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NO. COA 04-123

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 02 CRS 229570

RICHARD CRIST FISHER

Appeal by defendant from judgment entered 6 August 2003 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Victoria L. Voight, for the State.

William D. Auman for defendant-appellant.

THORNBURG, Judge.

Richard Crist Fisher ("defendant") appeals from a conviction of assault with a deadly weapon inflicting serious injury. Defendant asserts that the trial court erred by (1) failing to allow defendant to question a witness concerning the victim's prior arrest history, (2) failing to instruct the jury on the lesser included offense of assault inflicting serious injury and by characterizing the stick used by defendant as a deadly weapon per se, and (3) failing to dismiss the charges against defendant due to

insufficiency of the evidence. For the reasons stated herein, we find no prejudicial error.

At trial, the victim, James Garmon ("Garmon") testified as follows: On 17 June 2002, Garmon was at defendant's house doing some repair work on defendant's car. Garmon left defendant's house to take a break but returned and asked defendant for some money. Defendant swung at Garmon and Garmon kicked at defendant. Garmon then started walking back up the street. Defendant followed Garmon and hit Garmon on the head and across the back with a stick.

Defendant also testified that he hit Garmon several times with a stick. However, defendant testified that he hit Garmon because Garmon had a knife and was going to cut defendant. The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to a minimum of 42 months and a maximum of 60 months in the custody of the North Carolina Department of Correction. Defendant appeals.

Defendant's first assignment of error asserts that the trial court erred in failing to allow defendant to question defense witness Officer Craig Varnum of the Charlotte-Mecklenburg Police Department ("Officer Varnum") regarding Garmon's prior arrests. On redirect examination by defense counsel, Officer Varnum testified that he had arrested Garmon at least four times. Defense counsel then asked Officer Varnum if he knew what those individual charges were. The trial court sustained the State's objection to this question. Defendant argues that this question and Officer Varnum's

answer should have been admitted under North Carolina Rules of Evidence 405(a) and 608(b). We disagree.

Under Rule 405, evidence of specific instances of conduct is admissible in proving character only if character "is an essential element of a charge, claim, or defense[.]" N.C. Gen. Stat. § 8C-1, Rule 405(b) (2003). In the instant case, defendant claimed at trial that he hit Garmon in self-defense. Thus, defendant was entitled to introduce evidence as to Garmon's character for violence for the purpose of showing the reasonableness of defendant's apprehension and use of force. However, this Court has held that "[t]he specific incident of conduct a defendant seeks to enter into evidence becomes relevant 'only if defendant knew about it at the time of the [assault].'" *State v. Dewberry*, __ N.C. App. __, __, 600 S.E.2d 866, 871 (2004) (quoting *State v. Shoemaker*, 80 N.C. App. 95, 101, 341 S.E.2d 603, 607 (1986)).

In the case at bar, defendant has not pointed this Court to evidence of record that tends to show that defendant had knowledge of Officer Varnum's arrests of Garmon at the time of the events underlying defendant's conviction. Furthermore, assuming *arguendo* that sustaining the State's objection was error, defendant has not met his burden of proving that he was prejudiced by the error as several witnesses, including Officer Varnum, testified as to Garmon's reputation for violence. See *State v. Watson*, 338 N.C. 168, 188, 449 S.E.2d 694, 706 (1994) (holding that the trial court's error in not allowing a question about the victim's reputation for violence was harmless given the extensive testimony concerning the

victim's reputation for violence that was admitted), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995), *overruled on other grounds by State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995).

This testimony was also not admissible under Rule 608(b). This rule permits questions during cross-examination about specific instances of conduct concerning the character for truthfulness or untruthfulness of another witness. N.C. Gen. Stat. § 8C-1, Rule 608(b) (2003). In the instant case, Officer Varnum was asked to testify about Garmon's character for violence, not about his veracity. Furthermore, the question was asked during redirect, not cross-examination. Therefore, we conclude that the trial court did not err in sustaining the State's objection to defendant's question to Officer Varnum. This assignment of error is overruled.

Defendant's next assignment of error asserts that the trial court erred by characterizing the stick used by defendant as a deadly weapon per se and failing to instruct the jury on the lesser included offense of assault inflicting serious injury.

Defendant asserts that whether an instrumentality is a deadly weapon is a question of law only where there is no dispute regarding the facts. This argument is misplaced in that while several witnesses gave different versions of the exact course of events underlying defendant's conviction, there is no dispute that defendant assaulted Garmon with the weapon that was introduced into evidence and variously referred to as a "board," a "bat" a "stick" and a "club." Similarly, there is no conflict in the evidence as to the manner of its use. Both defendant and Garmon testified that

defendant hit Garmon on the head and the back. Finally, there is no conflict in the evidence indicating that Garmon was seriously injured due to defendant's use of the weapon. Officer Theodore Castano of the Charlotte-Mecklenburg Police Department testified that Garmon was hurting and bleeding, that Garmon had a gash in his head, and that the wound was spurting blood. Garmon testified that clamps were put into his head at the hospital and that he was dizzy for a couple of weeks after the assault. Because both the nature of the weapon and the manner of its use were of such character as to admit but one conclusion, the trial court did not err in deciding, as a matter of law, that the weapon used was a deadly weapon. *State v. Parker*, 7 N.C. App. 191, 195-96, 171 S.E.2d 665, 667-68 (1970). This argument fails.

Defendant also argues that the trial court erred by failing to instruct the jury on the lesser included offense of assault inflicting serious injury. "[A] trial judge must instruct the jury on all lesser included offenses that are supported by the evidence, even in the absence of a special request for such an instruction, and [the] failure to do so is reversible error which is not cured by a verdict finding the defendant guilty of the greater offense." *State v. Montgomery*, 341 N.C. 553, 567, 461 S.E.2d 732, 739 (1995). However, "the trial court is not required to submit lesser degrees of a crime to the jury 'when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.'" *State v. McKinnon*, 306 N.C. 288, 300-01, 293 S.E.2d 118,

126 (1982) (quoting *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972)).

As defendant's contention in reference to this argument is that the State did not present positive evidence that defendant used a deadly weapon, this argument must fail based on our conclusion, *supra*, that the trial court did not err by instructing the jury that the weapon used is a deadly weapon. This assignment of error is overruled.

Defendant's final assignment of error asserts that the trial court erred in failing to dismiss all charges due to insufficiency of the evidence. At trial, defendant made a motion to dismiss at the close of the State's evidence. However, defendant failed to renew this motion at the close of all the evidence. Thus, this issue was not properly preserved and is not properly before this Court. N.C. R. App. P. 10(b)(3) (2003); *State v. Leonard*, 300 N.C. 223, 231, 266 S.E.2d 631, 636, *cert. denied*, 449 U.S. 960, 66 L. Ed. 2d 227 (1980). This assignment of error is dismissed.

No error.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).