NO. COA06-153

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v. Montgomery County
No. 02 CRS 51953
No. 02 CRS 2740

KENNY LEGRAND

Appeal by defendant from judgment entered 8 September 2005 by Judge Steve A. Balog in Montgomery County Superior Court. Heard in the Court of Appeals 11 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

LEVINSON, Judge.

Kenny Legrand (defendant) appeals from judgment entered upon his conviction of second degree murder and possession of a handgun by a felon. We find no error.

On 9 September 2002 defendant was indicted for first degree murder in the 30 August 2002 shooting death of Adrian Hamilton ("Hamilton"). The case was tried as a non-capital homicide, commencing 5 September 2002. Defendant was also indicted for

possession of a firearm by a convicted felon, which was joined for trial with the murder charge.

The State's evidence at trial is summarized in relevant part as follows: Defendant, Hamilton, and most of the trial witnesses lived in Troy, North Carolina, near the intersection of Clairmont and Blue Streets. On 30 August 2002, local residents held an outdoor neighborhood cook-out party. The party began during the day and continued into the evening hours. At dusk, defendant and Hamilton began arguing and scuffling in the street. When Sergeant Timothy Atkins of the Troy Police Department drove up, they stopped and assured Atkins that they were just "play fighting" and that nothing was wrong. Defendant then headed for his house, and Atkins directed Hamilton to leave the party area.

After Atkins interrupted the confrontation between Hamilton and defendant, Hamilton walked to a nearby convenience store with his cousin, Andrea Gainey. He purchased two beers at the store, and then he and Andrea walked back towards the intersection where the party was being held. When Hamilton got to defendant's house, the defendant was outside with another man, Calvin Mcauley. The two men began arguing, and shortly thereafter, defendant shot and killed Hamilton.

Eyewitness testimony was offered by State's witnesses Andrea Gainey and Pam Capel, and by defense witness Calvin Mcauley. Their accounts of the shooting differed slightly, but were in general agreement that defendant and Hamilton exchanged threats and insults; that Hamilton may have bumped defendant's chest or raised

a beer bottle in a threatening manner; that defendant backed away from Hamilton; and that they heard a single gunshot and saw a spark of gunfire. After the shooting, defendant ran down the street, accompanied by another man, Anthony Marshall. Meanwhile, Hamilton staggered a few feet before collapsing in the street.

Sergeant Atkins and Lieutenant Allen of the Troy Police Department testified about their investigation of the shooting. Allen also testified about a statement he obtained from defendant, wherein the defendant admitted shooting Hamilton. Expert medical testimony established that Hamilton died from a gunshot wound.

The defendant called two witnesses, Cato Kelly and Calvin Mcauley, whose testimony tended to show that Hamilton was the aggressor in the conflict between him and defendant.

Defendant was convicted of second degree murder and possession of a firearm by a convicted felon. The trial court consolidated the offenses for purposes of sentencing, and imposed an active prison sentence of 198 to 247 months imprisonment. Defendant appeals.

Defendant argues first that the trial court committed reversible error by denying his motion to sever the charge of first degree murder from the charge of possession of a firearm by a convicted felon. The defendant did not testify at trial, which would ordinarily render inadmissable any evidence about his criminal record. *See, e.g.*, N.C. Gen. Stat. § 8C-1, Rule 609(a) (2005); *State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 165

(1991) ("the only legitimate purpose for introducing evidence of past convictions is to impeach the witness's credibility"). However, because a prior felony conviction is an element of the offense of possession of a firearm by a convicted felon, the joinder of that offense with the charge of first degree murder allowed the prosecution to introduce evidence that defendant had a prior conviction for common law robbery. Defendant contends that the admission of this evidence was so prejudicial that a new trial is required. We disagree.

Joinder of offenses for trial is governed by N.C. Gen. Stat. § 15A-926 (2005), which provides in pertinent part that:

> (a) Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

"The propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the trial judge. 'Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed.' Nevertheless, under N.C.G.S. § 15A-927(c)(2) [(2005)] the trial court must deny a joinder for trial [if] . . . it is necessary to promote a fair determination of the guilt or innocence of one or more defendants." *State v. Pickens*, 335 N.C. 717, 724, 440 S.E.2d 552, 556 (1994) (quoting *State v. Nelson*, 298 N.C. 573, 586, 260 S.E.2d 629, 640 (1979)).

In the instant case, defendant concedes that the two offenses arose from the same act or transaction, but asserts that joinder deprived him of a fair trial. He contends that admission of evidence of defendant's prior conviction of common law robbery "significantly bolstered" the State's case. We disagree.

First, there was only one brief mention of defendant's prior conviction during the trial, and no discussion of the factual background of the charge. Secondly, the homicide case was straightforward; the cause of death was undisputed, and defendant admitted shooting and killing Hamilton. The basic issue for the jury was clear; defendant claimed that the shooting was in self defense, and the State's position was that defendant did not act in self defense. Several eyewitnesses testified about the shooting, providing a first-hand account of the incident. Finally, we note that defendant argues on appeal that admission of his prior conviction was significant in part because the testimony of his witnesses, Cato Kelly and Calvin Mcauley, "corroborated the testimony of the defendant that the victim was the aggressor." This is inaccurate, as defendant did not testify.

Under N.C. Gen. Stat. § 15A-1443(a) (2005), a "defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." "After reviewing the evidence

in the instant case, we conclude the joinder of the two charges did not unjustly or prejudicially hinder defendant's ability to defend himself or to receive a fair hearing. In addition, the evidence was not complicated and the trial court's instruction to the jury clearly separated the two offenses." *State v. Cromartie*, __ N.C. App. __, __, 627 S.E.2d 677, 681, *disc. review denied,* 360 N.C. 539 (2006). This assignment of error is overruled.

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Defendant next argues that defense counsel rendered ineffective assistance of counsel by admitting during closing argument that defendant was guilty of possession of a firearm by a convicted felon, without first obtaining defendant's permission and consent to admit this offense. We disagree.

In his opening statement, defense counsel stated:

> I'll go ahead and tell you right now: Mr. Legrand had a pistol in his pocket. He pulled it out and showed it to Adrian Hamilton. Adrian kept coming with that bottle. And, yes, I'll go on record right now, and I have my client's permission to do this, he shot and killed Adrian Hamilton.

After opening statements were delivered, the trial court questioned the defendant, and specifically asked whether defendant had consented to defense counsel's admission of both the fact of his possessing a firearm, and that he used it to shoot and kill Hamilton:

> TRIAL COURT: Mr. Legrand, did you know ahead of time that [defense counsel] was going to let the jury know that - or admit on your behalf in his opening statement that you, in fact, did shoot Adrian Hamilton?

> DEFENDANT: Yes, sir.
>
> TRIAL COURT: Did he do so with your permission?
>
> DEFENDANT: Yes, sir.
>
> TRIAL COURT: Okay. I guess in so doing, he also admitted that you were in possession of a firearm, a handgun. Did he admit – make that admission with your permission also?
>
> DEFENDANT: Yes, sir.

The next morning, before bringing in the jury, the trial court, prosecutor, and defense counsel discussed the charge of possession of a firearm by a convicted felon. The court told the prosecutor that evidence of the fact of defendant's conviction of common law robbery was admissible, but that she could not introduce evidence that defendant was originally charged with a more serious offense. In response, defense counsel stated:

> And to that end, Your Honor, we'll stipulate that. I mean, we don't have to go through all that. We'll stipulate that he was convicted of common law robbery. (Emphasis added).

Moreover, when the prosecutor introduced evidence of the conviction, defendant did not object and did not ask any questions about the conviction on cross-examination. Thus, the record establishes that (1) defendant expressly stated in court that he consented to his counsel's admission that he possessed a firearm; (2) defendant expressly stated in court that he consented to his counsel's admission that he shot and killed the victim; (3) defense counsel told the trial court that defendant would stipulate to having a prior conviction; and (4) the record of defendant's prior

conviction was admitted without objection, cross-examination, or other challenge.

In this factual context, defendant contends that his counsel provided ineffective assistance by admitting his guilt of possession of a firearm by a convicted felon. Notably, he does not argue that this admission by counsel was a poor strategy, or that there was any doubt as to his prior felony conviction. Nor does defendant assert that he did not consent to the admission of guilt of possession of a firearm by a convicted felon. His claim of ineffective assistance of counsel rests entirely on his contention that the record inadequately documents his express consent to his counsel's admission that he had a prior felony conviction. To support his position, defendant relies on language in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), wherein the North Carolina Supreme Court held that "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed. . . . [W]e conclude that ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507-08 (emphasis added). Based on *Harbison*, defendant argues that, in the absence of an express statement on the record establishing defendant's explicit consent to admission of each element of an offense, *per se* ineffective assistance of counsel is conclusively established. We conclude

that, on the facts of this case, there is no possibility that the defendant was "surprised" by counsel's admission.

More importantly, since *Harbison* was decided in 1985, the "United States Supreme Court has found that whether or not a defendant expressly consented to counsel's argument was not dispositive in finding ineffective assistance." *State v. Al-Bayyinah*, 359 N.C. 741, 757, 616 S.E.2d 500, 512 (2005) (emphasis added) (citing *Florida v. Nixon*, 543 U.S. 175, 160 L. Ed. 2d 565, 581 (2004)). In *Nixon*, defense counsel representing a capital defendant "concluded that the best strategy would be to concede guilt, thereby preserving his credibility in urging leniency during the penalty phase." *Nixon*, 543 U.S. at 181, 160 L. Ed. 2d at 575. Defendant was sentenced to death. As "'no competent, substantial evidence . . . establish[ed] that Nixon *affirmatively* and *explicitly* agreed to counsel's strategy,' the Florida Supreme Court reversed and remanded for a new trial." *Nixon*, 543 U.S. at 186, 160 L. Ed. 2d at 577 (quoting *Nixon v. State*, 857 So. 2d 172, 176 (Fla. 2003). The United States Supreme Court reversed and held that defense counsel's statements to the jury were not the equivalent of a guilty plea:

> A presumption of prejudice is not in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the defendant.

Nixon, 543 U.S. at 179, 160 L. Ed. 2d at 573. The Court also held that ineffective assistance of counsel claims based on the issue of defense counsel's admission to the jury of defendant's guilt of

certain acts or offenses should be analyzed according to "the standard prescribed in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), which . . . require[s defendant] to show that counsel's concession strategy was unreasonable." *Nixon*, 543 U.S. at 189, 160 L. Ed. 2d at 580.

We conclude that the trial court's failure to document defendant's express consent to defense counsel's admission that he had a prior felony conviction does not require us to find that defense counsel was *per se* ineffective. We further conclude that defense counsel's strategy, to admit to the jury that defendant was guilty of possession of a firearm by a convicted felon, while asserting self-defense was not unreasonable. This assignment of error is overruled.

Defendant argues next that the trial court erred by failing to instruct the jury on the lesser-included offense of involuntary manslaughter. We conclude that defendant has not preserved this issue for appellate review.

The transcript of the charge conference reveals, in pertinent part, the following dialogue:

> TRIAL COURT: . . . Let me ask, first of all, from the defendant's standpoint with regard to the charge of first degree murder. What offenses does the defendant ask be submitted, if any, by way of lesser included offenses?
>
> DEFENSE COUNSEL: Your Honor, I think it would be appropriate to submit as way of lesser included both voluntary and involuntary and, of course, the defense of self-defense.

> TRIAL COURT: . . . What offenses do you suggest should be submitted to the jury on the murder charge?
>
> DEFENSE COUNSEL: . . . [J]ust include voluntary, involuntary, and the defense of self-defense.
>
> . . . .
>
> TRIAL COURT: . . . [I'll submit] guilty of first degree murder, guilty of second degree murder, guilty of voluntary manslaughter, or not guilty.
>
> . . . .
>
> TRIAL COURT: . . . Does anybody have any objections to any of those instructions?
>
> DEFENSE COUNSEL: No sir.

Although defendant requested an instruction on involuntary manslaughter, he did not object to the trial court's decision not to instruct on the offense, even when the trial court specifically asked if there were objections.

Under N.C.R. App. P. 10(b)(1) of the North Carolina Rules of Appellate Procedure, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion." Accordingly, defendant "may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict[.]" N.C.R. App. P. 10(b)(2). "Further, when a defendant fails to specifically and distinctly allege that the trial court's ruling amounts to plain error, defendant waives his right to have the issues reviewed under plain error. A defendant also waives plain error review by failing to allege plain error in

his assignments of error." *State v. Forrest*, 164 N.C. App. 272, 277, 596 S.E.2d 22, 25-26 (2004) (citing *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994), and *State v. Flippen*, 349 N.C. 264, 274-75, 506 S.E.2d 702, 710 (1998)).

In the instant case, defendant neither objected at trial nor assigned plain error on appeal. This assignment of error is overruled.

Defendant also argues that the trial court erred by denying his motion to suppress a statement made to law enforcement officers. Defendant asserts that the trial court's oral findings of fact, that the officers scrupulously honored defendant's right to counsel and that defendant reinitiated contact with the officers after first invoking his right to counsel, were not supported by the evidence. This argument is without merit.

The trial court's oral findings of fact are amply supported by the testimony elicited at the suppression hearing. Defendant essentially argues that the law enforcement officer's testimony was susceptible to an interpretation different from that of the trial court, or that other facts might have been found that would have supported a different conclusion. However, in "reviewing a trial court's ruling on a motion to suppress, the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Watkins*, 169 N.C. App. 518, 524, 610 S.E.2d 746, 751 (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000)), *disc.*

review denied, 360 N.C. 77, 624 S.E.2d 632 (2005). This assignment of error is overruled.

In a related argument, defendant asserts that the trial court committed reversible error by failing to reduce its ruling on defendant's motion to suppress to a written order. However, a written order was filed, and the Record on Appeal was amended to include the order. This assignment of error is overruled.

For the reasons discussed above, we conclude that defendant received a fair trial, free of prejudicial error.

No error.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).