NO. COA04-98

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2004

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 02 CRS 254023-24

HASSAN LEE BROOKS

Appeal by defendant from judgments entered 31 October 2003 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 October 2004.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for defendant-appellant.

LEVINSON, Judge.

On 16 December 2002, defendant (Hassan Lee Brooks) was indicted for assault with a deadly weapon inflicting serious injury. On 7 July 2003, defendant was indicted on charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. All three charges were tried at the 30 October 2003 Criminal Session of Mecklenburg County Superior Court.

The evidence presented at trial tended to show the following: On 23 November 2002, Wayne Martin went to Leather and Lace, a nightclub in Charlotte, North Carolina. Martin arrived at 1:40

a.m. and had a few drinks while waiting on a phone call from his girlfriend. Martin left the club at 2 a.m. and walked to his car in the parking lot while he talked on the phone. While Martin was on the phone, a large silver sports utility vehicle pulled up to him. Defendant was sitting in the front passenger seat of the car. Defendant told Martin "get it right; act like you know." Martin did not understand what defendant was saying. Then, he heard a pistol cock, he looked down and saw a Glock pistol in between defendant's legs with his hands on it. When Martin looked back up, the gun went off. Martin was shot in the left leg and fell to the ground. Defendant and his accomplices got out of the car, went through Martin's pockets and asked for his keys while Martin begged them not to shoot him again. They took defendant's gold necklace, and his wallet which contained his credit cards and approximately $200 in cash. Defendant demanded Martin's car keys but he could not find them. The defendant and the accomplices then got back in the car and drove away.

Later that afternoon, Officer Gresham Wilhelm of the Charlotte-Mecklenburg Police Department received information which led him to the Howard Johnson Motel. Officer Wilhelm found a silver sports utility vehicle and ran the tags. The vehicle came back stolen. Officer Wilhelm did an inventory of the vehicle and found a black Glock .40 caliber magazine. Officer Wilhelm also found a credit card with Martin's name on it.

A jury convicted defendant of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury, and the

trial court sentenced defendant to a term of 117 to 150 months imprisonment for the robbery conviction, and a consecutive term of 46 to 65 months imprisonment for the assault conviction. From these convictions and judgments, defendant now appeals.

In his first argument on appeal, defendant contends that he received ineffective assistance of trial counsel. Defendant asserts that he was denied effective assistance of counsel because his attorney (1) did not make an opening argument, and (2) offered the statement of the victim into evidence during the State's case-in-chief, thus foreclosing defendant from having the opportunity to make his closing argument after the State addressed the jury, under circumstances where, defendant insists, the State was going to introduce the document.

To establish ineffective assistance of counsel, defendant must satisfy a 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.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985). In reviewing a claim of ineffective assistance of counsel claim, our appellate courts will not second-guess trial counsel's decisions regarding trial tactics and strategy. *State v. Lowery*,

318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986).

In the instant case, defendant's assertions of ineffective assistance of counsel concern matters of trial strategy, to wit: whether to make an opening statement and whether and when to introduce a particular piece of evidence. This assignment of error is overruled.

In his second argument on appeal, defendant contends that the trial court erred by failing to give a limiting instruction to the jury on the use of corroborative evidence. We do not agree.

During the State's case, Officer Zerubabel Seth Amos Chickoree testified about Martin's statement to him on 23 November 2002. Defendant objected, and the court allowed the testimony for "corroborative purposes." However, the court did not give the jury a limiting instruction. Defendant contends that this constituted prejudicial error because the jury may have considered the testimony as substantive evidence. However, after the trial court admitted the testimony for corroborative purposes, defendant failed to request a limiting instruction. "It is well settled in this State that when a defendant does not specifically request an instruction restricting the purpose for which corroborative evidence is admitted, its admission is not assignable as error." *State v. Cox*, 296 N.C. 388, 390, 250 S.E.2d 259, 261 (1979) (citation omitted). This assignment of error is overruled.

In his third argument on appeal, defendant contends that the trial court committed plain error when it allowed testimony that had the sole purpose of impugning his character. Specifically,

defendant insists that the trial court committed plain error in permitting Detective Arvin Fant to testify that (1) when defendant was arrested, he had several outstanding warrants and was in possession of firearms, and (2) when defendant was interrogated, other cases not involving the victim in the present case were discussed. Defendant contends that he was prejudiced by this testimony "because it tended to portray [him] as a violent criminal with many run-ins with law enforcement" and that this evidence was of little probative value to the State's case.

"A plain error is one so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002) (citation and internal quotation marks omitted). Plain error is to be applied cautiously and only in the exceptional case where the error is so prejudicial that justice cannot have been done. *State v. Baldwin*, 161 N.C. App. 382, 388, 588 S.E.2d 497, 503 (2003) (citation omitted).

On the facts of this case, even assuming, *arguendo*, that the trial court committed error, it is not probable that the jury would have reached a different verdict had the testimony by Detective Fant been excluded. This assignment of error is overruled.

In his final argument on appeal, defendant contends that the trial court erred by failing to instruct the jury on self-defense. We do not agree.

"A defendant is entitled to a jury instruction on self-defense

when there is evidence from which the jury could infer that he acted in self-defense." *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998). "In determining whether the self-defense instruction should have been given, the facts are to be interpreted in the light most favorable to [the] defendant." *State v. Moore*, 111 N.C. App. 649, 654, 432 S.E.2d 887, 889 (1993) (citation and internal quotation marks omitted). Our appellate courts have held that where the record is "'totally void of any evidence' supporting 'defendant's self-serving claim' that he believed the other person was reaching for a weapon," the trial court may conclude that defendant's belief was not objectively reasonable and may properly refuse to instruct the jury on self-defense. *State v. Meadows*, 158 N.C. App. 390, 402, 581 S.E.2d 472, 479 (quoting *State v. Williams*, 342 N.C. 869, 873-74, 467 S.E.2d 392, 394 (1996)), *disc. review denied*, 357 N.C. 467, 586 S.E.2d 774 (2003).

In the instant case, Martin testified that he was unarmed. Defendant's sole evidence in support of an instruction on self-defense was his self-serving statement to police that Martin reached for a gun. However, there was no other evidence that Martin possessed or reached for a gun. Taking the evidence in the light most favorable to defendant, we conclude the trial court properly declined to instruct the jury on self-defense because defendant's belief was not objectively reasonable. This assignment of error is overruled.

No error.

Judges TIMMONS-GOODSON and CALABRIA conur.

Report per Rule 30(e).