NO. COA11-174
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

	Buncombe County
v.	Nos. 09 CRS 64830
	09 CRS 64832
HERNANDEZ JEWEL FINCH, JR.	10 CRS 42
Defendant.	10 CRS 43

Appeal by defendant from judgments entered 19 August 2010 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 1 September 2011.

Attorney General Roy Cooper, by Senior Deputy Attorney General Robert T. Hargett, for the State.

Marilyn G. Ozer for defendant-appellant.

GEER, Judge.

Defendant Hernandez Jewel Finch, Jr. appeals from his conviction of attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), discharging a firearm into an occupied vehicle, and possession of a firearm by a felon. Defendant primarily argues on appeal that the trial court erred in admitting

testimony that a witness had made a prior out-of-court statement explaining that he had not wanted to talk to the police because he was scared of retaliation by the *victim's friends and acquaintances*. We hold that even assuming, without deciding, that the evidence was improperly admitted, any error was harmless given the evidence of defendant's guilt, the perceived threat having come from the victim and not from defendant, and the admission of testimony of another witness regarding fear of retaliation by the victim.

Facts

The State's evidence tended to show the following facts. In the early morning hours of 7 November 2009, after a dispute at a nightclub in west Asheville, defendant, along with Daniel Young, Roy Leake, and Cordarall Horne, followed Rodriguez Paul and two women from the night club to the Pisgah View housing project. While Paul was still in his car, Young opened Paul's car door and told Paul, "'You need to call your homeboys; something bad's about to happen to you.'"

As Young was beating Paul, Paul looked past Young and saw the barrel of a gun. Young also looked backwards, and he saw that defendant was the one with the gun. Paul grabbed at the gun, but defendant started shooting. When the gun jammed, Paul was able to get out of the passenger side of the car, and he

started running. Ultimately, Paul was shot five or six times, including in the back. Later, five shell casings were recovered from the parking area. All of the casings had been fired from one gun.

The shooting was filmed from three different angles by surveillance cameras in the parking lot. At trial, the jury was shown the film multiple times while the events were narrated by detectives and other witnesses who were present at the shooting. Two witnesses specifically identified defendant as the shooter.

After the shooting, defendant left the scene by car with Horne, Leake, and another individual. Defendant disposed of his gun by throwing it off a bridge into a river. After dropping Leake off at his mother's house, the three remaining men drove to Hillcrest Apartments, another housing project. Defendant then left the State and was ultimately arrested in Kansas City, Kansas.

Defendant was indicted for attempted first degree murder, AWDWIKISI, discharging a firearm into an occupied vehicle, and possession of a firearm by a felon. Defendant did not put on any evidence during the trial, and the jury found defendant guilty of each of the charges. The trial court sentenced defendant to a presumptive-range term of 220 to 273 months imprisonment for attempted first degree murder, a consecutive

presumptive-range sentence of 116 to 149 months imprisonment for the offenses of AWDWIKISI and discharging a firearm into an occupied vehicle, and a consecutive presumptive-range sentence of 16 to 20 months imprisonment for possession of a firearm by a felon. Defendant timely appealed to this Court.

Discussion

Defendant first contends that the trial court erred in allowing a police officer to testify as to what Roy Leake had said in the second of three interviews about why he had been reluctant to discuss the shooting in his first interview. In that first interview, Leake did not identify the shooter, but in the second interview, Leake reported to the police that defendant had been the shooter.

At trial, Leake refused to identify defendant as the shooter and repeatedly failed to answer questions regarding the events at issue, either asserting his Fifth Amendment right or stating that he did not remember because he was intoxicated and afraid during the events. When asked about what he told officers during his interviews (including whether he went to the Pisgah View housing project, whether defendant was the shooter, whether Young punched Paul, whether Leake had driven away from the scene with defendant, and whether defendant threw the gun in

the river), Leake repeatedly answered by saying that he did not want to talk about "this."

After Leake's testimony, the State called Sergeant Michael Garrison of the Asheville Police Department to testify regarding his interviews with Leake. Sergeant Garrison testified that he first interviewed Leake over the phone and then conducted a second interview of Leake in person. According to Sergeant Garrison, in the second interview, Leake apologized for not being more forthcoming in the first interview. Sergeant Garrison testified over defendant's objection that Leake gave the following reason for not saying more in the first interview:

> He stated he was in fear for his life and his mother's life *from the victim's friends and associates in retaliation*. And he also stated that he's old school, meaning that there is a certain degree of respect for not snitching and that he didn't want to lose credibility or respect on the street by making a statement regarding one of his own friends.

(Emphasis added.) Defendant contends that this testimony should have been excluded as inadmissible hearsay.

Assuming, without deciding, that the trial court should have excluded this testimony, we hold that defendant has failed to show that there is a reasonable possibility that in the absence of this testimony, the jury would have found defendant not guilty. *See* N.C. Gen. Stat. § 15A-1443(a) (2009). The only

prejudice identified by defendant is that Leake's prior statement provided an explanation for Leake's evasiveness at trial: that he feared retaliation from Paul's (and *not* defendant's) friends and acquaintances.

Even if Leake's prior statement to Sergeant Garrison had been excluded, however, Horne also testified that he was afraid:

> MR. HORNE: Your Honor, do I have to answer the question?
>
> THE COURT: Yes. What did you see?
>
> MR. HORNE: I don't want to answer these questions, sir.
>
> THE COURT: Sir?
>
> MR. HORNE: I don't feel comfortable answering these questions, like --
>
> Q. Have you seen the video?
>
> A. Yes, sir. I'm just honestly telling you, you know what I'm saying. I'm not comfortable answering these questions. I'm scared, you know what I'm saying. I don't know --
>
> Q. Why are you scared?
>
> A. Because I don't want to get in the middle of it and then be -- you know what I'm saying, if something happens to me or anybody that I love or anything like that. So, you know, like I honestly don't want to get in the middle of it, like --

Horne's and Leake's participation in the events was nearly identical, and Horne's explanation for his reticence would likely be viewed as explaining Leake's evasiveness as well.

In addition, there was ample evidence of defendant's guilt. Both Young and Horne identified defendant as the shooter, and the jury had an opportunity to view the surveillance tape. Further, Leake did not, at trial, deny that defendant was the shooter -- he simply refused to answer the question. In light of the evidence of defendant's guilt and Horne's testimony about being afraid to testify, we cannot find prejudicial the jury's hearing that Leake was reluctant to provide information to the police because he was afraid of the victim's friends and acquaintances.

Defendant next points to his trial counsel's request that the trial court instruct defendant about his right to testify: "Your Honor, I've spoken to my client about testifying. This might be a good time to go over that with him on the record. He's chosen not to testify." The trial court, however, declined to instruct defendant on his right to testify. Defendant argues on appeal that the trial court was required to advise defendant of his constitutional right to testify and conduct an inquiry to determine whether defendant was "clearly and unequivocally waiv[ing] his right to testify."

State v. Smith, 357 N.C. 604, 588 S.E.2d 453 (2003), is controlling. In *Smith*, the defendant argued that his constitutional rights were violated "because the trial court did not inquire as to whether defendant wished to testify . . . ." *Id.* at 618, 588 S.E.2d at 463. The Supreme Court squarely held: "This Court has never required trial courts to inform a defendant of his right to testify or to make an inquiry on the record regarding his waiver of the right to testify." *Id.*

The Court explained further that "absent a defendant's indication that he wished to testify, it cannot be said that the trial court denied defendant of his right." *Id.* at 619, 588 S.E.2d at 463. In *Smith*, the defendant, who had counsel available to advise him "at all times," had "made it clear to the trial court that defendant wished to waive the right to testify on his own behalf." *Id.* The Court concluded that "[g]iven these circumstances, and because defendant never made a request to testify on his own behalf, we cannot say that defendant's rights were violated." *Id.*

Similarly, here, the trial court specifically confirmed with defendant's counsel that counsel had advised defendant of his rights, and defendant had elected not to testify. Under *Smith*, therefore, defendant's constitutional right to testify was not violated. While defendant argues that *Smith* is

distinguishable because defense counsel, in that case, did not actually request that the trial court instruct the defendant on his rights, the Court's holding in *Smith* did not hinge on any lack of a request. Since the plain language of the holding applies on its face to defendant's argument in this case, we are bound by *Smith*.

Defendant next contends that the trial court erred by instructing the jury on flight. It is well established that "[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). On the other hand, "[m]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

The evidence in this case permits an inference that defendant not only left the crime scene, but that he also took steps to avoid apprehension. Defendant fired his gun repeatedly at Paul, hitting him five or six times. He then left the scene without rendering any assistance to Paul or seeking to obtain any medical aid for Paul. *See State v. Anthony*, 354 N.C. 372,

425, 555 S.E.2d 557, 591 (2001) (holding that trial court properly instructed on flight when defendant, after shooting victims in front of witnesses, "immediately entered his car and quickly drove away from the crime scene without rendering any assistance to the victims or seeking to obtain medical aid for them").

After defendant left the scene of the shooting, he threw his gun off a bridge into a river where it was never found. *See State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990) (holding that actions of defendant were "clearly sufficient" to support instruction on flight when defendant threw murder weapon in nearby river where it was never recovered, defendant attempted to hide victim's body, and defendant threw victim's belongings over a guard rail by a major highway).

Defendant then left North Carolina and traveled to Kansas. *See State v. Wilson*, 338 N.C. 244, 255, 449 S.E.2d 391, 398 (1994) (holding flight instruction proper when, shortly after crime was committed, defendant traveled by bus to New York); *State v. Stitt*, 201 N.C. App. 233, 251, 689 S.E.2d 539, 553 (2009) (holding that when defendant traveled to New York after crime, flight instruction properly given because he did so alone and stayed longer than usual), *disc. review denied*, 364 N.C. 246, 699 S.E.2d 920 (2010).

The evidence collectively is sufficient to support the trial court's flight instruction. Defendant, however, contends that he did not flee the scene because he was guilty, but rather because he was afraid, and he further asserts that his traveling to Kansas could not constitute flight because he was simply returning home. As the Supreme Court explained in *Irick*, 291 N.C. at 494, 231 S.E.2d at 842, "[t]he fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." Consequently, the trial court in this case did not err by giving a jury instruction on flight.

Lastly, as a preservation issue, defendant contends that punishing him for both attempted first degree murder and AWDWIKISI violates the Double Jeopardy Clause. As defendant acknowledges, our Supreme Court has specifically rejected this contention. *See State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004). We are bound by that decision.

No error.

Judges STROUD and THIGPEN concur.

Report per Rule 30(e).