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NO. COA05-1611

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

STATE OF NORTH CAROLINA

v.

Orange County
No. 00 CRS 55611

TONY LEE THOMPSON, JR.

Appeal by defendant from judgment entered 1 October 2001 by Judge David Q. LaBarre in Orange County Superior Court. Heard in the Court of Appeals 24 August 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert Montgomery, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for defendant-appellant.

LEVINSON, Judge.

Tony Thompson, Jr. (defendant) appeals from judgment entered upon his conviction of assault with a deadly weapon with intent to kill inflicting serious injury. We find no error in his conviction but remand for resentencing.

Defendant was tried before an Orange County jury in August 2001. The State's trial evidence tended to show, in pertinent part, the following: Orson Lavar Lovelace testified that in December 2000 he was a full time student at North Carolina Central University and played on the school's football team. Lovelace,

called "Love" by his friends, was a business major who hoped to play professional football after graduation. He had a weekend job as a security guard for Club Reflections ("the club"), a Hillsborough, North Carolina night club. On Saturday, 3 December 2000, Lovelace worked at the club. At closing time, several patrons started fighting in the entryway of the club. Lovelace and other security guards broke up the fight and separated those involved. Lovelace testified that defendant, whom Lovelace recognized as a regular patron of the club, was not part of the fight inside the club's door. As the security guards moved the crowd out of the vestibule and tried to restore order, Lovelace heard shots. He looked out of the club's glass door and saw the defendant holding a gun and standing over a woman. Defendant approached the door to the club, and Lovelace stepped outside to attempt to calm defendant. A few seconds later he saw a flash, fell to the ground, and shouted, "I've been shot." Lovelace testified that he was only an "arms reach" from defendant when he was shot, that he recognized defendant's face, and that he was certain that defendant had shot him.

After the shooting, Lovelace spent over a week in the hospital, where he was treated for a shattered femur and severed blood vessels, including a major artery. His leg ultimately required two surgeries. By the time of trial, Lovelace was no longer using a wheelchair and had regained the ability to walk. However, his treating physician testified that he did not think

Lovelace would "regain 100 percent use" of his leg, and that professional football would not "be a good idea for him."

John Vaughn, also a part time security guard at the club, testified that on 3 December 2000 he worked at the door of the club, searching patrons for weapons. Vaughn knew defendant's name from hearing other people talk to him, and recalled defendant being at the club that night. When the fight broke out at closing time, Vaughn was among the guards in the vestibule who were trying to restore order and escort patrons outside. During the scuffling, Vaughn saw Lovelace outside the door of the club. He then noticed someone just outside the door had a gun, and Vaughn turned to run away from the vicinity of the weapon. A few seconds later, Vaughn heard gunshots and someone saying, "Love was shot. T.J. did it." Vaughn recognized the defendant from the description of "T.J." Returning to the club's entrance, Vaughn saw Lovelace lying on the ground bleeding profusely. He stayed with Lovelace while they waited for an ambulance to arrive, and when law enforcement officers arrived, Vaughn gave a statement.

Terrence Brooks testified that he was the manager and part owner of the club. Brooks was a lifelong resident of Hillsborough and knew many of the club's regular customers, including the defendant, whom he knew by the name T.J. On 3 December 2000 Brooks was in a booth near the front door when the fighting started. Defendant was not part of the fight inside the club. When Brooks went outside to deal with the patrons who had been fighting, he saw the defendant holding a gun while standing over a woman, and heard

popping noises. He told defendant to leave, and the defendant started towards his car. Brooks started back towards the door of the club, believing that the incident was over. To his surprise, the defendant walked past him, also headed for the door. Brooks was just a few feet behind the defendant, and saw him approach the door until he was only about a foot away from Lovelace with no one else between them. Lovelace yelled, "He's got a gun" and then Brooks heard a shot. When defendant turned around, Brooks saw that he was holding a gun in his hand. Defendant ran towards the parking lot, and shortly thereafter a Cadillac and a Mercedes sped out of the lot.

Law enforcement officers from the Orange County Sheriff's Department arrived at about the same time as the emergency medical technicians (EMTs). While the EMTs stabilized Lovelace and got him into an ambulance, Brooks told a law enforcement officer that T.J. had shot Lovelace, and described the defendant and the Mercedes defendant was driving when he left the club. Brooks testified that he had seen defendant at least twenty or thirty times at the club, that the area where Lovelace was shot was lighted, and that he had no difficulty identifying the defendant and had no doubt that defendant had shot Lovelace. On cross-examination, Brooks testified that when defendant "walked pas[t him] and shot Love" Brooks yelled, "Call 911 - T.J. shot Love." He also said that Lovelace was "just standing there" when the defendant shot him, that he saw a gun in defendant's hand when the defendant turned

around after the shooting, and that the defendant was the only one near Lovelace.

Other law enforcement officers testified to their role in the investigation of the incident. Brian Sykes testified that he was an officer in the Orange County Sheriff's Department, and had been dispatched to the club on 3 December 2000. When he arrived, Brooks told him that T.J. had shot Lovelace. Sykes knew that T.J.'s real name was Tony Thompson because Sykes and defendant had grown up and gone to school together. Billy Austin, patrol officer with the Orange County Sheriff's Department, testified that when he arrived at the club on 3 December 2000, Lovelace was lying in a large pool of blood. Austin spoke with Brooks and Vaughn, and asked them to provide written statements describing what they had observed of the shooting. Greg Stroud, an investigator with the Orange County Sheriff's Department, was on call on the night Lovelace was shot. By the time he got to the club, Lovelace had been taken to the hospital. Stroud collected the witness statements written by Brooks and Vaughn, and took photographs of the scene. He testified that the area where Lovelace was shot was sufficiently well lit that flashlights were not needed. Based on information he received, Stroud returned to the Sheriff's office and created a photo lineup that included a picture of defendant. Larry Faucette, an Orange County Sheriff's Department investigator, arrived at the club after Stroud. He testified that he knew the defendant, and knew both his given name and his nickname, T.J. After leaving the club, Faucette met with Brooks and Vaughn at the law enforcement

center, and separately showed each of them the photo array. Faucette testified that Brooks identified the picture of defendant as the shooter, known to Brooks as T.J. Vaughn did not see the actual shooting; however, he identified defendant as being the person he knew as T.J.

Christopher Pope, an Orange County Emergency Management paramedic, was tendered and accepted as an expert in paramedic emergency response. He testified that he was working on 3 December 2000, and was called to the club. When Pope arrived, Lovelace was awake and alert, although he had lost a lot of blood. Pope determined that Lovelace had suffered a gunshot wound to his groin area, and observed that Lovelace's right leg was greatly swollen. He applied pressure to the wound, and transported Lovelace to Duke Hospital as quickly as possible.

Dr. John Gray, a surgeon who practiced at Duke Hospital, was accepted as an expert in vascular surgery and trauma medicine. He testified that he had treated Lovelace on 3 December 2000 for a serious wound in his groin area. Gray diagnosed an injury to the main artery serving Lovelace's groin, a possible vascular injury to nearby veins, and a broken femur (leg bone). His expert opinion was that Lovelace's injuries were caused by a bullet wound. Gray repaired Lovelace's arterial and venal injuries, which had caused Lovelace to lose close to half of his total blood volume. He testified that Lovelace's injuries would have been fatal without immediate medical attention.

Dr. Edward Lilly, who was accepted as an expert in orthopaedic surgery and trauma, also treated Lovelace. He diagnosed multiple fractures of Lovelace's right femur. Initially, he performed surgery on Lovelace, in which he repaired damage to Lovelace's bone with a metal plate and screws. Later, a second surgical procedure was required, in which the plate and screws were replaced by a rod used to stabilize Lovelace's leg bone.

Lawrence Liner, an officer with the Hillsborough Police Department, offered evidence about an earlier incident involving the defendant. He testified that in 1995 defendant had shot a man outside a Hillsborough night club after drawing a weapon from the front of his pants. Defendant had turned himself into the police following the 1995 shooting. When questioned by the trial court, Liner stated that he believed that defendant had pled guilty to a felony assault in the earlier case.

Defendant presented the testimony of two witnesses. LaKeisha Jennings, a distant cousin of Brooks, testified that she had been among the individuals who were fighting in the club's vestibule on 3 December 2000. Brooks took her outside when the fight was broken up, and walked her away from the club. When Brooks walked back towards the club, Jennings heard shots, saw Lovelace lying on the ground, and heard Lovelace yell, "Help me. Call the police because I have been shot." She did not see the actual shooting, and did not know where defendant was at the time of the shooting. Gerald Lattie testified that when he arrived at the club on 3 December 2000, people were fighting and arguing near the door. He saw

defendant engaged in discussion with another man in the vicinity of the door to the club. As he started towards the club, Lattie heard a gunshot, so he ran back to his car and left.

Following the presentation of evidence, the jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court sentenced defendant in the aggravated range, to 167-210 months imprisonment. Although defendant gave notice of appeal, his counsel failed to perfect the appeal. In May 2005 this Court issued a writ of certiorari allowing defendant to file the instant appeal from the judgment.

Defendant argues first that the trial court committed reversible error by eliciting evidence of defendant's prior conviction for assault, given that defendant did not testify on his own behalf. We disagree.

At trial, Officer Liner of the Hillsborough Police Department testified about defendant's involvement in an earlier nightclub shooting. Defendant's objection to the admission of this evidence, which the State offered pursuant to North Carolina Rules of Evidence, Rule 404(b), was overruled by the trial court. Officer Liner's testimony tended to show that about five years earlier defendant had shot a man outside a nightclub in Hillsborough in a factual context bearing some similarities to that of the instant case. After the 1995 shooting, the defendant turned himself in and confessed to shooting the victim. Following several rounds of

examination and cross-examination about this prior shooting, the trial court asked the witness the following:

THE COURT: Captain, can you tell us what the disposition of this '95 shooting case was involving Tony Thompson?

THE WITNESS: If I recall it correctly, there was a plea at the end of the superior court trial.

THE COURT: Do you know what he pled to?

THE WITNESS: I'm not positive, but I believe it was assault with a deadly weapon inflicting serious injury. I'm not positive of that, Your Honor.

THE COURT: Thank you.

Defendant argues that the admission of this testimony violated his U.S. Constitutional right to a fair trial. However, defendant failed to raise a constitutional issue before the trial court, and we will not address it for the first time on appeal. "Constitutional questions 'not raised and passed upon in the trial court will not ordinarily be considered on appeal.'" *State v. Braxton*, 352 N.C. 158, 173, 531 S.E.2d 428, 436-37 (2000) (quoting *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)).

Defendant further asserts that, inasmuch as he did not testify, the fact of his prior conviction for a similar assault was "inadmissible, improper, and prejudicial." We conclude that a different result would not have obtained even assuming, *arguendo*, that the trial court erred by eliciting the fact of defendant's prior conviction.

Under N.C. Gen. Stat. § 15A-1443(a) (2005), a defendant is prejudiced by non-Constitutional error "when there is a reasonable

possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant."

A brief review of the trial evidence would include the following: Lovelace testified that he recognized defendant as a regular visitor to the club, that defendant shot him from close range, and that he had no doubt that defendant was the person who shot him. Brooks testified that he was familiar with defendant before the shooting, and that defendant was a regular customer at the club. On the night in question, Brooks saw defendant holding a gun, then saw defendant walk up to Lovelace, and heard Lovelace yell, "He's got a gun!" Brooks heard a shot; defendant immediately turned around, and Brooks saw that defendant was holding a firearm. Brooks also testified that no one else was between Lovelace and defendant when defendant shot Lovelace. Vaughn testified that, as soon as Lovelace was shot, he heard voices shouting that "T.J." had shot Lovelace, and that he knew T.J. to be defendant's nickname. Both Brooks and Vaughn identified defendant in a photo lineup, and both gave statements to law enforcement officers corroborating their trial testimony.

In sum, Lovelace testified unequivocally that defendant shot him, and Brooks offered eyewitness testimony from which the only reasonable inference was that defendant shot Lovelace. Moreover, Brooks' and Lovelace's credibility was not impeached, and the State's evidence, showing that defendant shot Lovelace, was

essentially uncontradicted. We also note that defendant does not argue on appeal that the evidence regarding defendant's prior shooting should have been excluded, and does not argue that the trial court erred by allowing Liner to testify that defendant had confessed to the 1995 shooting.

In this factual context, we easily conclude that "there was overwhelming evidence of defendant's guilt, making it extremely unlikely that the jury relied on the evidence of the earlier conviction rather than the substantive evidence of guilt. There is no reasonable possibility that a different result would have been reached at trial had the court excluded this prior conviction." *State v. Ross*, 329 N.C. 108, 121, 405 S.E.2d 158, 165 (1991). This assignment of error is overruled.

Defendant argues next that the trial court "essentially directed a verdict on the issue of serious injury in favor of the State" and that the instruction "constitutes structural error and requires automatic reversal[.]" We note that defendant does not argue that Lovelace's alleged injuries, if believed by the jury, do not constitute "serious injury" as a matter of law.

The trial court instructed the jury as follows on the serious injury element of the charged offense:

And fourth, that the defendant inflicted serious injury. Serious injury may be defined as such physical injury as causes great pain and suffering. A large caliber bullet wound which severs the femoral vein and artery and shatters the femur bone, causing substantial blood loss resulting in hospitalization, several operations, and being described as

permanent and debilitating is a serious injury.

Defendant contends that the trial court instructed the jury that, as a matter of law, Lovelace suffered serious injuries. This is an inaccurate characterization of the court's instructions, and confuses issues of fact with questions of law. The determination of whether or not Lovelace suffered the specifically described injuries was a question of fact for the jury. The court did not indicate to the jury what its verdict should be on this factual matter.

The trial court instructed the jury that if they were to find that Lovelace had suffered certain injuries, that this would constitute serious injury. This assignment of error is overruled.

The defendant's final assignment of error is that the trial court violated defendant's Sixth Amendment right to jury trial, as construed in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, *reh'g denied*, 542 U.S. 961, 159 L. Ed. 2d 851 (2004), by sentencing him in the aggravated range upon the trial court's finding the aggravating factor that defendant inflicted "permanent and debilitating" injuries on Lovelace. Defendant contends that, inasmuch as this fact was neither admitted by him nor submitted to the jury, the court erred by making this finding. He asserts that, under *Blakely* and North Carolina cases interpreting it, he is entitled to a new sentencing hearing. Based upon the facts of this case, we agree.

In *Blakely*, the United States Supreme Court

held that a trial court violates a defendant's Sixth Amendment right to jury trial if it finds any fact, other than the fact of a prior conviction, which increases the penalty for a crime beyond the prescribed statutory maximum. According to *Blakely*, unless the defendant admits to them, such facts must be submitted to a jury and proved beyond a reasonable doubt.

State v. Norris, 360 N.C. 507, 509, 630 S.E.2d 915, 919 (2006) (citation omitted). The North Carolina Supreme Court applied *Blakely* in *State v. Allen*, 359 N.C. 425, 449, 615 S.E.2d 256, 272 (2005), *motion to withdraw opinion allowed*, 360 N.C. 569, ___ S.E.2d ___ (2006), wherein it initially held that "the harmless-error rule does not apply to sentencing errors which violate a defendant's Sixth Amendment right to jury trial pursuant to *Blakely*. Such errors are structural and, therefore, reversible *per se*." However, in *Washington v. Recuenco*, ___ U.S. ___, ___, 165 L. Ed. 2d 466, 477 (2006), the United States Supreme Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." Additionally, in *North Carolina v. Speight*, ___ U.S. ___, ___ L. Ed. 2d ___ (No. 05-294, filed June 30, 2006), the United States Supreme Court vacated the judgment in *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005), and remanded "for further consideration in light of *Washington v. Recuenco*." Accordingly, the State argues that we should apply harmless error analysis to the court's finding of permanent and debilitating injury.

In the instant case, there was uncontradicted evidence that Lovelace suffered serious injury, but the evidence as to whether these injuries were "permanent and debilitating" was equivocal. Consequently, we conclude that the *Blakely* error in this case was not harmless beyond a reasonable doubt. Therefore, the defendant is entitled to a new sentencing hearing under either standard, and we need not reach the issue of whether *Blakely* error is reversible *per se* or is subject to harmless error review.

For the reasons discussed above, we conclude that defendant's conviction should be upheld, and we remand for a new sentencing hearing.

Affirmed in part, reversed and remanded in part.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).