NO. COA01-858

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v. Johnston County
No. 00 CRS 50731

RICKIE STEWART

Appeal by defendant from judgment entered 24 January 2001 by Judge Carl Tilghman in Johnston County Superior Court. Heard in the Court of Appeals 28 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Woodruff, Reece & Fortner, by Michael J. Reece, for defendant appellant.

McCULLOUGH, Judge.

Defendant Rickie Stewart appeals his conviction for assault with a deadly weapon with intent to kill inflicting serious injury and discharging a weapon into an occupied dwelling. Defendant was sentenced to a minimum of 96 months and a maximum of 125 months. We find no error.

On 18 January 2000, defendant shot his brother-in-law, Mark Stevens. Stevens testified that he and defendant had an argument on the property of his mother-in-law, whom Stevens called "Miss B[,]" during which defendant yelled at and spat upon him. When

defendant refused to "step back out of [Stevens'] face," Stevens pushed him. After speaking with Miss B, Stevens returned home. As he drove away, he saw defendant "walking back toward Miss B's trailer with a rifle or shotgun in his hand ... yelling something." Stevens told his wife about the incident and then drove to a trailer owned by his nephew, James Godwin. As Stevens sat in the front room of Godwin's trailer watching television, he heard gunshots outside. Defendant yelled for him to come out of the trailer and threatened to kill him. After hearing more shots, Stevens attempted to flee through the back door. Defendant "came around the front end of the trailer and said, 'There that m-f is. I'm gonna kill him.'" As Stevens turned to run back inside, defendant shot him in the head.

Defendant gave a different account of the shooting. He claimed that during their initial argument, Stevens pushed him to the ground and showed defendant a nine-millimeter pistol concealed beneath Stevens' coat. Defendant asked Stevens, "You dumb enough to show me a gun?" Defendant stood up and went to his house to retrieve his own "automatic" weapon. He came back outside, displayed his gun to Stevens, "and let him look at it[] while he was running and getting in the car." Stevens drove away.

Later that evening, defendant drove to the trailer park. He saw Cleveland Stewart near Godwin's trailer and had the following exchange:

> I said, "You seen [Stevens]?" [Stewart] said, "Yeah, he right in there." I said, "Okay." So I parked my car right on the side [of

> Godwin's trailer], jumped out there, and, you know, my rifle was in there. I stepped out there with it. I went to the door and [Stevens] was sitting [in] the chair looking straight at me ....

Armed with the rifle, defendant said to Stevens, "'You remember putting your hands on me?' ... 'Man, do it now.' ... 'I got something to straighten you out with.'" Stevens began "begging like a cat." Seeing a pistol in Stevens' back pocket, defendant said to him, "Go ahead and reach for it, you bad man." Instead, Stevens "got on the floor and started crawling backwards" through the trailer. Defendant called to him, "'No, go ahead, you bad man. You pull [your gun] out,' ... 'and then you turn it toward me and you can forget it.' ... 'See how bad you are now?' ... 'That's how dumb you are.' ... 'Come on out here and face me like a man.'"

Defendant began walking to his car but sensed that Stevens was "coming for" him. He looked back toward the trailer and saw Stevens at the door with his pistol. Defendant called out, "'You're dumb enough -- you don't listen, do you?' ... 'Now, you see how dumb you are?'" Stevens then "shot twice" at defendant. Defendant called Stevens a "dumb bunny" and returned fire. Defendant did not know if he struck Stevens, but drove away in his car after hearing the trailer door close.

Counsel appointed to represent defendant on appeal has filed an *Anders* brief indicating that he is unable to identify an issue with sufficient merit to support a meaningful argument for relief on appeal. He asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has filed

documentation with the Court showing that he has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of his right to file written arguments with the Court and providing him with a copy of the documents pertinent to his appeal. Defendant has filed his own arguments with this Court, which we treat below.

Defendant presents the following arguments to this Court: That the police investigators denied him his constitutional right to due process by failing to properly investigate the incident leading to his conviction; and that his trial counsel was ineffective.

I.

Defendant contends that police investigators violated his constitutional right to due process by failing to perform a paraffin test for gunpowder residue on Stevens. *See generally*, *State v. Crowder*, 285 N.C. 42, 203 S.E.2d 38 (1974), *death penalty vacated*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976) (discussing the "pitfalls inherent in the dermal nitrate [paraffin] test"). *Id.* at 55, 203 S.E.2d at 47. Defendant notes that police found a spent nine-millimeter shell casing just outside the door of the trailer. The investigating officer testified that he did not know what a paraffin test was, and thus defendant asserts he was "prevented ... from proving his claim that the victim shot first and that [defendant] acted in self-defense."

Defendant's argument has been rejected by our Supreme Court, as follows:

> Police officers are under no duty to take any particular course of action when investigating a crime. Of course, they cannot suppress evidence. *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). They are not required, however, to follow all investigative leads and to secure every possible bit of evidence, and their failure to do so is not prejudicial error.

State v. Noell, 284 N.C. 670, 694, 202 S.E.2d 750, 765 (1974), *death sentence vacated*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976). While the constitutional principle of due process guarantees a defendant "a reasonable time and opportunity to investigate competent evidence[,]" *State v. White*, 54 N.C. App. 451, 453, 283 S.E.2d 571, 573 (1981), *cert. denied*, 306 N.C. 392, 294 S.E.2d 219 (1982), it does not require police to perform any specific forensic test during a criminal investigation. *See State v. Henderson*, 285 N.C. 1, 21, 203 S.E.2d 10, 24 (1974), *death penalty vacated*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976). Defendant makes no claim that the police withheld exculpatory evidence or otherwise obstructed his own efforts to prepare a defense. Therefore, he has not shown a violation of due process, and this argument is without merit.

II.

Defendant contends that he was provided ineffective assistance of counsel at trial because his attorney failed to interview certain "material witnesses" who would have supported his defense that Stevens fired his weapon first. Defendant has failed to identify these witnesses. Moreover, nothing in the record on

appeal reflects that additional material witnesses were available. *See State v. Stroud*, ___ N.C. App. ___, 557 S.E.2d 544 (2001) ("[T]his Court is limited to reviewing this assignment of error only on the record before us"). Accordingly, defendant has failed to establish any error below.

Because a showing of ineffective assistance of counsel often depends upon the development of evidence outside the record on appeal, such claims are often more properly raised in a post-conviction motion for appropriate relief. Here, defendant has raised ineffective assistance of counsel on direct appeal. We must therefore determine whether his claim can be resolved on the face of the record or if we must dismiss the claim without prejudice to defendant's right to raise it in a motion for appropriate relief. *See id.* at ___, 557 S.E.2d at 547.

A defendant claiming ineffective assistance of counsel must show that his attorney "'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment[.]'" *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). He must also show "a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248. In the case before us, defendant contends his counsel failed to contact witnesses who would have testified that Stevens fired the first shot. As a result, defendant claims he was unable to prove that he shot Stevens in

self-defense.

We believe the record is sufficient to dispose of defendant's claim on direct appeal because, even assuming defendant had offered additional proof that Stevens fired his weapon first, we find no reasonable probability that the jury would have reached a different verdict at trial. "The right to ... self-defense may be forfeited not only by physical aggression on the accused's part but by conduct provoking the fatal encounter." *State v. Hamilton*, 77 N.C. App. 506, 513, 335 S.E.2d 506, 511 (1985), *disc. review denied,* 315 N.C. 593, 341 S.E.2d 33 (1986); and *State v. Baldwin*, 184 N.C. 789, 114 S.E. 837 (1922). "[I]n order for the aggressor to regain his right of self-defense, he must actively alert his victim to the fact that he intends to cease further aggression." *See State v. Bell*, 338 N.C. 363, 391, 450 S.E.2d 710, 726 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). By defendant's own account, he was the instigator and aggressor in the encounter with Stevens, going to Godwin's trailer and confronting Stevens with a rifle. Nor can defendant be said to have withdrawn from the conflict, as he continued to taunt Stevens after Stevens emerged from the trailer. Under these facts, defendant had no valid claim of self-defense. Therefore, defendant cannot demonstrate the prejudice required to show ineffective assistance of counsel.

Defendant also casts his alleged disagreement with counsel about trial tactics as a "conflict of interest." Such a dispute, however, is not a "conflict of interest" warranting removal of defense counsel. *See State v. Gary*, 348 N.C. 510, 516, 501 S.E.2d

57, 62 (1998).

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom and whether the appeal is wholly frivolous. We conclude the appeal is frivolous. We have examined the record for possible prejudicial errors and have found none. We find defendant received a fair trial free of prejudicial error.

No error.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).