NO. COA10-1445
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v. Wayne County
No. 06 CRS 52600

WILLIAM EARL BANDY, JR.

Appeal by defendant from judgments entered 15 April 2010 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 6 June 2011.

Roy Cooper, Attorney General, by John P. Barkley, Assistant Attorney General, for the State.

Richard E. Jester, for defendant.

THIGPEN, Judge.

William Bandy ("Defendant") appeals from a conviction of voluntary manslaughter and discharging a firearm into occupied property. We must decide whether the trial court erred by (I) excluding testimony regarding the victim's criminal history and (II) sentencing Defendant for both discharging a firearm into an occupied vehicle and voluntary manslaughter. Because the

exclusion of the testimony was not shown to be prejudicial, and Defendant was properly sentenced for both offenses, we find no error.

On 29 March 2006, Defendant had two encounters with Fred Coleman. During the first encounter at Adam's Chicken and Groceries in Goldsboro, North Carolina, Mr. Coleman told Defendant he was "going to do this and that, come back with his homeboys" and "kill [Defendant]." Mr. Coleman then followed Defendant in his car until Defendant reached his house. Defendant was so frightened by Mr. Coleman that he obtained a gun at his girlfriend, Sherbertta Worsley's house.

The second encounter occurred when Mr. Coleman and his girlfriend, Aleshia Brown, returned to Defendant's neighborhood to look at a used car. Ms. Brown and Mr. Coleman saw Defendant standing at a corner and approached him. Defendant asked Mr. Coleman if he had a problem with him and why he kept following him. Defendant walked toward Mr. Coleman's car, and Ms. Brown saw him take a gun out of his pocket. The two men began arguing as Defendant stood at Mr. Coleman's window while Mr. Coleman sat in his car. As Defendant was walking away, he thought he saw Mr. Coleman reach for something. Defendant then fired his

weapon twice and ran away. The next day when Defendant learned Mr. Coleman had died, he turned himself in to law enforcement.

Defendant was charged with first-degree murder and discharging a firearm into occupied property.[1] At trial, a jury found Defendant guilty of voluntary manslaughter and discharging a firearm into occupied property. The trial court sentenced Defendant to two consecutive terms of 103 to 133 months and 34 to 50 months imprisonment. Defendant appeals.

I. Exclusion of Evidence

In his first argument on appeal, Defendant contends the trial court erred by excluding evidence of Mr. Coleman's criminal history.[2] Specifically, the trial court prohibited Ms. Brown from stating whether Mr. Coleman had been found guilty of any crimes during the period of time Ms. Brown knew him. We conclude Defendant failed to preserve this issue for appellate review.

At trial, when questioned about Mr. Coleman's temper, Ms. Brown testified that throughout the course of her relationship

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[1]In a related case (07-CRS-1250), Defendant was also charged with and convicted of possession of a firearm by a convicted felon. Defendant does not appeal that conviction.

[2]Although Defendant contends the trial court erred by excluding evidence of Mr. Coleman's criminal history, Mr. Coleman's criminal record was not admitted into evidence at trial, and Defendant did not proffer Mr. Coleman's criminal record as a trial exhibit.

with Mr. Coleman, he had become a changed man. Ms. Brown stated on cross-examination, "When me and [Mr. Coleman] was together, [Mr. Coleman] was trying to change his life." On re-direct, she further explained, "Whatever he was doing before, I don't know. But he wasn't doing it with me." On re-cross examination, defense counsel asked Ms. Brown, "During the period of time that you knew [Mr. Coleman], had he been found guilty of any crimes?" The State objected, and the trial court sustained the objection. The record does not disclose what Ms. Brown's answer would have been to this question.

When we cannot discern from the record what the testimony of a witness would have been had the trial court not sustained the prosecution's objection, our Supreme Court has held:

> In order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. We also held that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Jacobs, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010) (citations omitted) (quoting *State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007), *cert. denied.*, __ U.S. __, 129 S.

Ct. 2857, 174 L.Ed.2d 601 (2009)). "We will not engage in speculation as to the answers each witness would have provided." *Raines*, 362 N.C. at 20, 653 S.E.2d at 138.

We find this case analogous to *State v. Cooke*, 306 N.C. 117, 291 S.E.2d 649 (1982), and *Jacobs*. In *Cooke*, a witness for the State testified that the victim "did not have a bad temper and 'he wasn't really violent.'" *Id.* at 122, 291 S.E.2d at 652. The court sustained the State's objection to counsel's question, "Do you know of his past criminal record?". *Id.* Our Supreme Court held that "[s]ince the record does not disclose what [the witness'] answer would have been to this question, the exclusion of the testimony is not shown to be prejudicial." *Id.* (citations omitted). Similarly, in *Jacobs*, a witness testified that he knew the victim was a convicted felon. 363 N.C. at 818, 689 S.E.2d at 862. When defense counsel asked the witness which of the victim's convictions he knew about, the trial court sustained the State's objection, and the witness nonetheless responded, "I don't know exactly." *Id.* at 818-19, 689 S.E.2d at 862. Our Supreme Court held the exclusion of the evidence regarding the victim's convictions had not been preserved for appellate review because "[n]o offer of proof was made regarding any details [the witness] knew about the victim's criminal

history, nor is the significance of any purported knowledge or lack of knowledge of these convictions . . . obvious from the record." *Id.* at 819, 689 S.E.2d at 862.

Like *Cooke* and *Jacobs*, the record in the instant case does not disclose what Ms. Brown's answer would have been to defense counsel's question, "During the period of time that you knew [Mr. Coleman], had he been found guilty of any crimes?". We will not speculate as to what Ms. Brown's testimony might have been, and, in the absence of proof of the significance of the excluded testimony, we cannot ascertain whether prejudicial error occurred.

II. Double Jeopardy

Defendant next argues the trial court erred by sentencing him for both discharging a firearm into an occupied vehicle and voluntary manslaughter because the offenses arose from a single assaultive act. Defendant analogizes his case to the felony-murder rule, arguing "the crime of voluntary manslaughter fully absorbs the firing of the pistol at Mr. Coleman." We disagree.

Our standard of review for double jeopardy claims is *de novo*. *State v. Hagans*, 188 N.C. App. 799, 804, 656 S.E.2d 704, 707 (citation omitted), *disc. review denied*, 362 N.C. 511, 668 S.E.2d 344 (2008). "The Double Jeopardy Clause of the Fifth

Amendment to the United States Constitution protects against multiple punishments for the same offense. The North Carolina Constitution provides similar protection." *State v. Washington*, 141 N.C. App. 354, 368, 540 S.E.2d 388, 398 (2000) (citing U.S. Const. amend. V.; N.C. Const. art. I, § 19), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). However, "[i]t is elementary that a defendant may be charged with more than one offense based on a given course of conduct." *State v. Ward*, 301 N.C. 469, 476, 272 S.E.2d 84, 88 (1980). A defendant may be properly charged with two separate and distinct offenses that arise out of a single course of conduct. *Id*. "When the same act or transaction constitutes a violation of two criminal statutes, the test to determine whether there are two separate offenses is whether each statute requires proof of a fact which the other does not." *State v. Haynesworth*, 146 N.C. App. 523, 530-31, 553 S.E.2d 103, 109 (2001) (citation omitted).

"Voluntary manslaughter is defined as the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation." *State v. Jackson*, 145 N.C. App. 86, 90, 550 S.E.2d 225, 229 (2001) (quotation marks and citation omitted). "The elements of discharging a firearm into occupied property are (1) willfully and wantonly discharging (2)

a firearm (3) into property (4) while it is occupied." *State v. Dubose*, __ N.C. App. __, __, 702 S.E.2d 330, 333 (2010) (citation omitted); *see also* N.C. Gen. Stat. § 14-34.1 (2009). Each offense requires proof of specific and distinct elements not required to be proved for conviction of the other. Therefore, we hold the trial court did not err by sentencing Defendant for both discharging a firearm into an occupied vehicle and voluntary manslaughter.

NO ERROR.

Chief Judge MARTIN and Judge STEPHENS concur.

Report per Rule 30(e).