NO. COA05-1222

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v. Catawba County
Nos. 03 CRS 56600-01

CESAR ADRIAN FLORES-CHAVEZ

Appeal by defendant from judgments entered 18 April 2005 by Judge James W. Morgan in Catawba County Superior Court. Heard in the Court of Appeals 29 May 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley, for the State.

J. Clark Fischer, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from judgment entered after a jury verdict of guilty of second-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced defendant to concurrent prison terms of 180-225 months and 90-117 months. We find no error.

The State adduced evidence tending to show that defendant shot Robert Neff and Roger Torrence with a nine-millimeter handgun in the home of defendant's brother, Jose Manuel Flores, on the night of 28 July 2003. An autopsy revealed that Neff died from a gunshot wound to the face "just below the left eye" and sustained

additional shots to the left arm, left shoulder, and right leg. Defendant also fired multiple shots at Torrence, striking him once in the back of his right shoulder as he tried to flee the house. Torrence, Allen Fernandez, Cynthia Olivera, and Martha Dedios each testified that defendant shot Neff and Torrence in Flores' dining room without provocation, and that he was the only person who displayed or fired a weapon. The witnesses further averred that neither Neff nor Torrence threatened or argued with defendant prior to the shooting. At the time of his death, Neff had a .25 caliber pistol in his right pants' pocket. Although the pistol was loaded, the safety mechanism was on, and no bullet was in the firing chamber. Defendant drove away from the scene in Torrence's red Mazda B3000 pickup truck but returned momentarily and was identified to police as the shooter by Olivera and Dedios. Following defendant's arrest, police found a loaded Bryco Arms nine-millimeter semiautomatic pistol and three additional magazines of ammunition in the center console area of the truck. They also found a chrome-plated Bryco Arms nine-millimeter semiautomatic pistol on Flores' driveway adjacent to the kitchen door. A forensic firearms and tool mark examiner from the State Bureau of Investigation concluded that the bullets and spent cartridge cases found at the shooting scene were fired from the pistol recovered from the driveway, which defendant purchased from Sportsman Gun and Pawn in Newton, North Carolina, on 18 November 2002. He purchased a second nine-millimeter semiautomatic handgun from Sportsman Gun and Pawn on 4 June 2003.

Defendant offered evidence that he fired at Neff and Torrence in self-defense. He testified that he went to Flores' house on the night of 28 July 2003, intending to watch a televised fight with his brother. He brought with him two nine-millimeter handguns and five loaded magazines, because he planned to go to a shooting range the next day. After letting himself into Flores' house, which was unoccupied, he placed the guns and ammunition in the computer room. A few minutes later, Neff and his family knocked on the door and entered the house, followed almost immediately by Torrence.

Defendant had met Neff and Torrence on two prior occasions but did not know them well. Torrence looked at defendant "all mean like" and was "breathing real loud" and clenching his fists. Defendant found a chair for Torrence to sit down at the dining table. Torrence kept looking out of the window into the yard as though "agitated, upset or something." Defendant saw a vehicle outside with its lights on and told Torrence to "tell them to come in." Torrence exchanged a look with Neff and left the room briefly. When he returned, Torrence closed the blinds. Flores walked into the house with Fernandez and shook defendant's hand, looking "frightened all the way." When Flores went to the bathroom, Torrence asked Neff if they were "going to do it here." Neff replied, "No, we're going to wait until we get to my house." Neff looked at defendant and said, "Hey, when your brother gets back, we are going to go party at my house."

Defendant left the table and knocked on the bathroom door, hoping to ask Flores what was happening. When his brother did not

respond, defendant retrieved one of his guns and a clip of ammunition and walked outside to the driveway. He loaded the gun as he approached Torrence's truck and asked Olivera to come inside. He followed Olivera into the house. When she saw Torrence, she smiled. Torrence saw defendant, looked at Neff and said, "Do it, do it now." Defendant drew his weapon and saw Neff "coming up with his hands like this[,]" brandishing a black gun. Defendant fired two shots at Neff's arm. When Neff stood up and came toward him, defendant fired a third shot and struck Neff in the leg. Defendant fired a fourth shot at Neff, which felled him. Believing that Torrence was shooting at him, defendant fired at Torrence, who "took off running[.]" Torrence stopped at the front door and turned back toward defendant with a gun. Defendant fired twice more at Torrence before ducking behind a wall. When he heard the front door open, he came out from behind the wall and saw that Torrence was gone. Flores appeared and asked, "What are you doing?" Defendant told his brother, "They're trying to kill me. He's got a gun." Defendant warned Flores not to go outside, because "the other one is out there." Flores took defendant's gun, called 911, and told defendant to "[g]et the 'F' out of here. Get out of here now." Defendant got into Torrence's truck and drove onto Highway 127, placing his guns on the center console of the truck. After driving a few miles, he returned to his brother's residence and submitted to arrest by police.

Flores also testified for the defense, stating that he arrived at his house with Fernandez just after 10:15 p.m. and found

defendant, Neff, Torrence, Dedios and Olivera rolling marijuana cigarettes at his dining table. He did not see anyone with a gun. Defendant, Neff and Torrence were not arguing but were "talking . . . [,] rolling the weed up and having a good time." Flores went to the bathroom and was in the kitchen getting a beer when he heard the gunshots, but thought that someone was outside "just shooting or playing with a gun." Defendant came into the kitchen, grabbed Flores and said, "Back up, back up because he's got a - - he's got a gun." When Flores tried to look into the dining room, defendant said, "Don't look out there. . . . [T]hey're blasting." Flores walked into his dining room and saw Neff on the floor. After telling Dedios to get her children out of the house, he called 911 and returned to the kitchen. Defendant told Flores that Torrence had drawn a gun and "was going to shoot [her]." Defendant then asked Flores to give him a ride. Flores refused and ran from the house.

In his sole argument on appeal, defendant claims the trial court erred by allowing the prosecutor to cross-examine Flores about the details of his prior conviction for trafficking in marijuana in a manner exceeding the permissible scope of such impeachment evidence under N.C.R. Evid. 609. We disagree.

Rule 609(a) provides as follows: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony . . . shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." Otherwise, extrinsic evidence of a witness' prior

conduct may not be used for impeachment purposes unless the specific conduct is "probative of truthfulness or untruthfulness." N.C.R. Evid. 608(b). In applying these rules, our courts have held "that a cross-examiner can elicit only the 'name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a) in the guilt-innocence phase of a criminal trial.'" *State v. Braxton*, 352 N.C. 158, 193, 531 S.E.2d 428, 448 (2000) (quoting *State v. Lynch*, 334 N.C. 402, 410, 432 S.E.2d 349, 353 (1993)), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Additional evidence regarding a witness' prior conviction may be elicited "'to correct inaccuracies or misleading omissions in the [witness'] testimony or to dispel favorable inferences arising therefrom.'" *Id.* (quoting *Lynch*, 334 N.C. at 412, 432 S.E.2d at 354). However, such additional evidence must be "related to the factual elements of the crime rather than the tangential circumstances of the crime." *State v. King*, 343 N.C. 29, 49, 468 S.E.2d 232, 245 (1996).

In this case, Flores acknowledged on direct examination that he was imprisoned in Columbus County, North Carolina "for drug trafficking[,]" and had been in prison there for "[f]our months" at the time of defendant's trial. Defense counsel later asked Flores how long he had "actually been incarcerated[,]" and he responded, "For sixteen months." On cross-examination, the State elicited testimony from Flores that he had prior convictions "[f]or possession of meth[amphetamine], one driving without owner's consent, and this drug trafficking that I'm here on now." When the

prosecutor sought clarification, Flores confirmed that he was "presently serving time for a conviction in trafficking in marijuana." Flores conceded that he adopted the alias of "Jose Antonio" or "Jose Antonio Cortez Flores" when he came to North Carolina, "because [he] had warrants out there in California." He also used the alias of "Ruben Fernandez Garchuzo" to avoid arrest for driving a friend's car without a license, and used a fourth alias, "Jose Torres" in California. Flores further admitted using three different social security numbers while living in the United States. Flores then testified that prior to the shooting in July of 2003, he had been dealing marijuana for [a]bout six months[,]" and estimated that he sold "[p]robably about [four] or [five] pounds a month.

The prosecutor then returned to Flores' conviction for marijuana trafficking, which led to the exchange at issue in defendant's appeal:

> Q. And you're aware that there are certain amounts of marijuana that one has to sell in order to be convicted or plead guilty to trafficking in marijuana?
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Well, he can answer the question. Go ahead.
>
> Q. Are you aware of that, sir?
>
> A. Yes, sir. It has to be over [ten] pounds to be a drug trafficking.
>
> Q. . . . So at some point you sold over [ten] pounds of marijuana, because you're serving time for that?

> [DEFENSE COUNSEL]: Objection --
>
> A. No.
>
> [DEFENSE COUNSEL]: -- Your Honor.
>
> THE COURT: Overruled.
>
> Q. No, that's not true?
>
> A. I wouldn't sell that – That's about the most I would get is [ten pounds], and then I'll sell one probably every other week – a week, two a week. But I'll get about [ten] of them.
>
> Q. But - Well, you responded to my question about what you're serving time for.

Defendant now contends that such a "broad-ranging inquiry into the specifics of [Flores'] prior conviction[]" was forbidden by N.C.R. Evid. 609(a) and served "no legitimate purpose other than to portray [him] as a 'major drug dealer' whose testimony supporting [d]efendant's self-defense claim was unworthy of belief." Casting Flores' account of the shooting as "pivotal" to his defense, defendant seeks a new trial.

We find no merit to defendant's claim. In response to defendant's admission to a prior conviction for "drug trafficking[,]" the State elicited his further admissions that (1) he was convicted of trafficking in marijuana, and (2) this offense reflected Flores' involvement with "over [ten] pounds" of marijuana. "Weight of the marijuana is an essential element of trafficking in marijuana under G.S. 90-95(h)." *State v. Goforth*, 65 N.C. App. 302, 306, 309 S.E.2d 488, 492 (1983). Moreover, as Flores testified, North Carolina law requires the weight of

marijuana involved to exceed ten pounds in order to qualify as "trafficking" under N.C. Gen. Stat. § 90-95(h). Accordingly, we conclude the prosecutor's questions merely illuminated for the jury an essential element of Flores' otherwise undefined conviction for marijuana "trafficking" and did not stray improperly into the tangential circumstances of his crime. *See King*, 343 N.C. at 49-50, 468 S.E.2d at 245.

We further find that any error under Rule 609(a) was harmless. *See* N.C. Gen. Stat. § 15A-1443(a) (2005). The challenged cross-examination concerned the past criminal activity of Flores, rather than defendant. *Compare Braxton*, 352 N.C. at 194, 531 S.E.2d at 449 ("Even if the questions . . . did exceed the proper scope of inquiry, any error was not prejudicial in that the questions were asked of a defense witness, not of defendant.") *with State v. Wilson*, 98 N.C. App. 86, 91, 389 S.E.2d 626, 629 (1990) (finding prejudicial error where the defendant admitted his prior conviction for accessory to armed robbery and the prosecutor then asked him whether the gun used in the robbery and the stolen money were on his person at the time of his arrest). Moreover, Flores did not purport to see the shootings but merely relayed defendant's hearsay statement to him immediately thereafter. Flores also admitted without objection that he had been convicted of trafficking in marijuana, that he sold four or five pounds of marijuana per month, that he had employed aliases to evade criminal liability, and that he had used three social security numbers in California. In light of these admissions, we find no likelihood that the State's inquiry

into the meaning of "trafficking" affected the jury's assessment of his credibility.

The record on appeal includes additional assignments of error not addressed by defendant in his brief to this Court. Pursuant to N.C.R. App. P. 28(b)(6), we deem them abandoned.

No error.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).