NO. COA06-67

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v. Lenoir County
Nos. 05CRS050219, 1592

CEDRIC GENE BRUNTON

Appeal by defendant from judgment entered 24 August 2005 by Judge W. Allen Cobb, Jr. in Lenoir County Superior Court. Heard in the Court of Appeals 18 October 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Angel E. Gray, for the State.

Paul F. Herzog for defendant-appellant.

HUNTER, Judge.

Cedric Gene Brunton ("defendant") appeals from judgment of the trial court entered consistent with jury verdicts finding him guilty of assault with a deadly weapon inflicting serious injury, discharging a weapon into occupied property, and two counts of injury to personal property. The jury also found defendant guilty of habitual felon status. Defendant argues the trial court erred in (1) failing to hold a second competency hearing at the close of the State's evidence; (2) denying defendant's motion to dismiss the charge of discharging a weapon into occupied property based on sufficiency of the evidence; (3) failing to instruct the jury on

the lesser-included offense of assault with a deadly weapon; and (4) allowing defendant to proceed with ineffective assistance of counsel. For the reasons stated herein, we find no error.

On 23 August 2005, the trial court held a competency hearing pursuant to the State's request to declare defendant competent to stand trial. The trial court heard testimony from defendant and his probation officer, Shane Foxworth ("Foxworth"). The trial court also considered evidence of a forensic psychiatric competency evaluation performed in July of 2005. The evaluation found defendant competent to proceed to trial.

At the competency hearing, defendant testified that he understood he was being charged with a felony, but "want[ed] to know where all that c[a]me from." Defendant also testified that he did not find the State's current offer of a plea bargain acceptable, and that he preferred to proceed to trial. Foxworth testified that defendant was difficult to deal with but understood and complied with directions. Foxworth denied that defendant was irrational; rather, defendant "just didn't want to or feel that he needed to be on probation." According to Foxworth, defendant believed "[h]e was unfairly prosecuted, perhaps in that the conditions of probation didn't necessarily apply to him, maybe in respect to those." However, defendant "seem[ed] to understand what [Foxworth was] telling him and the consequences of what [Foxworth was] instructing him to do[.]"

Following presentation of the evidence at the competency hearing, the trial court found that defendant

> failed to establish that his reluctance to take the plea offered, because of the possible maximum punishment, is the product of a mentally ill mind, but rather, the mind of a street-wise convict brought once more into contact with the criminal justice system. The defendant is able to appear in court in a presentable fashion with no inappropriate [a]ffect or behavior. The defendant seemed to be able to answer questions on a timely basis and in a basic understandable fashion. He is able to communicate coherently although sometimes inaudibl[y]. The defendant can therefore assist in his defense in a rational or reasonable manner.

The trial court therefore granted the State's motion to declare defendant competent to stand trial, and the case proceeded to trial that same day.

During defendant's trial, the State presented evidence tending to show the following: On the afternoon of 17 January 2005, Alexander Sutton ("Sutton"), a student at Lenoir Community College in Kinston, North Carolina, was driving his vehicle when he saw a young woman he recognized walking beside the street. Sutton did not know the woman by name, but he stopped his vehicle and asked her if she needed a ride. The woman accepted his offer and instructed him to drive to defendant's home, where she said she needed to retrieve some clothing. Sutton was acquainted with defendant, who was his second cousin, but he did not realize the house belonged to defendant. Sutton parked his car in defendant's driveway and waited for the woman to return. After a few minutes, Sutton got out of the car to wait. Sutton testified that:

> I was standing out there on the edge of the street, and I just, I heard the screen door on the house slam. I heard the door slam and I turn[ed] around and I [saw] the defendant

> fumbling in his coat[,] and when he c[a]me out of his coat he had a big black handgun. The only instinct I knew at that time was to go to my vehicle and get out of there, [but] before I [could] get to my car I just started hearing, bangs, and I remember my car getting hit [and] right before I stepped to my car, I got hit.

Sutton described defendant as "mumbling, cussing, talking real loud and crazy, and pointing a gun." Sutton stated that "[b]efore [he] kn[e]w it . . . [defendant] was shooting it." Sutton heard four gunshots altogether. The first two bullets struck the trunk of his car and his upper arm. He did not know where the next two bullets went. Four bullet shell casings were later found in front of defendant's home. After he was shot, Sutton fled the scene on foot. He ran a few blocks until he found a woman who summoned emergency assistance on his behalf. He was taken to the hospital, where he was treated for the gunshot wound to his arm.

Later that afternoon, officers from the Kinston Department of Public Safety investigating the shooting interviewed defendant's next-door neighbor, Glyceria Brown ("Brown"). Brown stated that she knew defendant, and that he "did things around the house for me." Brown informed the officers that she had worked the overnight shift at her employment, that she had fallen asleep around 10:30 that morning with the television on, that she was a sound sleeper, and that she did not hear the shooting. Both of Brown's automobiles were parked in her driveway at the time of the shooting.

The next day, Brown discovered a "bullet casing thing" between some towels she kept in an armoire in her bedroom. Brown then

noticed there was a hole in her armoire and in her bedroom wall. She called the police, who discovered a bullet lying on the floor of her bedroom. The hole in Brown's bedroom wall extended through the exterior wall of her home. The path of the bullet found in Brown's armoire was from the exterior of her home, through her bedroom wall, over her bed, and into her armoire on the opposite side of the room.

At the close of the State's evidence, the trial court inquired whether defendant intended to present evidence. Counsel for defendant replied as follows:

> The answer is yes, I think we are going to put on some evidence, but the issue that is confronting me is Mr. Cedric Brunton as to whether he's going to testify, and I have talked to Mr. Brunton about it at 8 o'clock this morning. His mother has spoken with him as well, and the biggest problem that we have in this case is that Mr. Brunton may be mentally competent to stand trial, but he is not emotionally competent to stand trial, and consequently he is, he is virtually no help whatsoever in, in the case; and in fact I cannot get a straight answer from him as to whether he wants to take the stand, or understands the risks if he does, versus what benefits might be if he didn't; and therefore, I'm asking the Court to instruct Mr. Brunton, in those matters, hoping to gain some understanding as far as what he would like to do in this matter.

The trial court responded that it could not "delve into the sphere of trial tactics" but that it would instruct defendant as to his right under North Carolina law to testify, as well as his privilege not to testify. The trial court then instructed defendant accordingly, and asked him whether or not he understood. Defendant replied, "I reckon I do. I don't know. I don't know." The trial

court asked defendant if it should repeat any part of the instructions. Defendant responded, "I don't understand, understand it." Counsel for defendant stated:

> It has been documented by Dorothea Dix that, that the defendant has an IQ that is minimum as far as that goes, and so in some respect wording may, may create a barrier as much as anything. But as they've also indicated in the report that Mr. Brunton's history of addictions and so on, coupled with his limited IQ, coupled with what appears to be some significant emotional problems create[] a true barrier for him understanding certain significant matters.

The trial court stated that it had "already visited this issue." Counsel for defendant advised the trial court that he was "just . . . unable to determine what Mr. Brunton's wishes are about testifying or not testifying. I don't know what he wants to do." The trial court informed counsel for defendant that it could not "take on another role." Counsel stated that he didn't "know what more to do" but that he was "prepared to go forward."

Counsel for defendant then called Sutton to testify. Sutton denied going to defendant's house to purchase drugs, but admitted he was a convicted felon, and that he had a shotgun in the trunk of his car when he went to defendant's house. Sutton stated that he could not remember the name of the young woman whom he drove to defendant's home, and that he never saw her again. Sutton denied that he had threatened to kill defendant with a gun when defendant would not allow Sutton to enter his home.

Officer Lolita Brown-Chapman of the Kinston Department of Public Safety gave further testimony on behalf of defendant. She

agreed that, as a convicted felon, Sutton was not allowed to possess a firearm, and that had he been discovered with such, he would have been charged. Defendant did not testify.

Upon reviewing the evidence, the jury found defendant guilty of assault with a deadly weapon inflicting serious injury, discharging a weapon into occupied property, and two counts of injury to personal property. The jury also found defendant guilty of habitual felon status. The trial court consolidated the charges and sentenced defendant to a presumptive term of imprisonment of 90-117 months. Defendant appeals.

I. Competency Hearing

Defendant argues the trial court erred in failing to conduct a second competency hearing at the close of the State's case. Defendant contends that, although he was initially found competent by the trial court, there was "substantial evidence" to show that he "was likely becoming incompetent" by the close of the State's case. Although defendant concedes that defense counsel never actually requested a second competency hearing, counsel's "remarks about the intellectual and emotional functioning of the defendant at the close of the [S]tate's case, [were] the functional equivalent of a motion to have his client re-examined with respect to capacity to proceed." Alternatively, defendant argues the trial court should have ordered a second competency hearing *sua sponte*. Defendant contends he should be granted a new trial. We find no merit in this argument.

First, contrary to defendant's argument, the statements by defense counsel do not support the inference that counsel requested a second competency hearing. To the contrary, defense counsel admitted to the trial court that his client remained "mentally competent to stand trial." Rather, it is apparent that defense counsel was having difficulties ascertaining his client's wishes on whether or not defendant intended to testify, and he sought the trial court's assistance in instructing defendant. Defense counsel's frustration with defendant was perhaps not unexpected, given the evidence submitted at defendant's competency hearing, all of which tended to show that defendant was a difficult person to deal with. The psychiatrist who administered defendant's competency evaluation explicitly warned that, "[b]ased on his episodes of past poor cooperation, [defendant] may not cooperate with an attorney, but . . . he is capable of cooperating with an attorney if he chooses to do so."

Second, while it is true that the "'trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent[,]'" *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977) (quoting *Crenshaw v. Wolff*, 504 F.2d 377, 378 (8th Cir. 1974)), there was no such substantial evidence before the court in the instant case to suggest that defendant lacked the capacity to proceed. The trial court had conducted a competency hearing for defendant only the previous day. At the competency hearing, the State presented

substantial evidence of defendant's competency, as well as his tendency to be difficult and uncooperative. There was no evidence before the trial court that defendant's mental state had significantly deteriorated in the previous twenty-four hours, only renewed evidence that defendant was a difficult client. The trial court therefore did not err in failing to hold a second competency hearing. *See State v. Heptinstall*, 309 N.C. 231, 237, 306 S.E.2d 109, 112 (1983) (holding that, in reviewing the defendant's testimony as a whole, and "taking into account [the] defendant's tendency to be manipulative" there was little evidence to suggest that the defendant lacked capacity to proceed and therefore no duty of the trial court on its own motion to reopen the question of the defendant's competency). We overrule this assignment of error.

II. Motion to Dismiss

By further assignment of error, defendant contends the trial court erred in denying his motion to dismiss the charge of discharging a firearm into occupied property, in that the State failed to present sufficient evidence that defendant knew or had reasonable grounds to know that Brown was home at the time he fired his weapon at Sutton.

"When considering a motion to dismiss on the grounds of insufficiency of the State's evidence, the trial court must determine whether there is substantial evidence of each element of the offense and that defendant committed that offense." *State v. Coleman*, 161 N.C. App. 224, 232, 587 S.E.2d 889, 894 (2003). "Substantial evidence is such relevant evidence as is necessary to

persuade a rational juror to accept a conclusion." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004). "'In determining the sufficiency of the evidence we consider it in the light most favorable to the State.'" *State v. Shaw*, 164 N.C. App. 723, 728, 596 S.E.2d 884, 888 (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)), *disc. review denied*, 358 N.C. 737, 602 S.E.2d 676 (2004).

A person is guilty of discharging a firearm into occupied property if he "'intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.'" *State v. James*, 342 N.C. 589, 596, 466 S.E.2d 710, 715 (1996) (quoting *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973)); N.C. Gen. Stat. § 14-34.1 (2005).

In the light most favorable to the State, there was evidence from which a reasonable juror could conclude that defendant either knew or had reason to know that the Brown residence was occupied when he fired his weapon at Sutton. Brown testified that she was acquainted with defendant and that he helped her around the house. Brown was home and asleep at the time of the shooting. Her television set was turned on. Most notably, both of Brown's vehicles were parked in the driveway in front of her home. Where all the vehicles belonging to an individual are parked in front of

that individual's residence, common sense and everyday experience would tend to indicate the likelihood of the owner being at home. *See State v. Hicks*, 60 N.C. App. 718, 721, 300 S.E.2d 33, 35 (1983) (noting the converse proposition that where no cars are parked in front of a residence, such fact would tend to support an inference that no one was at home. However, where the residence has a garage, such fact would explain the absence of any parked cars in front of the residence). From this evidence, a reasonable juror could conclude that defendant knew or should have known the building was occupied at the time he discharged his weapon. *Compare State v. Everette*, 172 N.C. App. 237, 242, 616 S.E.2d 237, 241 (noting that the fact that the restaurant was located in an area where other establishments were open until the early morning hours showed that it was reasonable to believe that the restaurant was also open and occupied at the time of the 2:30 a.m. shooting), *stay granted on other grounds*, 360 N.C. 69, 620 S.E.2d 199 (2005).

III. Serious Injury

Defendant next argues the trial court committed plain error in failing to instruct the jury on the lesser-included offense of assault with a deadly weapon. Defendant contends there was conflicting evidence as to whether the injury to Sutton was sufficiently serious to support the instruction of assault with a deadly weapon inflicting serious injury, and that the lesser-included offense should therefore have been submitted for the jury's consideration. Defendant concedes that our review of this assignment of error is limited to that of plain error. Plain error

is error so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

"It is well settled that 'a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts.'" *State v. Drumgold*, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979) (quoting *State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E.2d 406, 413 (1977)). However, "[a]n instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). "'Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser[-]included offense is required.'" *Id.* at 562, 572 S.E.2d at 772 (quoting *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989)). The trial court examines the record to determine the presence or absence of any evidence that might convince a reasonable juror to convict the defendant of the lesser-included offense. *Id.*

Whether a serious injury has been inflicted is a factual determination generally left for the jury to decide under appropriate instructions. *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586-87 (1988). A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at

work in determining whether an injury is serious. *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983). "Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury." *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991). Notably, "[i]n the absence of conflicting evidence, a trial judge may instruct the jury that injuries to a victim are serious as a matter of law if reasonable minds could not differ as to their serious nature." *Id.* at 54, 409 S.E.2d at 318-19 (holding that reasonable minds could not differ as to the seriousness of the victim's physical injuries, where she sustained a bullet wound to her ear which caused daily ringing in her ear at the time of trial, as well as powder burns and lacerations on her hand and head).

Defendant argues the State presented insufficient evidence that the victim, Sutton, was seriously injured. We disagree. The State presented evidence tending to show that Sutton was injured when he was struck by a bullet to his upper arm. Sutton wrapped material around his arm to staunch the flow of blood, then sought emergency assistance. Sutton was lying on the ground when emergency responders arrived at the scene. They subsequently applied pressure to stop the bleeding, then bandaged Sutton's arm. He was later transported to the hospital, treated, and released. The entrance and exit wounds Sutton sustained were visible at trial eight months later. From this evidence, a reasonable juror could conclude that Sutton sustained serious injury. *See Hedgepeth*, 330 N.C. at 53-55, 409 S.E.2d at 318-19. Defendant presented no

evidence to contradict that of the State's regarding the serious nature of Sutton's injury. Notably, under *Hedgepeth*, the trial court could have instructed the jury (but did not do so) that the injury to Sutton was a serious one as a matter of law. *See id.* The trial court therefore did not err in failing to submit the lesser-included offense of misdemeanor assault to the jury, much less committed plain error. We overrule this assignment of error.

IV. Effective Assistance of Counsel

Finally, defendant argues he was denied effective assistance of counsel. Although defendant acknowledges that "most ineffective assistance claims are properly brought in a Motion for Appropriate Relief rather than on direct appeal[,]" he asserts that "this case presents the extremely rare case when counsel's 'ineffective assistance' can be litigated on direct appeal[.]" Defendant contends his counsel's performance was deficient as a matter of law, with no strategic basis for his behavior, resulting in irrevocable prejudice to defendant. We do not agree.

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985). "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *Id.* at 561-62, 324 S.E.2d at 248. To meet this burden, the defendant must satisfy the following 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 errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*."

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

"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." *Id.* at 563, 324 S.E.2d at 248. "This determination must be based on the totality of the evidence before the finder of fact." *Id.* Thus,

> "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."

Id. (quoting *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 699).

Defendant contends his counsel's performance was deficient in that counsel for defendant decided to call two State's witnesses during defendant's presentation of evidence. Defendant argues that the same evidence could have been presented during cross-examination, without sacrificing defendant's right to opening and closing arguments to the jury. Defendant contends there could have been "*no* strategic reason for counsel's behavior," and that he was irrevocably prejudiced thereby. We find no merit in this argument.

First, there could have been several reasons behind defense counsel's strategy. From reviewing the record as a whole, it is clear that defendant's theory of the case was one of self-defense. Defendant encouraged the jury to believe that Sutton arrived at defendant's home seeking drugs and threatened to kill defendant when he did not allow Sutton to enter his home. Defense counsel was frustrated in his attempts to advance this theory of the case, however, by defendant's apparent refusal to cooperate, particularly in regards to whether or not defendant would testify. At the close of the State's case, defense counsel could not ascertain whether or not defendant intended to testify. Recalling several of the State's witnesses bought defendant additional time to decide whether or not to testify, and to effectively communicate his wishes to his attorney. The testimony brought out during defendant's presentation of the evidence cast some doubt on the State's case. Moreover, while it is true that defense counsel could have elicited the same information from the State's witnesses during cross-examination, the questions asked by defense counsel, specifically targeting defendant's theory of the case, strategically highlighted the weaknesses in the State's case at a time shortly before the jury would retire to deliberate.

Further, there is little to suggest that defense counsel's performance, even if deficient in some measure, had any effect on the outcome at trial. The State presented strong evidence that defendant deliberately fired four shots from a firearm. One of these shots struck Sutton; the second struck Sutton's vehicle; and

one of the shots penetrated defendant's next-door neighbor's home. Defendant presented little evidence to rebut the State's position. Given these facts, there is no reasonable probability that, but for counsel's recall of the State's witnesses and resulting sacrifice of the closing argument, there would have been a different result in the proceedings. We therefore overrule this assignment of error.

In the judgment of the trial court we find

No error.

Judges HUDSON and CALABRIA concur.

Report per Rule 30(e).