (alteration in original) (quoting *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986)).

In the case *sub judice*, defendant's sixteen-year-old sister, Gardenia Jenkins, testifying as an alibi witness for the defense stated that defendant returned home around 8:30 pm on the night of the shooting. Jenkins testified that defendant came into her room to check on her, then spoke with their father, Willie Byron, at

least until 12:30 am when she went to sleep. During voir dire, the State questioned Jenkins about prior juvenile convictions for assault, breaking and entering, trespass, and two counts of larceny. Defendant objected on the grounds that evidence of juvenile adjudications generally is inadmissible under Rule 609(d). The trial court overruled the objection finding that the juvenile adjudications would have been admissible to attack the credibility of a witness if committed by an adult and that Jenkins' credibility was a central issue in determining defendant's whereabouts on the night of the murder. The trial court then allowed the State to question Jenkins about the juvenile adjudications on cross-examination in the presence of the jury.

In his brief, defendant does not argue that the trial court abused its discretion in admitting evidence of the juvenile convictions. Rather, defendant argues that Rule 609(d) allows a *defendant* to impeach the *State's* juvenile witness with evidence of juvenile adjudications, but that the rule should not be applied against a defense witness. In support of this argument, defendant cites to Rule 609's Commentary, which explains that evidence of juvenile adjudications may be admissible to impeach under certain circumstances in order to satisfy the requirements of *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347. See N.C.G.S. § 8C-1, Rule 609, Official Commentary, and *Davis*, 415 U.S. at 319, 39 L. Ed. 2d at 355 (finding that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender").

We do not interpret Rule 609(d) to mean that the right to impeach a witness with juvenile adjudications is a one-way street to be traveled only by defendants. "If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation omitted). Here, the language of Rule 609(d) is clear. Had the Legislature intended to limit evidence of juvenile adjudications to impeachment of "State" witnesses only, it could have easily done so. Furthermore, defendant has failed to show that the trial court abused its discretion in allowing the State to impeach Jenkins with her juvenile convictions. Accordingly, this assignment of error is overruled.

III.

Finally, defendant argues that defendant's trial counsel rendered such poor advocacy and legal representation that defendant was denied his Sixth Amendment right to effective assistance of counsel and Fifth Amendment rights to due process and a fair trial, such that the resulting constitutional error was harmful per se. A defendant has the right to effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). To prove ineffective assistance of counsel, a defendant must satisfy a two-part test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

"counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's error were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 562, 324 S.E.2d at 248 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

Defendant argues that he was deprived of effective assistance of counsel because his trial counsel failed to: 1) object to the prosecution's misstatement of the law regarding mere presence; 2) object to the prosecution's misstatement of the law regarding acting in concert; 3) object to the admission of hearsay; and 4) move for non-suit and dismissal at the close of all the evidence on the grounds of insufficiency of the evidence. With the exception of the hearsay issue, defendant references only pages of the transcript. He does not otherwise offer any authority or argument in support of his basic assertions of ineffective assistance of counsel. It is not the duty of this Court to speculate as to how these alleged failures by trial counsel to object or make certain motions, translate into ineffective assistance of counsel.

After reviewing the transcript, we conclude that the failure to object to the hearsay statements did not rise to the level of ineffective assistance of counsel. See generally *State v. Aiken*, 73 N.C. App. 487, 326 S.E.2d 919 (1985). Moreover, defendant has failed to show that he was prejudiced by trial counsel's alleged errors. "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a

reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Linton*, 145 N.C. App. 639, 648, 551 S.E.2d 572, 578 (2001) (quoting *Braswell*, 312 N.C. at 561-63, 324 S.E.2d at 247-49 (citations omitted)), *review denied*, 355 N.C. 498, 564 S.E.2d 229 (2002).

Defendant has failed to show and on this record we find no reasonable probability that the result at trial would have been different absent trial counsel's alleged errors. This assignment of error is overruled.

Based on the foregoing, we find no error.

NO ERROR.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).