NO. COA05-958

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

STATE OF NORTH CAROLINA

v. Cumberland County
No. 03 CRS 71149

NICARIO L. CHRISTIAN

Appeal by defendant from judgment entered 16 February 2005 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 18 April 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General H. Dean Bowman, for the State.

Miles & Montgomery, by Lisa Miles, for defendant-appellant.

ELMORE, Judge.

Nicario Christian (defendant) was convicted on one count of murder in the first degree arising from his actions in a drive-by shooting on 20 December 2003 that killed Delmetro Bradford. He argues that the trial court erred by failing to instruct the jury on self-defense and admitting irrelevant evidence; he also argues that he received ineffective assistance of counsel. For the reasons stated herein, we determine that defendant received a trial free of prejudicial error and affirm the judgment entered against him.

In the light most favorable to the State, the evidence at trial showed that on 20 December 2003, around 4:00 p.m., Bradford and three of his friends—Martin Melvin, Danny French, and Barry Smith—were walking down Ellis Street in Fayetteville, North Carolina. A burgundy Ford F-150 approached them from behind and passed. The truck was driven by Darius Evans, and in the passenger's seat was defendant. Deonte Branch and Clifton Currie were in the backseat of the truck. After passing the four people on the street, Evans turned around in the road and headed back toward the pedestrians. At this point, Evans testified he recognized defendant and thought he saw him reach for his waistband.

Defendant, as testified to by the passengers in the truck, leaned out the window and up over the roof of the truck, and shot at the young men. At the time of the shooting French had gone into a store, but both Melvin and Smith testified about the shooting. They said that the truck slowed before firing at them and that they each fell to the ground in cover. They testified Bradford did not have a weapon on him, despite perhaps having a reputation for carrying one. The other passengers in the truck testified that defendant just started shooting at Bradford, it was not something any of them had discussed.

Police officers testified to their investigation, and that defendant turned himself in on 24 December 2003. An officer involved with arresting Bradford several times before on drug charges testified that defendant was never carrying a weapon when

he arrested him. The court received medical testimony that Bradford was shot twice, the gunshot wound to his abdomen being fatal. Following this evidence, the jury convicted defendant of first-degree murder and he was sentenced to life without parole. He now appeals.

Defendant first argues that the trial court erred by failing to instruct the jury on the theory of self-defense. Defendant claims that as the truck approached Bradford, Bradford reached toward his waist as if he had a weapon. Defendant further cites evidence that Bradford was "known as someone who would 'bust you' if he had a gun, and was known to carry a gun on occasion." Thus, defendant argues the evidence elicited on cross-examination supported an instruction on self-defense. We disagree.

Our Supreme Court has stated:

> For defendant to be entitled to an instruction on either perfect or imperfect self-defense, the evidence must show that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily harm. . . . In addition, defendant's belief must be 'reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.'

State v. Ross, 338 N.C. 280, 283, 449 S.E.2d 556, 559-60 (1994) (internal citations omitted).

In the instant case, defendant did not testify and offered no evidence in his defense. And while there was very limited evidence introduced that Evans saw Bradford reach for his waist, there was no evidence presented that defendant saw this action or was necessarily aware of Bradford's alleged reputation for carrying a

firearm. There was also no evidence introduced that Bradford was armed when shot. As stated in *Ross*, where the defendant shot an unarmed man in the back who was leaving a fight:

> [d]efendant failed to present evidence to support a finding that he in fact formed a belief that it was necessary to kill the victim in order to protect himself from death or great bodily harm; nor is there evidence that if defendant had formed such a belief, the belief was reasonable under the circumstances.

Id., 449 S.E.2d at 560. Here, the evidence shows that defendant was in a car moving away from the decedent who, from the other side of the road and in the light most favorable to defendant, might have been reaching for a weapon. The record is void of any evidence that suggests a reasonable person would have felt the need to lean out of a moving vehicle and use deadly force in order to avoid serious injury. "Where the defendant fails to present 'some evidence' indicating that he acted in self-defense, he is not entitled to a jury instruction on that defense." *State v. Bryant*, 80 N.C. App. 63, 66, 341 S.E.2d 358, 360, *rev'd on other grounds*, 318 N.C. 632, 350 S.E.2d 358 (1986). As such, we overrule defendant's assignment of error.

Defendant next argues that his counsel's opening statements forecasting evidence of self-defense, followed by the failure to present such evidence, deprived him of his right to the effective assistance of counsel. He further argues this deficiency was compounded when counsel still eluded to the concept in closing, despite the trial court's decision that no instruction would be given.

In order to successfully challenge a conviction on the basis of ineffective assistance of counsel, defendant must demonstrate: 1) that his trial counsel's performance "fell below an objective standard of reasonableness[;]" and 2) that this deficiency in performance was prejudicial to his defense. *State v. Braswell*, 312 N.C. 553, 561-562, 324 S.E.2d 241, 248 (1985). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984).

Defendant contends that *State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987), controls our review. We disagree. There, our Supreme Court determined that counsel's failure to produce evidence as promised in opening statements that the defendant in a rape trial was "physically and psychologically incapable of engaging in sexual acts" was probably prejudicial. *Id.* at 400-01, 358 S.E.2d at 510-11. The Court noted that the trial was one of credibility: the victim stating she was raped in her sleep and the defendant taking the stand and stating the actions were consensual. *Id.* In a trial centered on credibility, it is evident how counsel's promises and inability to maintain a consistent defense likely prejudiced defendant. But here, credibility was not necessarily at the forefront of the trial. A pedestrian was shot from a moving truck and three passengers in the car testified that defendant produced a weapon and shot the victim over the vehicle's roof. Defendant did not contradict this testimony. We are hard pressed

to see a reasonable probability that had defense counsel not eluded to self-defense that the outcome of this case would have been any different.

Defendant next argues that the trial court erred in allowing certain testimony to reach the jury at trial. Specifically, he argues that Branch, a passenger in the truck, testified that some time before the shooting defendant told him the victim broke into defendant's house and he was going to get him for that.

On appeal defendant argues that this testimony was irrelevant and prejudicial under Rule 403. However, that was not the context of defense counsel's objection or the *voir dire* discussion at trial. Defense counsel objected and argued that this statement was rumor; it could not be connected as a statement of defendant; and as rumor there was a lack of foundation, in accord with the statement being highly prejudicial. The trial court found that the statement was attributable to defendant and overruled the objection. "When a defendant makes a specific objection at trial, the defendant cannot contend that the evidence is objectionable on another basis on appeal." *State v. Little*, 126 N.C. App. 262, 266, 484 S.E.2d 835, 838 (1997) (citing *State v. Sherrill*, 99 N.C. App. 540, 543, 393 S.E.2d 352, 354, *disc. review denied*, 327 N.C. 641, 399 S.E.2d 130 (1990)). However, even if we were to address defendant's argument on appeal regarding the relevancy and prejudicial nature of the statement, we could not agree that the statement's admission was an abuse of discretion.

Having reviewed defendant's properly preserved assignments of error and the record before us, we hold that defendant received a trial free from prejudicial error.

No error.

Judges WYNN and LEVINSON concur.

Report per Rule 30(e).