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NO. COA01-1170

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v.

Gaston County  
No. 98 CRS 26491

WILLIAM DERIS BELL

Appeal by defendant from judgment entered 24 May 2001 by Judge Larry G. Ford in Gaston County Superior Court. Heard in the Court of Appeals 29 April 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.*

*Sharon Dunigan Jumper for defendant-appellant.*

MARTIN, Judge.

Defendant appeals from a judgment sentencing him to imprisonment for a minimum term of 108 months and a maximum term of 139 months following his conviction by a jury of assault with a deadly weapon with intent to kill inflicting serious injury.

The State presented evidence tending to show that the victim and Chad Burgess (Burgess) had been feuding with each other. On 28 August 1998 the victim ran out of his house to confront Burgess and two other men, defendant and Gary Butler (Butler), who had been riding by the victim's house in Burgess' pickup truck. As the victim ran toward the truck, defendant stood up in the bed of the

truck and fired a .380 caliber pistol at the victim. A bullet entered the victim's right arm, severed a nerve, exited the arm, and lodged in the rib cage. As the victim turned to run away from the truck, Burgess fired a shot that struck the victim in the upper part of his right leg, shattering the leg. The victim fell down an embankment. As the victim lay in the embankment, Burgess backed up the truck toward the victim. Defendant continued to fire shots at the victim from the bed of the truck. Defendant stopped shooting when the victim's brother came out of the house and fired a shotgun into the air. Burgess and his passengers sped away.

Defendant gave a statement to Detective Jim Anderson of the Gastonia Police Department in which he stated he fired three shots after he saw a "flash of gunfire" from a tree. As the truck proceeded down the road, defendant "saw someone shoot and [he] shot back two more times."

Butler testified for defendant that the victim, armed with a gun, came running at the truck and fired the gun into the back of the truck. Defendant stood up, "drew a bead upon [the victim] and started commencing firing."

Defendant contends that the court committed plain error by failing to submit the lesser offense of assault with a deadly weapon inflicting serious injury because the evidence of the element of intent to kill is entirely circumstantial. He also contends that he was denied effective assistance of counsel because of counsel's failure to request the instruction.

Plain error may be found only in the rare and exceptional case

in which "it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done' . . . or it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4<sup>th</sup> Cir. 1982), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Similarly, ineffective assistance of counsel may be found only where there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985).

The intent to kill necessary for a conviction of assault with a deadly weapon with intent to kill inflicting serious injury is inferred from the nature of the assault, the manner of the assault, the nature of the weapon employed and the surrounding circumstances. *State v. White*, 307 N.C. 42, 296 S.E.2d 267 (1982). An assailant is "held to intend the normal and natural results of his deliberate act." *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973). The evidence is uncontradicted that defendant fired multiple shots at the victim with a .380 semiautomatic pistol. Defendant admitted in his statement that he fired multiple shots. Butler testified for defendant that defendant "drew a bead" at the victim as he fired the gun. There is no positive evidence that defendant did not intend to kill the victim. Under these circumstances, it is not probable a different result would have occurred had the

instruction been submitted.

We hold the trial court did not commit plain error in failing to submit the instruction and that defendant did not receive ineffective assistance of counsel because of counsel's failure to request the instruction in a timely manner.

No error.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).