

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA03-855

NORTH CAROLINA COURT OF APPEALS

Filed: 15 June 2004

STATE OF NORTH CAROLINA

v.

Durham County
Nos. 93 CRS 20688-20690

ALEXANDER GENTRY

On writ of certiorari by defendant to review judgment entered 14 July 1995 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 20 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Grady L. Balentine, Jr., for the State.

Geoffrey W. Hosford, for defendant-appellant.

CALABRIA, Judge.

Alexander Gentry ("defendant") seeks review¹ of a judgment entered on jury verdicts of guilty of two counts of discharging a firearm into occupied property and one count of second-degree murder.² We find no error.

In July of 1993, Sidney Reddick ("Reddick") and Randall Williams ("Williams") engaged in an altercation as a result of

¹ Our review of the judgment is pursuant to a petition for writ of certiorari granted by this Court on 26 July 2002.

² Defendant was properly sentenced pursuant to the Fair Sentencing Act, which was in effect until its repeal and replacement by the Structured Sentencing Act on 1 October 1994.

Williams taking a stash of drugs Reddick asked him to watch. During the altercation, Inez Williams (the "victim"), Williams' mother, assaulted Reddick with a chair. Reddick stated he would "shoot up" the victim's house and later planned, with defendant and others, to "spray" or open fire on everyone in the house. That plan came to fruition during the night of 21 July 1993 when Reddick, defendant, and at least four other individuals went to the victim's house. Multiple rounds were fired into the house, and one round hit the victim. On 2 August 1993, the victim died of complications from the wound. Peter Ware, a special agent in the State Bureau of Investigation and an expert in firearms identification, examined the fatal shot and testified it could have been fired from the Tech 9 pistol defendant borrowed in anticipation of the shooting. Defendant was indicted and tried on two counts of discharging a firearm into occupied property and one count of murder.

At trial, the State offered the testimony of Derrick Parrish, one of the individuals who took part in the shooting with Reddick and defendant. Defendant offered the testimony of Bryant Boyd ("Boyd"), who was outside the victim's house at the time of the shooting. Boyd testified defendant was not one of the participants in the shooting because, although the perpetrators were masked, none of the individuals had the same build as defendant. On cross-examination, the State elicited testimony concerning Boyd's prior convictions for purposes of impeachment.

At the close of the State's evidence and again at the close of all the evidence, defendant moved to dismiss the charges against him. The trial court denied both motions and the jury found defendant guilty of all charges. After making findings of aggravation and mitigation, the trial court sentenced defendant in the aggravated range to a term of natural life in prison. In his brief to this Court, defendant asserts the trial court committed reversible error in (I) permitting the detailed cross-examination of Boyd concerning his prior convictions and (II) finding as a non-statutory aggravating factor that "the victim was asleep at the time of th[e] incident." Defendant also asserts he received ineffective assistance of counsel.

I. Cross-examination of Boyd

In his first assignment of error, defendant asserts the trial court erred in allowing the State's detailed cross-examination of Boyd regarding his prior convictions. Defendant contends this questioning was improper and allowed the State to "portray Boyd as a drug dealer whose testimony was not credible." Because defendant failed to object to the State's cross-examination of Boyd on these grounds at trial, defendant asserts plain error.

"[T]he plain error rule . . . is always to be applied cautiously[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). "Under plain error review, 'reversal is justified when the claimed error is so basic, prejudicial, and lacking in its elements that justice was not done[.]'" see *State v. Miller*, 357 N.C. 583, 592, 588 S.E.2d 857,

864 (2003) (quoting *State v. Prevatte*, 356 N.C. 178, 258, 570 S.E.2d 440, 484 (2002)), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003), and, "absent the [claimed] error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 609(a) (2003), a party may elicit testimony from a witness during cross-examination "that the witness has been convicted of a felony" for purposes of attacking their credibility. Policy reasons (such as undue distraction of the jury, harassment of witnesses, and possible confusion resulting from detailed inquiry into the crimes used to impeach the witness) prompted limiting "[t]he permissible scope of inquiry [under Rule 609] . . . to the name of the crime, the time and place of the conviction, and the punishment imposed." *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993). Nevertheless, our Supreme Court has allowed a more detailed inquiry in certain circumstances. See, e.g., *State v. Bishop*, 346 N.C. 365, 388-90, 488 S.E.2d 769, 781-82 (1997) (affirming that the State is entitled to cross-examine a witness about details of a prior crime to correct inaccuracies, misleading omissions, or misstatements concerning the witness' criminal record); *State v. Braxton*, 352 N.C. 158, 194, 531 S.E.2d 428, 449 (2000) (finding the scope of impeachment proper where the State questioned a witness about a prior conviction to jog his memory or to "clarif[y] the nature of the crimes which [the witness] had [previously] tended to minimize," including where the witness "was not completely

forthright and accurate in testifying about his prior convictions on direct examination").

Applying these principles to the instant case, we perceive no error in the scope of impeachment by the State. On direct examination, Boyd testified that (1) he was currently incarcerated as a result of a conviction for carrying a concealed weapon, (2) the only charge pending against him was a single probation violation for drug charges, and (3) the only felony for which he had been convicted in the last ten years that carried a sentence of sixty days or more was for the drug charges he was currently "on probation for." Defendant reaffirmed his testimony during cross-examination when the following exchange took place:

[THE STATE]: Now, you say that you only had one felony and that's what you're on probation for, is that []right?

[BOYD]: As far as my knowledge.

[THE STATE]: Now, what you told us, is that all you can remember about your convictions?

[BOYD]: No, that's not all I can remember. As far as -- I'm not -- I can't remember as far as ten years back from right now.

In the cross-examination that followed, the State inquired into no less than twelve of Boyd's prior convictions, many of which Boyd admitted and none of which defendant has argued on appeal were not, in fact, valid prior convictions. To the extent Boyd indicated he was unable to remember his prior convictions, the State was justified in giving further details than those sanctioned by *Lynch* in order to jog his memory. To the extent Boyd misstated his criminal record, the State was entitled to correct inaccuracies or misleading omissions with details of the prior crimes. In either

event, the State was entitled to provide greater detail concerning Boyd's prior convictions as a result of his failure to be forthright or accurate during his direct examination. *Braxton*, 352 N.C. at 194, 531 S.E.2d at 449. Moreover, presupposing the scope of the State's inquiry, which was largely limited to the name of the charge, the date of conviction, the date of arrest, the arresting officer, and/or Boyd's date of birth and address, exceeded *Braxton*, it does not rise to the level of plain error. Accordingly, this assignment of error is overruled.

II. Aggravating Factor

In his second assignment of error, defendant asserts the trial court erred in finding as an aggravating factor that "the victim was asleep at the time of th[e] incident." Defendant contends the State failed to prove defendant "knew [the victim] would be asleep at the time of the shooting" or "that this was calculated in a manner to take advantage of sleeping occupants." In short, defendant argues that he had to have the "inten[t] to take advantage of the fact that [the victim] was sleeping" before the trial court can find the factor in aggravation.

"Pursuant to the Fair Sentencing Act, the trial court is not confined to consideration of statutory factors only, but may consider nonstatutory factors to the extent they are (1) related to the purposes of sentencing and (2) supported by the evidence in the case." *State v. Taylor*, 322 N.C. 280, 287, 367 S.E.2d 664, 688 (1988) (citing N.C. Gen. Stat. § 15A-1340.4(a) (1983)). In *State v. Thompson*, our Supreme Court held a trial court could properly

find as a nonstatutory aggravating factor that the defendant took advantage of a victim because the victim was asleep at the time of the crime and was, therefore, in a more vulnerable position than one who is conscious of his surroundings. *Id.*, 328 N.C. 477, 495, 402 S.E.2d 386, 395-96 (1991). *Accord State v. Norman*, 151 N.C. App. 100, 105, 564 S.E.2d 630, 633 (2002) (explaining "sleep . . . constitute[s] a proper basis for an aggravating factor if it impaired the victim's ability to flee, fend off an attack, or otherwise avoid being victimized"). Contrary to defendant's argument, use of this factor is solely a function of the victim's vulnerability. The pertinent inquiry is whether defendant, in fact, was afforded an advantage over the victim because she was asleep, not whether defendant intended to use this fact to his advantage. Defendant's assignment of error is premised on the argument that intent is a necessary pre-requisite to the use of this factor in aggravation. That argument is without merit; accordingly, this assignment of error is overruled.

III. Ineffective Assistance of Counsel

In his final assignment of error, defendant asserts he received ineffective assistance of counsel at trial. Defendant's assertion is based on two grounds: (1) his attorney failed to object to the State's cross-examination of Boyd as previously detailed herein and (2) his attorney failed to give an opening statement during the trial. We have already considered and found proper the State's manner of impeaching Boyd, thus obviating defendant's first basis. Defendant's second basis also fails.

A claim for ineffective assistance of counsel involves the following two-part test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a *trial whose result is reliable*.

State v. Miller, 357 N.C. 583, 597-98, 588 S.E.2d 857, 867 (2003) (citations omitted). In this case, defendant contends the lack of a forecast of evidence by his counsel in an opening statement "deprived the jury of hearing the defense theory of the case from the beginning . . . [and] the jury had probably decided what they would probably do by the time they heard closing argument from defense counsel." This contention could be made in every case where a defendant's counsel did not give an opening statement; thus, if defendant's argument is availing, it would establish a *per se* rule that failure to give an opening statement is tantamount to ineffective assistance of counsel. Such a rule would make it strategically advantageous to abstain from giving an opening statement: if no opening statement is given and the result of the trial is unfavorable, a defendant need only claim ineffective assistance of counsel to receive a new trial. Defendant has cited no authority for this proposition, and we decline to adopt it. This assignment of error is overruled.

Affirmed.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).