NO. COA11-152
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Wayne County
Nos. 08 CRS 58229
09 CRS 50320

ANGELA CHANELLE LEFTDWRIGE

Appeal by Defendant from judgments entered 22 July 2010 by Judge J. Carlton Cole in Wayne County Superior Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly W. Duffley, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for Defendant.

BEASLEY, Judge.

Angela Chanelle Leftdwrige (Defendant) appeals from judgments entered on her convictions of attempted first-degree murder and trafficking in cocaine by possession. For the reasons stated below, we conclude there was no error.

On 3 August 2009, Defendant was indicted on charges of attempted first-degree murder, assault with a deadly weapon with

intent to kill inflicting serious injury, and possession of a stolen firearm. On 8 September 2009, Defendant was indicted on charges of trafficking in cocaine by possession, keeping and maintaining a dwelling for the use of controlled substances, and a second count of possession of a stolen firearm. Prior to trial, the State dismissed both counts of possession of a stolen firearm. The case was heard at the 19 July 2010 Criminal Session of Wayne County Superior Court before the Honorable J. Carlton Cole.

On 22 July 2010, the jury returned guilty verdicts for the charges of attempted first-degree murder, assault with a deadly weapon with the intent to kill inflicting serious injury, trafficking in cocaine by possession, and maintaining a dwelling for the use of controlled substances.

Defendant was sentenced to 125 to 159 months imprisonment for the attempted first-degree murder charge, 35 to 42 months imprisonment for the charge of trafficking in cocaine by possession, and 4 to 5 months imprisonment for the charge of maintaining a dwelling for the use of controlled substances. The first two sentences were ordered to run consecutively. Defendant rejected probation and accepted an active sentence for the third conviction, which the court ordered to run concurrently with the first conviction. Defendant gave timely notice of appeal.

I.

Defendant argues that the trial court erred in its instructions to the jury on the charge of attempted first-degree murder. While instructing the jury on this charge, the trial court misspoke in two instances. First, the court stated that

> [t]he defendant would be guilty of attempted first-degree murder on the ground of self-defense if, first, it appeared that the defendant -- appeared to the defendant and she believed it to be necessary to use potential deadly force against the victim in order to save herself from death or great bodily harm.

This instruction was flawed because the defendant would be *not* guilty of the charged offense by reason of self-defense if she believed it necessary to use deadly force to save herself from death or great bodily harm. The trial court also gave a flawed instruction regarding the elements of the crime, stating that

> [i]f you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and not in self-defense attempted to kill the victim with a deadly weapon, and performed an act designed to bring this about, and that in performing this act the defendant acted without malice, without premeditation, and without deliberation, it would be your duty to return a verdict of guilty of attempted first-degree murder.

The trial court mistakenly indicated that a charge of first-degree murder requires an act performed *without* malice,

premeditation, and deliberation. In fact just the opposite is true. Defense counsel informed the court of a flaw in the jury instructions and the jury was called back into the courtroom. The court explained that the instructions contained an omission important to their deliberations and re-read the entirety of the instructions as to the attempted first-degree murder charge. The second reading of the jury instructions contained no flaws.

The parties disagree as to whether Defendant properly preserved her objection to the jury instructions, and on the proper standard of review for this issue. However assuming *arguendo* that Defendant did properly preserve the objection for appeal, she has failed to establish she suffered any prejudice even under the more lenient standard of review for prejudicial error, let alone under the plain error standard. Any error in the initial jury instructions was cured promptly and sufficiently by the trial court.

Defendant cites several cases for the proposition that when conflicting instructions are given on applicable law, "there must be a new trial since the jury is not supposed to be able to distinguish between a correct and incorrect charge." *State v. Carver*, 286 N.C. 179, 183, 209 S.E.2d 785, 788 (1974); *see also State v. Allison*, 256 N.C. 240, 243, 123 S.E.2d 465, 467 (1962) ("[C]onflicting instructions upon a material aspect of the case must be held for prejudicial error . . . since it cannot be

known which instruction was followed by the jury."). Such cases are distinguishable from the instant case because here the court did not simply give the jury conflicting instructions. Instead, the court gave one erroneous instruction and then clearly and unambiguously told the jury to disregard that instruction, and gave a second, proper instruction. There is no basis for assuming that the jury may have relied on the incorrect instruction here, because it was explicitly told which instruction to follow. Accordingly, this argument is overruled.

II.

Defendant next argues that she was denied effective assistance of counsel in violation of her rights under both the United States and North Carolina Constitutions. *See, e.g.*, *State v. Baker*, 109 N.C. App. 643, 644, 428 S.E.2d 476, 477 (1993). In support of this claim, Defendant asserts that her counsel mistakenly informed the judge that her sentences for the attempted first-degree murder charge and for the trafficking in cocaine charge had to run consecutively. During sentencing, defense counsel made the following statement to the court: "I understand that one count and another count would have run at the expiration of the other, but I would ask if the Court would allow the class I to go with the -- with one of the two counts concurrently, Judge, at this time."

To establish a claim for ineffective assistance of counsel, a defendant must show that "(1) 'counsel's performance was deficient,' meaning it 'fell below an objective standard of reasonableness,' and (2) 'the deficient performance prejudiced the defense.'" *State v. Garcell*, 363 N.C. 10, 51, 678 S.E.2d 618, 644 (2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). Deficient performance prejudices the defense when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

The burden of proof for both prongs of the claim is on the defendant, absent special circumstances. *See State v. Rogers*, 352 N.C. 119, 125, 529 S.E.2d 671, 675 (2000) ("While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed . . . when the likelihood that any lawyer, even a fully competent one, could provide effective assistance is remote."(internal quotation marks omitted)). No such circumstances exist here, so the burden remains on Defendant to establish that she received ineffective assistance of counsel. Defendant has not met this burden. Defendant admits that the trial court never stated its sentencing decision was required by statute. The mere

suggestion that Defendant raises is not enough to establish a reasonable probability that but for counsel's statement her sentencing would have been different. Accordingly, this argument is also overruled.

No Error.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).