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COA01-1115

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v.

LINWOOD DEON FARR

Wilson County
Nos. 00 CRS 50587,
50588

Appeal by defendant from judgments entered 6 April 2001, as amended 4 May 2001, by Judge Clifton W. Everett, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 22 April 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert O. Crawford, III, for the State.

Farris and Farris, P.A., by Robert A. Farris, Jr., for defendant-appellant.

MARTIN, Judge.

A jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon. The trial court sentenced defendant in the aggravated range of 145 to 183 months imprisonment for the assault, based on a finding that "[t]he victim of this offense suffered serious injury that is permanent and debilitating." The court imposed a consecutive, presumptive sentence of 103 to 133 months for armed robbery. Defendant appeals.

The State's evidence tended to show that on the night of 19 January 2000, defendant entered the Peace Mini Mart at the corner of Hines and Daniel Streets in Wilson. He pointed a gun at the clerk and demanded money. When the clerk offered \$150 from his pocket, defendant said it was "not enough" and shot the clerk twice in the face. Defendant took the money from the cash register and left the store. In addition to the clerk's positive identification of defendant, police found defendant's latent fingerprint on a bag of corn chips next to the cash register.

As a result of the shooting, the clerk bled profusely at the scene and sustained a broken jaw and broken teeth. He was hospitalized and underwent surgery "more than once." The clerk also lost his left eye, which had to be replaced with a glass prosthesis.

On 23 January 2000, police went to the residence of Kathy Ruffin, looking for defendant. Police asked Ruffin and her mother if defendant was in the residence, explaining that they had "warrants for [defendant] for the crimes that had been committed." An officer explained to Ruffin that if defendant came out, he should do so "with his hands in plain view due to the nature of the crime." Ruffin went back inside the residence for a few minutes and returned to the door, unsure of what to do. At the suggestion of the police, she granted permission for a search of her residence. Once the police were inside, they were informed that defendant was in the attic. A police canine was brought into the house. Its handler, Officer James Anthony announced to defendant

that the dog would be released into the attic if he did not come out. Defendant emerged and was placed under arrest.

Defendant denied robbing the Peace Mini Mart or shooting the clerk. Defendant testified that he believed the police had come for him at Ruffin's residence because he had missed appointments with his probation officer. He admitted hiding from the police in Ruffin's attic until he heard the police canine barking. Surmising that a police dog would not be used for a probation violation, defendant came out voluntarily. Ruffin corroborated defendant's testimony that he hid in order to avoid capture for the probation violation.

Defendant contends the trial court erred in instructing the jury that his flight from police could be considered as evidence of guilt. Defendant "concedes that he hid in the attic when the police came to arrest him." He further concedes that "hiding from the police" constitutes flight. See *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994). However, he insists the evidence showed he hid in order to avoid arrest on an unrelated probation violation. Defendant also argues that the form of the flight instruction, conveyed to the jury the trial court's belief that defendant fled to avoid capture for the instant crimes. We reject his contentions.

"Evidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt." *State v. King*, 343 N.C. 29, 38, 468

S.E.2d 232, 238 (1996). "The fact that there may be other reasonable explanations for defendant's conduct does not render the [flight] instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977) (citing *State v. Lampkins*, 283 N.C. 520, 196 S.E.2d 697 (1973)). "Where there is some evidence supporting the theory of the defendant's flight, the jury must decide whether the facts and circumstances support the State's contention that the defendant fled." *State v. Norwood*, 344 N.C. 511, 535, 476 S.E.2d 349, 360 (1996) *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997).

The State's proffer supported a jury instruction on flight. It is undisputed that defendant hid in Ruffin's attic to avoid capture by the police five days after the robbery and shooting occurred. The State adduced additional evidence that defendant took this evasive action after police notified Ruffin of the charges against him and after Ruffin, in turn, informed defendant that the police were looking for him. Viewed together with the evidence implicating defendant in these crimes, such circumstances constitute "some evidence" of flight sufficient to support a jury instruction. The fact that defendant had other cause to flee goes to the weight, not the admissibility, of this evidence. See *Irick*, 291 N.C. at 494-95, 231 S.E.2d at 843.

Moreover, contrary to defendant's assertion, the form of the flight instruction did not express an opinion concerning the reason for defendant's hiding from police. The court instructed the jury as follows:

Now, in this case Ladies and Gentlemen, the State contends and the defendant . . . denies that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show of consciousness of guilt.

However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt. . . .

In *State v. Lloyd*, 354 N.C. 76, 118, 552 S.E.2d 596, 625 (2001), the Supreme Court approved a flight instruction couched in virtually identical language:

"Now, ladies and gentlemen, the State contends that the defendant . . . fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show of consciousness of guilt. However, proof of this circumstance is not sufficient in[] itself to establish the defendant's guilt[]."

Rejecting the defendant's claim of prejudice, the *Lloyd* court found, "The [trial] court did not suggest that there was evidence to support the State's contention of flight, but instructed only that the State contended that defendant fled." *Lloyd*, 354 N.C. at 120-21, 552 S.E.2d 626-27. The same is true here. "The trial court . . . accurately informed the jury that it was the contention of the State, not the trial court, that defendants fled." *State v. Abraham*, 338 N.C. at 362, 451 S.E.2d at 157. Under this instruction, the jury was free to accept defendant's explanation of his actions. See *id.*

Defendant next claims the court erred in sentencing him in the aggravated range for assault with a deadly weapon with intent to

kill inflicting serious injury, based on a finding that "[t]he victim of this offense suffered serious injury that is permanent and debilitating." N.C. Gen. Stat. § 15A-1340.16(d)(19) (1999). Defendant points to G.S. § 15A-1340.16(d), which provides that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation" Because "serious injury" is an essential element of his offense, defendant avers the court erred in aggravating his sentence based upon the severity of the clerk's injuries.

This Court has previously rejected defendant's interpretation of G.S. § 15A-1340.16(d) and has allowed the trial court to find the aggravating factor in G.S. § 15A-1340.16(d)(19), even where serious injury is an element of the defendant's crime. "[T]he language of the statute, that 'the serious injury inflicted upon the victim is permanent and debilitating' creates a distinction between the suffering of the victim at the time the serious injury is inflicted and any long-term or extended effects that arise due to that serious injury." *State v. Crisp*, 126 N.C. App. 30, 39, 483 S.E.2d 462, 468, *appeal dismissed, disc. review denied*, 346 N.C. 284, 487 S.E.2d 559 (1997).

In asserting that the "serious injury" element of felonious assault with a deadly weapon with intent to kill inflicting serious injury denotes an injury with long-term effects, defendant points to G.S. § 14-32.4 (1999), which defines "serious bodily injury" as that which "creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted

condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." This Court has not yet determined whether the definition of "serious bodily injury" applies to the "serious injury" element of assault with a deadly weapon with intent to kill inflicting serious injury under G.S. § 14-32(a). See *State v. Poland*, ___ N.C. App. ___, 560 S.E.2d 186 (2002). As in *Poland*, however, it is unnecessary to resolve this question in order to rule on defendant's claim.

In *State v. Wampler*, 145 N.C. App. 127, 133, 549 S.E.2d 563, 568 (2001), this Court upheld an aggravated sentence for the offense of assault with a deadly weapon with intent to kill inflicting serious injury, based on a finding that the victim's injuries were "permanent and debilitating" under G.S. § 15A-1340.16(d)(19). The *Wampler* court noted prior decisions holding "that long term effects or extended effects that arise from the victim's injuries may be properly used as an aggravating factor" in sentencing. *Id.* (citing *State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994); *State v. Crisp*, *supra*). Although the Court quoted the definition of "serious bodily injury" found in G.S. § 14-32.4 as an element of the defendant's offense, it agreed with the trial court that the victim's long-term disfigurement and impairment could constitute an aggravating factor under G.S. § 15A-1340.16(d)(19):

In the present case, the victim's injuries went beyond the "serious injury" necessary to convict defendant of the offense. [The victim] received several serious injuries including a broken wrist, chewed fingers, and a gash in the head. The aggravating factors that he

suffered included permanent disfigurement of his fingers, surgery, loss of use and impairment. Moreover, the victim cannot bend his fingers and will always have a steel plate and screws in his hand.

Wampler, 145 N.C. App. at 133, 549 S.E.2d at 568.

As in *Wampler*, the victim in this case sustained severe injuries. As a result of two gunshot wounds to the face, the store clerk suffered a broken jaw, broken teeth, and heavy bleeding. Beyond these serious injuries, the loss of his left eye is a permanent disfigurement and impairment separate from the "serious injury" element of the underlying offense. The trial court committed no error in finding the aggravating factor listed in G.S. § 15A-1340.16(d)(19).

No error.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).