NO. COA05-647

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 03 CRS 249263, 64
03 CRS 249267, 68
03 CRS 249271

FABRICE PEAN

Appeal by defendant from judgments entered 14 October 2004 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 January 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for the State.

Haral E. Carlin, for defendant.

LEVINSON, Judge.

Defendant (Fabrice Pean) appeals from his convictions and judgments on two charges of attempted robbery with a dangerous weapon, two charges of assault with a deadly weapon inflicting serious injury, and one charge of conspiracy to commit robbery with a dangerous weapon. We find no error in the trial of these matters, but remand for a new sentencing hearing.

The evidence presented at trial may be summarized as follows: China Dexter Jones (hereafter "Jones"), who worked as the manager at a Burger King restaurant in Charlotte, N.C., testified he was

attacked by defendant and another man as Jones and his co-worker were leaving the restaurant together during the early morning hours of 14 October 2003. At approximately midnight, Jones and Ivan Dawkins (hereafter "Dawkins") exited the restaurant. "[A]s soon as we closed the front door we [saw] two guys jump out of the bushes. It startled us so we just, you know, walked towards the car." Jones reached his car, got into the driver's seat, and closed the driver's door. Jones watched the two men "and wondered what was going on and then I reached over to let [Dawkins] in and that's when the gun went off and they shot me." He was shot in his abdomen. Jones stated the gun was held by the man with defendant. The police arrived shortly thereafter. Jones was transported to Carolinas Medical Center, where he underwent surgery on his stomach. A part of Jones' small intestine was removed. Thirty-two staples were required to suture the incision. Following the operation, Jones experienced internal bleeding and remained in the intensive care unit for three days. He was out of work for two and one half months following the surgery.

Jones testified he recognized his two assailants. He knew the men from his work at Burger King. Defendant and the man who shot him came to the restaurant almost every day in the late afternoon. Jones often gave them free food.

Dawkins testified he and Jones were attacked by two black men as they left the Burger King. As he and Jones walked to Jones' car in the parking lot, "we saw two guys jump[] over the median . . . [and] as [Jones and I] walked over to the car and that's when [sic]

they said, give it up, give it up[.]" Jones was shot through the car window. As Dawkins ran for help, he fell down and noticed that he had also been shot. Dawkins stated that the man holding the gun and defendant regularly came into the Burger King restaurant together.

Officer Ryan Jackson of the Charlotte Mecklenburg Police Department testified. He was patrolling near the Burger King on the night of 13 October 2003 when he heard approximately five gun shots from the direction of the Burger King. Jackson was not able to apprehend the two black male suspects he observed running from the scene with tee-shirts over their heads.

Dr. Mike Runyon, a physician employed by Carolinas Medical Center, treated Dawkins in the emergency room on the morning of 14 October 2003. Runyon testified that Dawkins had "two wounds that appeared to be gunshot wounds, "one . . . at the side of the hip . . . and then one straight out the buttock in the back." The wounds were circular, approximately one centimeter in diameter. When he arrived in the emergency room, Dawkins was awake and coherent, complaining of pain from the wounds. Runyon cleaned and bandaged the wounds. Dawkins was prescribed pain medication. According to Runyon, Dawkins' injuries were "serious."

Antwan Mobley testified that he and defendant planned and committed the attempted robbery of Jones and Dawkins together on the night of 13 October 2003. Because he believed Jones would recognize them, Mobley decided to hide their faces with tee-shirts. When Mobley and defendant saw Jones leaving the restaurant, they

jumped over a wall into the Burger King parking lot. Mobley ran to the driver's side door of Jones' car and pulled out a gun. Mobley saw Dawkins on the other side of the car "[make] a move and I just reacted and the gun went off and I jerked back and [it] went off again." While in jail, Mobley wrote a letter to defendant. Mobley testified he wrote defendant because he was wondering "[h]ow come [sic] [defendant] just can't come to court and just tell the truth? . . . I feel[] like he should just come to court and just tell you all what happened that night[.]" Mobley read his letter during his testimony. In the letter, Mobley asked defendant, "why [can't you] just say you [were] there and you know it is true."

Detective Arvin Fant of the Charlotte Mecklenburg Police Department was the detective assigned to the case. Fant created photographic line-ups for each suspect and showed them to Dawkins and Jones. Jones identified Mobley as the man who shot him, and identified defendant as the other man involved in the attack. Dawkins was able to identify Mobley as the man who shot him, but was not able to identify defendant in the photo line-up. The two photo line-ups were admitted into evidence.

Defendant offered evidence but did not testify. Defendant's evidence consisted of the testimony of several family members and friends who provided an alibi for defendant.

The jury convicted defendant on all charges. The trial court consolidated defendant's convictions, and sentenced him to two consecutive terms of imprisonment. Defendant appeals.

Defendant first argues that the trial court committed plain error by allowing the State to elicit testimony from Mobley that violated his right not to incriminate himself. Specifically, defendant contends it was error for the trial court to allow the following testimony:

> How come he just can't to court and just tell the truth . . . . I feel[] like he should just come to court and just tell you all what happened that night. Open up like a man even though we were wrong for what we were doing. I [felt] like he should come out here today and [do] this--tell you all the truth.
> . . . .
>
> And I [felt] like I should write him because I love him so much and he should just come out and tell the truth. . . .
>
> . . . .
>
> But why [can't you] just say you [were] there and you know it is true. . . . [I] just wish you [would] just tell them so I will not have to. Better from you than from me telling them about you[.]

The law regarding the admission of evidence regarding a defendant's right to remain silent following his arrest is well established:

> It is impermissible for the trial court to admit testimony relating to a defendant's exercise of his right to remain silent and to request counsel. *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994). Such an error requires the defendant be granted a new trial unless it can be shown the error was harmless beyond a reasonable doubt. *Id.* (citing N.C. Gen. Stat. § 15A-1443(b)). However, [where] defense counsel failed to object to this testimony at trial . . . our review is limited to plain error. *State v. Walker*, 316 N.C. 33, 38, 340 S.E.2d 80, 83 (1986). *See also State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983) (holding plain

> error review to be appropriate regarding situations involving evidentiary rulings by the trial court).
>
> . . . .
>
> In *State v. Alexander*, our Supreme Court held the admission of testimony regarding the defendant's post-arrest silence did not constitute plain error because (1) the comments regarding the defendant's silence were relatively benign; (2) the prosecutor did not attempt to emphasize the defendant's silence; and (3) the evidence of the defendant's guilt was substantial. *State v. Alexander* 337 N.C. 182, 196, 446 S.E.2d 83, 91 (1994).

State v. Walker, 167 N.C. App. 110, 130, 605 S.E.2d 647, 660-61 (2004), *disc. review denied*, 359 N.C. 642, 614 S.E.2d 921 (2005). "[T]o constitute plain error the appellate court must be convinced that absent the error, the jury probably would have reached a different verdict." *Id.* (citing *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)).

In the instant case, defendant did not object to the introduction of the testimony he now complains about on appeal. Even assuming, *arguendo*, that defendant can raise this constitutional objection for the first time on appeal, we conclude the admission of the testimony did not constitute plain error.

Here, there was substantial evidence of defendant's guilt. Jones, who was well acquainted with defendant, identified him as one of his attackers; Mobley testified defendant was his accomplice in committing the crimes. Other than eliciting Mobley's testimony, the record does not reveal any comment by the prosecution regarding defendant's failure to testify. Based on the evidence in the

instant case, we cannot hold the admission of Mobley's testimony constitutes plain error. This assignment of error is overruled.

Defendant next argues the court committed reversible error by failing to instruct the jury on the lesser included offense of assault with a deadly weapon for the charge of assault with a deadly weapon inflicting serious injury as to Ivan Dawkins. Defendant contends there was conflicting evidence regarding the seriousness of the injury sustained by Dawkins. We disagree.

The elements of assault with a deadly weapon inflicting serious injury are: (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, (4) not resulting in death. N.C. Gen. Stat. § 14-32(b) (2005); *State v. Wade*, 161 N.C. App. 686, 689, 589 S.E.2d 379, 381-82 (2003), *disc. review denied*, 358 N.C. 241, 594 S.E.2d 33 (2004).

> The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a deadly weapon. . . . The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case.

State v. Jones, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). "Factors our courts consider in determining if an injury is serious include pain, loss of blood, hospitalization and time lost from work." *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983).

Misdemeanor assault with a deadly weapon is a lesser included offense of assault with a deadly weapon inflicting serious injury. *State v. Lowe*, 150 N.C. App. 682, 685, 564 S.E.2d 313, 316 (2002).

"'The primary distinction between felonious assault under G.S. § 14-32 and misdemeanor assault under G.S. § 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used *and* serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that either a deadly weapon was used *or* serious injury resulted, the offense is punishable only as a misdemeanor.'" *Id.* (quoting *Owens*, 65 N.C. App. at 110-11, 308 S.E.2d at 498).

A defendant is "'entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keebler v. United States*, 412 U.S. 205, 208, 36 L.E.2d 844, 847 (1973)). Where there is "no genuine dispute in the evidence as to the serious nature of the prosecuting witness' injury[,]" the defendant is not entitled to an instruction on a lesser included offense which does not include the element of "serious injury." *State v. Uvalle*, 151 N.C. App. 446, 455, 565 S.E.2d 727, 733 (2002).

In the instant case, the evidence at trial tended to show Dawkins received two bullet holes in his hip and buttock. Dawkins was taken to the hospital, where the wounds were cleaned and bandaged. Dawkins was complaining of pain on his arrival at the hospital and received pain medication. The emergency room physician who treated Dawkins testified Dawkins' injury was "serious." We conclude the trial court did not err by failing to

instruct on the lesser included offense of misdemeanor assault with a deadly weapon. *See State v. Crisp*, 126 N.C. App. 30, 37, 483 S.E.2d 462, 466-67 (1997) (reasonable minds could not have differed that an injury caused by a bullet passing through victim's calf muscle, requiring hospital treatment, was a serious injury). This assignment of error is overruled.

In a related argument, defendant contends the trial court erred by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury as to Dawkins because the evidence was insufficient to establish that the injury Dawkins received was serious. We disagree.

The standard of review for a motion to dismiss in a criminal trial is as follows:

> "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied."

State v. Scott, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "[T]he trial court is to consider the evidence in the light most favorable to the State, which entitles the State 'to every reasonable intendment and every reasonable inference to be drawn from the evidence[.]'" *State v. Bailey*, 157 N.C. App. 80, 83, 577 S.E.2d 683, 686 (2003) (quoting *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982)). "Whether a serious injury has been inflicted depends upon the facts of each case and

is generally for the jury to decide under appropriate instructions." *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991) (citation omitted).

In the instant case, there was sufficient evidence to demonstrate that Dawkins' injuries were serious. Dawkins suffered two bullet holes in his hip and buttock. Dawkins required medical attention to clean and bandage the wounds as well and pain medication. The emergency room physician who treated Dawkins described Dawkins' injuries as "serious." Accordingly, the trial court did not err by denying defendant's motion to dismiss. *Accord State v. Streeter*, 146 N.C. App. 594, 597, 553 S.E.2d 240, 242 (2001) (concluding wounds made from a bullet which pierced the prosecuting witness' shoulder, ricocheted off his shoulder blade, and exited his body creating two bullet holes in his upper body causing the victim pain was sufficient evidence for a jury to determine the injury was serious). This assignment of error is overruled.

Defendant next argues the trial court committed plain error by allowing witness Jones to testify he observed defendant's "mug shots" in the photo line-up. Defendant contends this constitutes reversible error because it suggested to the jury that defendant was previously in police custody. We disagree.

Defendant did not object to the witness' use of the words "mug shot" when the witness answered questions concerning the photo line-up, or to the admission of the photo line-up. We therefore review for plain error. "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) (internal quotation marks and citation omitted).

Assuming *arguendo* the reference by Jones to defendant's photograph as a "mug shot" was error, we cannot conclude this constituted plain error. Defendant, an acquaintance of Jones, was identified by Jones as the perpetrator of the crimes. Furthermore, Mobley testified at length that defendant was his accomplice during the attempted robberies. Based on all the evidence of record, we cannot hold that, absent the reference to the possibility that defendant was once in police custody, that the jury would probably have reached a different result. This assignment of error is overruled.

Defendant next contends, and the State agrees, that the trial court erred in sentencing defendant by not requiring the State to prove defendant's prior criminal convictions by a preponderance of the evidence. *See* N.C. Gen. Stat. § 15A-1340.14(f) (2005). After reviewing the record, we agree and therefore remand for a new sentencing hearing.

No error in the trial, remanded for resentencing.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).