NO. COA06-1637

NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2007

STATE OF NORTH CAROLINA

v. Wake County
No. 05 CRS 106248

FLOYD LEE DUNN, Jr.,
Defendant.

Appeal by defendant from judgment entered 14 July 2006 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 28 August 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert C. Montgomery and Associate Attorney General LaToya B. Powell, for the State.

Janet Moore for defendant-appellant.

BRYANT, Judge.

Floyd Lee Dunn, Jr. (defendant) appeals from a judgment entered 14 July 2006 consistent with a jury verdict finding him guilty of felony possession of a firearm. Defendant was sentenced to a minimum of fifteen months and a maximum of eighteen months imprisonment.

The State's evidence tended to show that on the evening of 17 October 2005, at approximately 9:00 p.m. defendant was with his girlfriend, Marilyn Pulley, at her Raleigh apartment; they had an argument; defendant went outside and fired a gun; defendant was

seen leaving in a white Honda Accord; minutes later, while driving the white Honda Accord, the police apprehended defendant and found a gun in the glove compartment; defendant was uncooperative when officers, utilizing a gunshot residue test, attempted to determine whether he had recently fired a gun; and the shell casings found outside Pulley's apartment were fired from the gun found at the time defendant was apprehended.

This matter was tried at the 12 July 2006 Criminal Session of Wake County Superior Court before the Honorable Carl R. Fox. After the trial court denied defendant's motion to suppress, a jury found defendant guilty of one count of possession of a firearm by a felon. Defendant was sentenced to a term of fifteen to eighteen months imprisonment. Defendant appeals.

Defendant appeals whether the trial court erred by: (I) warning defendant's witness about committing perjury during a suppression hearing; (II) failing to provide a limiting instruction to the jury regarding defendant's prior conviction; and (III) admitting evidence. In addition, defendant contends he (IV) received ineffective assistance of counsel. For the following reasons, we find defendant received a trial free from error.

Preliminarily, we note the State has filed a motion to strike defendant's narrative of closing arguments or, in the alternative, a petition for *writ of certiorari*, submitted pursuant to N.C. R. App. P. Rules 9(c)(1) and 11(c). "A trial court's order settling the record on appeal is final and will not be reviewed on appeal."

Penland v. Harris, 135 N.C. App. 359, 363, 520 S.E.2d 105, 108 (1999) (citation omitted) We note the State's motion to strike defendant's narrative is not properly before us as "[r]eview of an order settling the record on appeal is available, if at all, only by way of *certiorari*." *Id.*

In this case, closing arguments were not recorded. In his proposed record on appeal, defendant, pursuant to North Carolina Appellate Rule 9(c), included a narrative of the closing arguments which were based upon the transcribed events at trial. After several unsuccessful attempts by the parties to settle the record on appeal themselves, the State requested an in-court hearing at which the trial court heard arguments from both parties "by teleconference and for good cause shown." On 29 November 2006, the trial court entered an order, *nunc pro tunc*, indicating "the State's request for an in-court hearing . . . is denied, that counsel for [defendant] shall perfect his appeal pursuant to the Appellate Rules, and that the Court allows the filing of [Defendant's] Narrative Submission separately from the Record on Appeal with the transcript[.]" N.C. R. App. P. Rules 9(c) and 11(c).

> As to unavailable verbatim transcripts, a party has the means to compile a narration of the evidence through a reconstruction of the testimony given. [] N.C. R. App. P. 9(c)(1). Any dispute regarding the accuracy of a submitted narration of the evidence can be resolved by the trial court settling the record on appeal. [] N.C. R. App. P. 11(c). Overall, a record must have the evidence "necessary for an understanding of all errors assigned." N.C. R. App. P. 9(a)(1)(e)[.]

State v. Quick, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006)(citations omitted). In settling the record on appeal, the trial court properly allowed the narrative submission of the closing arguments. We deny the State's petition for *writ of certiorari*. *See State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 612 S.E.2d 148 (2005) (petition of *writ of certiorari* to review settling of record on appeal denied).

I

Defendant argues the trial court erred during Marilyn Pulley's testimony at the suppression hearing by warning her not to commit perjury. Pulley testified that she had placed the gun in the glove compartment of the car driven by defendant after her cousin gave it to her.

> THE COURT: Hold on a minute. Hold on a second. Let me -- let me just warn you of something, okay, Miss Pulley? Because you are under oath. What you are saying here I feel compelled to advise you, since you are under oath and since I have already been advised by the evidence that this gun, that there are bullets indicating from this gun [sic] that were matched to this gun and it's been described as being used in this incident, that testifying -- what you are testifying to is a material fact in this case. And if you are testifying to something -- if you testify in this case under oath to something that turns out to be untruthful, that you could be subject to being indicted for perjury.
>
> THE WITNESS: Okay.
>
> THE COURT: Now let that -- and that's a felony. I want to make you perfectly aware of that before you answer this question about how this gun and when this gun got into the glove box.
>
> THE WITNESS: Okay.

THE COURT: Are you aware of that?

THE WITNESS: Yes.

THE COURT: All right. Now you know that.

Defendant contends the trial court's warnings to Pulley, deprived him of his "rights to due process and the effective presentation of a defense in a fair trial before an impartial tribunal." We disagree.

"[A] judicial warning to a witness about contempt sanctions or perjury prosecutions is not a *per se* due process violation." *State v. Melvin*, 326 N.C. 173, 186, 388 S.E.2d 72, 78 (1990); *see also State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988) (rejecting the defendant's contention that judicial warnings concerning perjury stifled the free presentation of testimony). "[A] trial judge may, if the necessity exists because of some statement or action of the witness, excuse the jurors and, in a judicious manner, caution the witness to testify truthfully, pointing out to him generally the consequences of perjury." *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 636 (1976). "[J]udicial warnings and admonitions to a witness with reference to perjury are not to be issued lightly or impulsively . . . [so as not to] upset the delicate balance of the scales which a judge must hold evenhandedly." *Id.* "Whether judicial or prosecutorial admonitions to defense or prosecution witnesses violate a defendant's right to due process rests ultimately on the facts in each case." *Melvin*, 326 N.C. at 187, 388 S.E.2d at 79. "[T]he reviewing court should examine the circumstances under which a perjury or other similar admonition was

made to a witness, the tenor of the warning given, and its likely effect on the witness's intended testimony." *Id.*

The record here fails to show Pulley's testimony changed in any material way from the time she was warned by the trial court during the suppression hearing until she testified in front of the jury as a defense witness. In each instance, Pulley's testimony was consistent -- she had placed her cousin's gun in the glove compartment of her car the night before defendant was arrested. Unlike the trial court in *Rhodes*, the trial court here never accused Pulley of not telling the truth. Instead, the trial court explained to Pulley that, because of other evidence presented, her testimony on the issue of how the gun appeared in her glove compartment was a "material fact" and that "if" what she testified to in the suppression hearing was later found to be untruthful she would be subject to prosecution for perjury. This warning was reasonable given these circumstances. Further, there is no indication that defendant's trial counsel abandoned any line of questioning or defense as did counsel in *Rhodes*. The one specific question defendant now says his trial counsel asked during the suppression hearing but did not ask during Pulley's direct examination during trial -- whether she had a conversation with defendant concerning the gun -- was a question initially asked *after* the trial court gave its perjury warning to Pulley. Therefore, the trial court did not err in warning Pulley not to commit perjury. *See Lamb*, 321 N.C. at 640, 365 S.E.2d at 603 (distinguishing *Locklear* and *Rhodes* while finding judicial warnings

concerning perjury did not upset the delicate balance of the scales). This assignment of error is overruled.

II

Defendant argues the trial court committed plain error by failing to give the jury a limiting instruction concerning his prior conviction for discharging a firearm into occupied property. We disagree. Because defendant did not request a limiting instruction in this case, he has the burden to show that any error amounted to "plain error." *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135, *cert. denied*, 543 U.S. 1023, 160 L. Ed. 2d 500 (2004). In order to show plain error, a defendant must show there was an error and that it had a probable impact on the jury's verdict. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983). "It is a well recognized rule of procedure that when evidence competent for one purpose only and not for another is offered it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent." *State v. Goodson*, 273 N.C. 128, 129, 159 S.E.2d 310, 311 (1968) (quotation and citation omitted); *State v. Brower*, 289 N.C. 644, 664, 224 S.E.2d 551, 565 (1976) (holding that in the absence of a request, "failure to give a limiting instruction is not error").

The trial court instructed the jury:

> The defendant has been charged with possessing a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt: First, that the defendant was convicted of a felony in

> Wake County Superior Court. The term conviction is defined as final judgment in any case in which felony punishment or imprisonment for a term exceeding one year, as the case may be, is permissible without regard to the plea entered or the sentence imposed. And second, that thereafter the defendant possesses a firearm.

Defendant has not shown the absence of an instruction that defendant's prior conviction could be considered an element of the offense but not evidence of predisposition that caused the jury to find defendant guilty. *See State v. Alexander*, 16 N.C. App. 95, 100, 191 S.E.2d 395, 398 (holding that absent a request, the trial court's failure to give a limiting instruction as to the admission of evidence of prior convictions was not error), *cert. denied*, 282 N.C. 305, 192 S.E.2d 195 (1972). This assignment of error is overruled.

III

Defendant argues the trial court committed plain error by allowing Catina Burnette to testify that she saw "gunfire smoke" when she saw defendant's hand up the air. We disagree.

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 602, a witness may testify to any relevant matter about which he or she has personal knowledge. *State v. Anthony*, 354 N.C. 372, 411, 555 S.E.2d 557, 583 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). Pursuant to N.C. Gen. Stat. § 8C-1, Rule 701, "a lay witness may testify as to his or her opinion, provided that the opinion is rationally based upon his or her perception and is helpful to the jury's understanding of the testimony." *Id.* at 411, 555 S.E.2d at 583. "Personal knowledge is not an absolute but may consist of

what a witness thinks he knows from personal perception." *State v. Wright*, 151 N.C. App. 493, 495, 566 S.E.2d 151, 153 (2002) (quotation marks omitted). "[O]pinion evidence is always admissible when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences." *State v. Smith*, 300 N.C. 71, 74, 265 S.E.2d 164, 167 (1980).

Catina Burnette testified she heard defendant and his girlfriend arguing outside, heard two loud sounds like gunshots and observed "gunfire smoke." Defendant initially objected to "the State's characterization of the gunfire smoke" because the witness had not testified "as to gunfire smoke." Even though the trial court sustained the objection and struck the State's characterization, the transcript plainly shows that the witness had previously referred to what she saw as "gunfire smoke." After the objection was sustained, the State asked whether the witness had said "that it was like gunfire smoke." The witness answered affirmatively. Defendant raised no further objection when the State elicited additional testimony from the witness that she saw "gunfire smoke." Moreover, Burnette had personal knowledge that she saw smoke and her reference to it as "gunfire smoke" was rationally based upon her perception. *See State v. Mitchell*, 342 N.C. 797, 808, 467 S.E.2d 416, 422 (1996) (holding "testimony was not mere speculation, but was based on her personal observation" and "helpful to a clear understanding of a fact in issue"). The

trial court did not commit error by admitting Burnette's testimony. This assignment of error is overruled.

IV

Defendant contends he received ineffective assistance of counsel and was "prejudiced at trial and on appeal by his lawyer's acts and omissions." We disagree.

"[I]neffective assistance of counsel claims 'brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.'" *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (quoting *State v. Fair*, 354 N.C. 131, 166-67, 557 S.E.2d 500, 524-25 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002)). Defendant must show that counsel's performance was deficient such that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 247-48 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). Defendant must also show the deficient performance prejudiced the defense such that counsel's errors were so serious as to deprive defendant of a fair trial. *Id.*

Defendant raises five claims of ineffective assistance of counsel. However, in each claim, he fails to show how counsel's performance prejudiced defendant and deprived him of a fair trial. "[I]f a reviewing court can determine at the outset that there is

no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. From our review of the record, we overrule defendant's ineffective assistance of counsel claims.

No error.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).