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NO. COA11-270
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Cumberland County
No. 09 CRS 17300; 54403

RECO MURRAY

Appeal by defendant from judgments entered 27 August 2010 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 14 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Creecy Johnson, for the State.

Sue Genrich Berry, for Defendant-Appellant.

ERVIN, Judge.

Defendant Reco Delquan Murray appeals from judgments sentencing him to a term of thirty to forty-five months imprisonment based upon his conviction for assault with a deadly weapon inflicting serious injury and to a consecutive term of fifteen to eighteen months imprisonment based upon his conviction for possession of a firearm by a felon. On appeal, Defendant contends that the trial court erred by admitting an extra-judicial statement and by responding to a jury question

concerning the definition of "intent" as applied to the issue of Defendant's guilt of assault with a deadly weapon inflicting serious injury. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Background

A. Substantive Facts

In January 2009, Anthony Greene told Keith Housey that Defendant was beating Mr. Greene's girlfriend, Adrienne Hayes. Ms. Hayes was Defendant's ex-girlfriend. Mr. Housey knew Defendant from living in the same neighborhood and riding in Defendant's blue Cadillac.

Mr. Housey and Mr. Greene went to Ms. Hayes' residence, where they noted that the door was out of its frame, that Defendant was standing in the doorway, and that Ms. Hayes had a black eye and swollen face. Mr. Housey advised Ms. Hayes to call the police. Because Defendant's and Ms. Hayes' daughter was in the home, Mr. Housey told Defendant "that he don't need to be doing this in front of his kids." After stating that what had happened was none of Mr. Housey's business, Defendant left before the police arrived.

On 30 March 2009, Mr. Housey had dinner with his sister, Wanda Sellers, and Larry Sykes at Ms. Sellers' home. As the group was departing, Defendant arrived in his blue Cadillac. After Mr. Housey asked Defendant why he was looking at him in a particular manner, Defendant retrieved a gun from the interior of his car. Mr. Sykes, Mr. Housey, and Ms. Sellers began to run after Defendant cocked the gun.

After hearing a gunshot, Mr. Housey jumped between two cars without realizing that he had been wounded in his leg. Defendant approached Mr. Housey and said that Mr. Housey was "minding other people['s] business" and was not "so big now." After Ms. Sellers told Defendant that she had called the police, Defendant returned to his car. As he did so, Mr. Housey heard Defendant say, "Yeah, I told you, boy. Yeah, you ain't so bad now, huh? You ain't so bad now." Defendant then sped away.

When the police arrived, Mr. Housey told them that "Reco" shot him. However, Mr. Housey did not know his assailant's last name at that time. Mr. Housey received extensive medical treatment, including undergoing several surgical procedures, for the injuries he sustained in the shooting.

B. Procedural History

On 15 December 2009, the Cumberland County grand jury returned bills of indictment charging Defendant with possession

of a firearm by a felon and assault with a deadly weapon with intent to kill inflicting serious injury. The charges against Defendant came on for trial before the trial court and a jury at the 23 August 2010 session of the Cumberland County Superior Court. On 27 August 2010, the jury returned verdicts finding Defendant guilty of possession of a firearm by a felon and assault with a deadly weapon inflicting serious injury. At the ensuing sentencing hearing, the trial court sentenced Defendant to a term of thirty to forty-five months imprisonment based upon his conviction for assault with a deadly weapon inflicting serious injury and to a consecutive term of fifteen to eighteen months imprisonment based upon his conviction for possession of a firearm by a felon. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Admission of Mr. Sykes' Statement

In his first challenge to the trial court's judgments, Defendant contends that the trial court improperly admitted evidence concerning a statement that Mr. Sykes made to an investigating officer in which he identified Defendant as the individual who assaulted Mr. Housey. We disagree.

On direct examination, Mr. Sykes testified that he was at Ms. Sellers' house on the evening of 30 March 2009.[1] Mr. Sykes recalled that Mr. Housey exchanged some words with a person who was inside a car, that the person in the car got out and discharged a firearm, and that Mr. Sykes ran behind a church at the sound of gunfire. Although Mr. Sykes remembered speaking with a police officer after the shooting and signing a paper that the officer handed to him, he claimed that he could not remember the name of the person in the vehicle or the make or color of the car that this individual was driving. In addition, Mr. Sykes responded negatively when asked if he could identify the assailant in the courtroom.

After declaring Mr. Sykes to be a hostile witness, the trial court allowed the State to ask Mr. Sykes leading questions. However, the trial court also determined that the State could only establish that the officers "interviewed [Mr. Sykes] and that the witness gave a statement without getting into the substance of what was said."

On cross-examination, Defendant established that Detective Daniel Suggs was the lead detective on this case and that several statements and supplements had been provided to him by

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[1] Pursuant to a material witness order, Mr. Sykes had been taken into custody, appointed counsel, and compelled to testify given his failure to appear in response to a subpoena.

other officers for inclusion in his final report. Subsequently, Defendant asked Detective Suggs whether "[t]here was a report from Officer McCoy" concerning his interview with Mr. Housey. After Detective Suggs responded in the affirmative, Defendant asked, "[W]hat did that report indicate?" In addition, Defendant inquired whether Detective Suggs had read reports from Officer Enea, ID Technician Payne, and Officer Berrios. At that point, the following proceedings occurred:

> Q. And Officer Suggs, you're aware that Mr. Housey had initially indicated that he didn't know who the suspect was?
>
> A. It's not what he told me. I don't know what he told any other officers. I didn't receive a direct report of that. I said I talked with Mr. Sykes and was given a name, partial name. I talked with Mr. Housey and was given a partial name. Followed up with the information Mr. Housey gave me with Rhandi Carmello, got the full name, and went with - -
>
> Q. In one of those reports, you didn't necessarily read; is that right?
>
> A. True.
>
> Q. And Officer Suggs, would you be surprised to know in those report[s] there's no reference to –
>
> [State]: Objection.
>
> THE COURT: Let him complete his question, ma'am. Go ahead.

> Q. There's no reference to Reco Murray coming into their yard and standing over Mr. Housey with a weapon?

After hearing Defendant's questions, the trial court excused the jury and stated that:

> THE COURT: That's opening the door . . . . That along with the earlier questions about the statements that this officer took. Even though there were objections to it, the questions were completed. The Court's position is now you've opened the door to the introduction of Mr. Sykes' statement.
>
> Your objection and your exception is noted for the record.

Although Defendant withdrew his previous question when the jury returned, the trial court indicated that the matter could still be addressed on redirect. At that time, the trial court allowed the State to elicit testimony from Detective Suggs that:

> Larry Sykes stated he saw Reco drive by in a light blue Cadillac. He stated that Reco drove back by and then parked in the yard across the street. Sykes stated that Reco got out of his car carrying a rifle. Sykes advised the victim began to run, jump the fence in the front yard of 1209 Commerce Street, and was running toward the house. Sykes stated that Reco fired twice. Sykes stated that Reco then walked back to his car, got in, and then drove away. That is when I went to the ambulance and spoke with [Mr.] Housey.

The relevant statutory provisions address the admissibility of out-of-court statements in a number of different ways.[2] As a general proposition, "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted," N.C. Gen. Stat. § 8C–1, Rule 801(c), constitutes inadmissible hearsay. Although "a witness is ordinarily subject to impeachment . . . through the use of prior inconsistent statements," *State v. Cozart*, 131 N.C. App. 199, 205, 505 S.E.2d 906, 910-11 (1998) (citations omitted), *disc. review denied*, 350 N.C. 311, 534 S.E.2d 600 (1999), the State is prohibited from using the impeachment process to place otherwise inadmissible substantive evidence before the jury under certain circumstances. *State v. Hunt*, 324 N.C. 343, 349-50, 378 S.E.2d 754, 757-58 (1989). These legal principles are, however, inapplicable when a party "opens the door." *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981).

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[2] This Court reviews "a trial court's determination of whether an out-of-court statement is admissible" on a *de novo* basis. *State v. Gabriel*, __ N.C. App. __, __, 700 S.E.2d 127, 130 (2010), *disc. review denied*, 365 N.C. 211, 710 S.E.2d 19 (2011); (*See, e.g., State v. Minter*, 111 N.C. App. 40, 432 S.E.2d 146 (reviewing a trial court's decision to allow extrinsic evidence of a witness' hearsay statements utilizing a *de novo* standard of review), *cert. denied*, 335 N.C. 241, 439 S.E.2d 158 (1993).

"[W]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *Id.* at 177, 277 S.E.2d at 441; *see also State v. Brown*, 64 N.C. App. 637, 645, 308 S.E.2d 346, 351 (1983) (holding that "the State could properly pursue a subject voluntarily introduced by the defense and which subject then fell within the scope of cross-examination once the door had been opened"), *aff'd*, 310 N.C. 563, 573, 313 S.E.2d 585, 591 (1984). The fact that Defendant questioned Detective Suggs in such a manner as to suggest that nothing in the investigation that he conducted into the shooting of Mr. Housey indicated that Defendant had "com[e] into the[] yard and [was] standing over Mr. Housey with a weapon" "opened the door" to the admission of the substance of Mr. Sykes' statement, which contained exactly that sort of information. As a result, we conclude that the trial court did not err by admitting the substance of Mr. Sykes' statement into evidence.

Although Defendant acknowledges the potential applicability of the "opening the door" doctrine, he argues that the question that he directed to Detective Suggs was nothing more than an inquiry concerning the statement that Mr. Housey gave to Officer

McCoy and did not encompass each of the statements mentioned in Detective Suggs' final report. When examined in context, however, it is clear to us that Defendant's cross-examination of Detective Suggs had greater breadth than Defendant suggests. The consequences of posing a broad question such as the one at issue here are clear. *See Brown*, 64 N.C. App. at 646, 308 S.E.2d at 351-52 (explaining that it was not the court's place to "'object to experienced counsel's plan of trial'") (quoting *State v. Waddell*, 289 N.C. 19, 25, 220 S.E.2d 293, 298 (1975), *modified*, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976)). Thus, the trial court did not err by admitting the substance of Mr. Sykes' statement into evidence.[3] Moreover, even if the trial court did err by admitting the challenged evidence, any such error would have been harmless in light of the fact that Mr. Housey and Ms. Sellers had already identified Defendant as Mr. Housey's assailant, noted that Defendant drove a blue Cadillac, and testified that Defendant shot Mr. Housey in the leg. *State v. Byers*, 175 N.C. App. 280, 289, 623 S.E.2d 357, 362 (stating that a defendant "waives the benefit of an objection when the same or similar evidence is admitted without

[3] Although Defendant suggests that the present case is controlled by *Hunt*, 324 N.C. at 349, 378 S.E.2d at 757, we do not find that argument persuasive. Simply put, *Hunt* did not involve a situation in which the defendant "opened the door" to the admission of otherwise inadmissible evidence.

objection") (citation omitted), *disc. review denied*, 360 N.C. 485, 631 S.E.2d 135 (2006). As a result, Defendant is not entitled to relief from the trial court's judgments based on the admission of Mr. Sykes' statement.

B. Response to Jury Inquiry

Secondly, Defendant contends that the trial court erred in responding to a question posed by the jury during its deliberations. More specifically, Defendant argues that the trial court's response to the jury's question involved an additional instruction to the jury, so that the trial court was required to inform the parties of the instruction that it intended to give and permit them to be heard with respect to that instruction before giving it. We disagree.

In its initial instructions to the jury concerning the issue of Defendant's guilt of the lesser included offense of assault with a deadly weapon inflicting serious injury, the trial court stated that a finding of guilt required proof "that the defendant assaulted [Mr.] Housey by intentionally shooting him in the leg with a rifle." After beginning its deliberations, the jury asked, "[f]or [the] . . . assault with a deadly weapon inflicting serious injury charge, do we have to believe that [Defendant] intentionally shot [Mr. Housey] in the leg" versus "just shooting in the direction of [Mr. Housey] and

hitting him anywhere." Upon receipt of the jury's inquiry, the trial court asked Defendant if he wanted to be heard. In response, Defendant stated that the trial court's previous instructions adequately explained the applicable law and objected to the delivery of more detailed instructions. Even so, the trial court announced the intention to "clarify" whether the jury had to "find beyond a reasonable doubt that [Defendant] fired the weapon with the specific intent to hit [Mr. Housey] in the leg;" informed the jury "that the term 'intent' or 'intentionally' . . . refers to the intent to intentionally point a weapon at someone, intentionally discharge that weapon at someone, hitting that person somewhere;" and stated that "intent refer[red] to pointing the weapon at [Mr. Housey], intentionally pulling the trigger, firing the weapon at him." Shortly after receiving this clarification, the jury returned a verdict convicting Defendant of assault with a deadly weapon inflicting serious injury.

After a jury begins its deliberations, a trial court may give appropriate additional instructions in response to a jury inquiry. *State v. Williamson*, 122 N.C. App. 229, 236, 468 S.E.2d 840, 845 (citing N.C. Gen. Stat. § 15A-1234(a)), *disc.*

review denied, 344 N.C. 637, 477 S.E.2d 54 (1996).[4] If the trial court delivers such additional instructions, it "must inform the parties generally of the instructions [it] intends to give and afford [the parties] an opportunity to be heard." N.C. Gen. Stat. § 15A-1234(c). However, not all responses to jury questions are "additional" instructions for purposes of N.C. Gen. Stat. § 15A-1234(c). For example, in *State v. Farrington*, 40 N.C. App. 341, 346-47, 253 S.E.2d 24, 27 (1979), this Court stated that, "when [a judge] is repeating or clarifying instructions previously given in response to the jury's question, we do not believe these to be 'additional instructions' as contemplated" by N.C. Gen. Stat. § 15A-1234(c). *See also Williamson*, 122 N.C. App. at 236, 468 S.E.2d at 845 (recognizing that repeating and clarifying instructions without substantively adding to what has been said previously does not trigger the applicability of N.C. Gen. Stat. § 15A-1234(c)). After carefully reviewing the record, we conclude that the trial court's response to the jury's question constituted a

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[4] The substance of a trial court's jury instruction is subject to *de novo* review. *State v. Barron*, __ N.C. App. __, __, 690 S.E.2d 22, 29, *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010); *see also State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971) (stating that "[t]he chief purpose of a charge is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict").

clarification of its original instruction to the jury rather than a new instruction.

At the time that it initially instructed the jury, the trial court stated that the jury would need to find that "the defendant assaulted [Mr.] Housey by intentionally shooting him in the leg with a rifle" in order to convict him of assault with a deadly weapon inflicting serious injury. After the jury sought information concerning the meaning of "intent," the trial court informed the jury that "inflicting serious injury refers to the intent to intentionally point a weapon at someone, intentionally discharge that weapon at someone, hitting that person somewhere." The trial court's explanation of what the term "intent," as used in its original instructions, meant did not add anything of substance to its original instructions; instead, the trial court simply and directly addressed the jury's concerns about whether Defendant had to have intended to shoot Mr. Housey in a specific part of his body as a prerequisite for a finding of guilt of assault with a deadly weapon inflicting serious injury. Given that set of circumstances, we believe that the trial court's instruction to the jury did not constitute an additional instruction of the type necessary to trigger the procedural protections set out in N.C. Gen. Stat. § 15A-1234(c). *State v. Rich*, 132 N.C. App.

440, 448, 512 S.E.2d 441, 447 (1999) (holding that the trial court did not err by failing to follow the procedures required by N.C. Gen. Stat. § 15A-1234(c) by responding to the jury's request for "legally-accepted paraphrases" of a legal term), *aff'd*, 351 N.C. 386, 400, 527 S.E.2d 299, 307 (2000).

Moreover, the trial court's response to the jury's question correctly stated the applicable law, which makes it difficult to see how Defendant could have been prejudiced by the trial court's clarification even if N.C Gen. Stat. § 15A-1234(c) applied to the situation at issue here and the trial court had acted inconsistently with its provisions. Assault with a deadly weapon inflicting serious injury is not a specific intent crime. *State v. Woods*, 126 N.C. App. 581, 587, 486 S.E.2d 255, 258 (1997) (citing *State v. Curie*, 19 N.C. App. 17, 20, 198 S.E.2d 28, 30 (1973)); *see also State v. Hunt*, 100 N.C. App. 43, 46, 394 S.E.2d 221, 223 (1990) (stating that "intent is not a prescribed element of assault with a deadly weapon inflicting serious injury"). Instead, assault with a deadly weapon inflicting serious injury is a general intent crime in which the State need only prove "the doing of some act." *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994) (citing *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992), and *State v. Davis*, 214 N.C. 787, 792, 1 S.E.2d 104, 107 (1939)), *cert.*

denied, 515 U.S. 1169, 116 S Ct. 2634, 132 L. Ed. 2d 873, *reh'g denied*, 515 U.S. 1183, 115 S. Ct. 32, 132 L. Ed. 2d 913 (1995). Thus, the trial court's response to the jury's inquiry accurately stated that Defendant's guilt of assault with a deadly weapon inflicting serious injury hinged upon a jury finding "that the defendant assaulted [Mr.] Housey by intentionally - - intent referring to pointing the weapon at him, intentionally pulling the trigger, firing that weapon at him." As a result of the fact that the trial court's clarification accurately stated the applicable law and the fact that Defendant has not pointed to any substantive error of omission or commission in the trial court's response to the jury's inquiry, we are unable to see how any failure on the part of the trial court to comply with N.C. Gen. Stat. § 15A-1234(c) prejudiced Defendant in any way. Thus, Defendant is not entitled to relief from the trial court's judgments on the basis of this contention.[5]

III. Conclusion

[5] Defendant also suggests that the trial court's clarification was in some way inconsistent with the contents of the indictment returned against Defendant in the assault case. After reviewing the trial court's clarification in light of the language in which the indictment is couched, which simply tracks the relevant statutory language, we are unable to see any inconsistency of the type about which Defendant complains.

Thus, for the reasons set forth above, we conclude that neither of Defendant's challenges to the trial court's judgments have merit and that Defendant received a fair trial that was free from prejudicial error. As a result, the trial court's judgments should remain undisturbed.

NO ERROR.

Judges STEPHENS and BEASLEY concur.

Report per Rule 30(e).