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NO. COA06-202

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v.
DARRYL MURRAY,
Defendant.

Mecklenburg County
Nos. 04 CRS 73343
04 CRS 207322

Appeal by defendant from a judgment entered 20 April 2005 by Judge F. Donald Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Roberta A. Ouellette, for the State.

D. Tucker Charns for defendant-appellant.

BRYANT, Judge.

Defendant Darryl Murray was charged with assault with a deadly weapon inflicting serious injury, possession of a firearm by a felon and having attained habitual felon status. The State's evidence tended to show that on the night of 21 September 2003, Antonio Goodman (Goodman) went to the motel room of Antonia Barber after receiving a telephone call from her. The door to the motel room was open when Goodman arrived. Goodman saw Barber standing next to the bed and defendant standing next to a dresser setting a gun down. As Goodman walked into the room, defendant fired a shot at Goodman's head. Goodman tried to grab the gun and was shot in

the face and in the back. At the close of the State's evidence, defendant moved to dismiss the charges. The trial court dismissed the assault charge, but denied the motion as to the possession charge.

Defendant testified that he shot Goodman in self-defense. Defendant admitted that he had been convicted of possession with intent to sell and deliver cocaine in 1995 and knew that he was not allowed to possess a gun. Defendant's co-workers Douglas Lea, Kenny Rice and Tim Ballard testified on defendant's behalf. Lea, who was the Human Resources Director at defendant's place of work, testified that defendant noted that he had been convicted of a crime on his employment application and that a criminal background check "revealed what [defendant] was charged with in the past." Lea further testified that defendant was an excellent employee, trustworthy and a good person. Over defendant's general objection, the trial court permitted the prosecutor to ask Lea about the contents of the criminal background report on cross-examination.

The trial court submitted the charge of possession of a firearm by a felon to the jury. After deliberations, the jury found defendant guilty as charged. Defendant subsequently admitted his habitual felon status. The trial court sentenced defendant to 92 to 120 months imprisonment and ordered defendant to pay restitution of \$8,000 to Goodman. Defendant appeals.

I

Defendant first contends the trial court erred in allowing the

State to cross-examine Lea about defendant's prior criminal convictions contained in the criminal background check. During direct examination, defense counsel elicited the following testimony from Lea:

[DEFENSE COUNSEL]: Do you make employees, the prospective employees fill out applications?

[MR. LEA]: Yes we do. Applications, employment backgrounds, and drug screens, yes, sir.

[DEFENSE COUNSEL]: Did [defendant] fill out an application in that regard?

[MR. LEA]: Yes, he did.

[DEFENSE COUNSEL]: Is one of the questions on the application whether or not you've been convicted of a prior crime . . . ?

[MR. LEA]: That is correct, it is on the application.

[DEFENSE COUNSEL]: Did [defendant] answer that question?

[MR. LEA]: Yes, sir, he did.

[DEFENSE COUNSEL]: How did he answer that question, if you know?

[MR. LEA]: That he did have a background, and the background revealed what he was charged with in the past.

On cross-examination, the prosecutor asked Lea "do you know what criminal past he cited in that application?" Defense counsel objected and the trial court overruled the objection. Lea responded, "Yes, sir, I do. I've looked at the criminal background report." The prosecutor subsequently asked Lea if the report showed "a sale or delivery of cocaine from 1994?" and "a possession of cocaine from 1993?" to which Lea responded affirmatively. When

the prosecutor asked, "Did you uncover a larceny of a breaking and entering conviction from 1994 from Mecklenburg County?" the following occurred:

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[MR. LEA]: May I refer to the records, please?

THE COURT: Yes, sir.

[THE PROSECUTOR]: Yes, please.

[MR. LEA]: We have September 15th, 1995, felon possession with intent to sell and distribute cocaine. Guilty jail, 8 to 10 months. 12/2/93, sale and delivery of cocaine, one count. Department of Corrections, 19 years. 10/23, breaking and entering, jail 9 years.

Defendant asserts it was error for the State to impeach defendant through Lea's testimony because Lea lacked personal knowledge of the matters. Rule 602 of the North Carolina Rules of Evidence states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." N.C. Gen. Stat. § 8C-1, Rule 602 (2005). However, "evidence which is otherwise inadmissible is admissible to explain or rebut evidence introduced by defendant." *State v. O'Hanlan*, 153 N.C. App. 546, 561, 570 S.E.2d 751, 761 (2002) (citation omitted), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397-98 (2004). Further, "where a defendant examines a witness so as to raise an inference favorable to defendant, which is contrary to the facts, defendant opens the door to the introduction of the State's

rebuttal or explanatory evidence about the matter." *Id.*

The trial court did not err in admitting evidence of defendant's prior convictions. Defendant opened the door by soliciting vague testimony of a defense witness that defendant had been charged with something in the past. The details of the criminal background report were admitted only after defendant "opened the door" during direct examination of the defense witness. This assignment of error is overruled.

II

Defendant also contends the trial court erred in ordering him to pay \$8,000 in restitution to Antonio Goodman because the trial court dismissed the assault case in which Goodman was injured. Section 15A-1340.34 of the North Carolina General Statutes authorizes the trial court to order restitution for "any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(b) (2005).

Here, the trial court dismissed the assault charge and defendant was convicted of possession of a handgun by a felon and pled guilty to habitual felon status. The State concedes that Goodman was not the victim of the possession of a firearm offense, and therefore, the trial court should not have ordered defendant to make restitution to Goodman. The judgment is therefore vacated and the case remanded for resentencing.

No error. Judgment and commitment vacated and case remanded for resentencing.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).