NO. COA06-206

NORTH CAROLINA COURT OF APPEALS

Filed: 21 November 2006

STATE OF NORTH CAROLINA

v. New Hanover County
No. 04 CRS 051773

HERBERT LINWOOD CLARK, JR.

Appeal by defendant from judgments entered 6 October 2005 by Judge John W. Smith in New Hanover County Superior Court. Heard in the Court of Appeals 30 October 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

TYSON, Judge.

Herbert Linwood Clark, Jr. ("defendant") appeals from judgments entered after a jury found him to be guilty of attempted first-degree murder, first-degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury, and assault on a female. We find no error.

I. Background

In the Summer of 2003, defendant and Rhonda Allen ("the victim") were dating. Around November 2003, the victim terminated the relationship because defendant was unemployed. After the victim ceased the relationship, defendant entered the victim's

workplace and stated, "you know I was going to do something to you or hurt you but you got two kids and I'm not going to do that." The victim told defendant not to visit her at her workplace again or she would obtain a restraining order.

On the night of 30 January 2004, the victim and her two children were inside their home. The victim heard thumps at the door. The victim walked to the living room and heard another thump. Defendant kicked open the door, stood in the doorway, and stated, "I got a surprise for you." Defendant stated, "[w]ell, I already damaged the door so I need to go ahead and do what I came to do," and pointed a gun at the victim.

Defendant and the victim struggled over the gun for approximately "five or ten minutes." She convinced defendant to put the gun down. Defendant and the victim talked for another five or ten minutes, and she walked him toward the door. The victim asked defendant to leave, as the victim's mother, Rebecca McMillan ("McMillan"), drove her car up the driveway. Defendant pointed the gun at the victim's head and said, "[k]iss your family goodbye."

Defendant and the victim again struggled over the gun. The gun fired and a bullet entered the carpet. As McMillan walked through the front door, defendant and the victim continued to struggle over the gun in the kitchen. The gun fired and a bullet hit the victim in the chest. McMillan grabbed the victim and told her to run. The victim ran out of the house and collapsed on her neighbor's front lawn.

McMillan grabbed defendant and struggled with him into another room. Defendant fell on top of McMillan. Defendant stated, "[w]ell, if I can't have [the victim], I'll shoot myself" or "if I can't kill [the victim], I'll kill myself." Defendant shot himself in the head.

The police responded and emergency medical services transported the victim and defendant to the hospital. The victim suffered severe wounds in her chest, a bruise to the lung, and a broken hand. On 12 April 2004, a grand jury indicted defendant on: (1) attempted first-degree murder; (2) first-degree burglary; (3) assault with a deadly weapon with intent to kill inflicting serious injury; and (4) assault on a female.

At trial, defendant testified and corroborated the above facts. A jury returned verdicts of guilty on all charges. The trial court sentenced defendant, as a prior record level IV offender, to three consecutive terms for: attempted first-degree murder, 251 months minimum, 311 months maximum; first-degree burglary, 117 months minimum, 150 months maximum; assault with a deadly weapon with intent to kill inflicting serious injury, 133 months minimum, 169 months maximum; and one concurrent term of seventy-five days for assault on a female. Defendant appeals.

II. Issues

Defendant argues: (1) the State's cross-examination of him violated the North Carolina Rules of Evidence when the prosecutor inquired about his prior convictions; (2) the trial court erred in failing to arrest judgment for his conviction for assault with a

deadly weapon with intent to kill inflicting serious injury, because he was convicted of attempted first-degree murder based upon the same facts; and (3) the trial court erred in failing to arrest judgment for his conviction for assault on a female, because defendant was convicted of attempted first-degree murder based upon the same facts.

III. Defendant's Prior Convictions

Defendant argues the State's cross-examination of him violated the North Carolina Rules of Evidence when the prosecutor questioned him about his prior convictions. We disagree.

A. Standard of Review

Under N.C. Gen. Stat. § 15A-1443(a) (2005):

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States 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. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

"[T]he burden is on the appellant not only to show error but also to show that he suffered prejudice as a result of the error." *State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981). "The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction[.]" *Id.*

B. Impeachment Testimony

Under N.C. Gen. Stat. § 8C-1, Rule 609(a) (2005), "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." The permissible scope of inquiry into prior convictions for impeachment purposes is restricted, however, to the name of the crime, the time and place of the conviction, and the punishment imposed. *State v. Finch*, 293 N.C. 132, 141, 235 S.E.2d 819, 825 (1977).

Details of prior convictions are admissible to "correct inaccuracies or misleading omissions in the defendant's testimony or to dispel favorable inferences arising therefrom." *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993).

> For example, when the defendant "opens the door" by misstating his criminal record or the facts of the crimes or actions, or when he has used his criminal record to create an inference favorable to himself, the prosecutor is free to cross-examine him about details of those prior crimes or actions.

Id.; *see State v. Small*, 301 N.C. 407, 436, 272 S.E.2d 128, 145-46 (1980) ("Evidence which might not otherwise be admissible against a defendant may become admissible to explain or rebut other evidence put in by the defendant himself.").

Defense counsel asked defendant the following questions during direct examination:

> Defense: [Y]ou mentioned about having been incarcerated. Can you tell me what you have been convicted of during the last 10 years that carries more than 60 days in jail?

> Defendant: Mostly a ticket, a driving ticket with a sports car, a Mazda RX-6.
>
> . . . .
>
> Defense: [Defendant], were you convicted in 1996 for first degree burglary?
>
> Defendant: No sir. . . .

Defendant did not testify on direct examination to any other prior convictions. During defendant's cross-examination, the transcript shows the following colloquy between the prosecutor and defendant:

> Prosecutor: All right. Now, your record is a little more extensive than just a conviction for burglary in '98, isn't that correct, or whatever it was? You've also been convicted of breaking and entering in 1995, were you not?
>
> Defendant: Yes, sir.
>
> . . . .
>
> Prosecutor: But that was with a woman, that was a woman's house that had a baby?
>
> Defense: Objection.
>
> Court: Sustained.
>
> . . . .
>
> Prosecutor: And they dismissed the felony restraint and assault with a deadly weapon on that?
>
> Defense: Objection.
>
> Court: Sustained.
>
> Defense: Move to strike.
>
> Court: Allowed.
>
> Prosecutor: You also got convicted of burglary that was a 70-year-old woman; is that correct?
>
> Defense: Objection to the facts.

> Court: Sustained.
>
> . . . .
>
> Prosecutor: And the felony you intended to commit on that occasion was a sexual assault; is that correct?
>
> Defense: Objection.
>
> Court: Overruled.
>
> Prosecutor: You were convicted of burglary for the purposes of - - - you broke in at night for the purpose of committing a felony and that was a sexual assault, was it not?
>
> Defendant: No, sir.
>
> Prosecutor: Well, that's what you were charged with.
>
> Defendant: That's what I was charged with.
>
> Prosecutor: And you plea bargained and it was dismissed to your plea to burglary; is that correct?
>
> Defendant: I understand, yes, sir.
>
> Prosecutor: You were also convicted in 1998 of assault on a female; isn't that correct?
>
> Defendant: Yes, sir.

During direct examination, defendant denied his prior conviction of burglary and failed to testify to or disclose any of his other prior convictions. The prosecutor's cross-examination of defendant elicited his prior convictions for breaking and entering in 1995, burglary, and assault on a female in 1998. Defendant's testimony on direct examination could have tended to mislead the jury about the gravity and nature of his prior convictions. The prosecutor's questions contradicted defendant's misstatements of and omissions from his prior criminal record. The trial court

properly permitted the State's cross-examination under the restrictions set forth in *Lynch*.

Defendant's testimony is also permissible because the trial court gave the following jury instruction at the beginning of the trial:

> In the course of receiving the evidence, it may be incumbent upon the lawyers to make objections. So you may hear one of the attorneys say "Objection" and I'll respond to that in one of two ways. I'll either say "Overruled" or "Sustained." If I say the objection is sustained, it means that you should not consider either the question or any answer. If an answer has started, it should not be considered by you in any way. If I say the objection is overruled, all that means is that the evidence is proper for you to hear and consider.

"These general instructions, given at the beginning of the trial, are sufficient to prevent any prejudicial effect produced by the failure to strike the improper testimony." *State v. Strickland*, 153 N.C. App. 581, 591, 570 S.E.2d 898, 905 (2002) (citing *State v. Vines*, 105 N.C. App. 147, 153, 412 S.E.2d 156, 160-61 (1992)), *cert. denied*, 357 N.C. 65, ___ S.E.2d ___ (2003).

Defendant's testimony is admissible either because the testimony corrected his misstatements and omissions on direct examination or the trial court gave the quoted general instruction. Defendant has failed to show "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." N.C. Gen. Stat. § 15A-1443. This assignment of error is overruled.

IV. Same Facts for Multiple Convictions

Defendant argues the trial court erred in failing to arrest judgment for his convictions for assault with a deadly weapon with intent to kill inflicting serious injury and assault on a female. Defendant contends he was convicted of attempted first-degree murder based upon the same facts and was subjected to double jeopardy for convictions of attempted murder and the two assaults on the victim. We disagree.

The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see* N.C. Const. art. I, § 19. The Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969); *State v. Ballenger*, 123 N.C. App. 179, 180, 472 S.E.2d 572, 572-73 (1996), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84 (1997). This Court has recognized that:

> [E]ven where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

State v. Murray, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988).

A. Attempted First-Degree Murder and Assault with a Deadly Weapon

The elements of attempted first-degree murder are: (1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing. N.C. Gen. Stat. § 14-17 (2005); *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000).

The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault; (2) with the use of a deadly weapon; (3) with an intent to kill; and (4) inflicting serious injury, not resulting in death. N.C. Gen. Stat. § 14-32(a) (2005); *Peoples*, 141 N.C. App. at 117, 539 S.E.2d at 28.

In *State v. Tirado*, the defendants argued that the trial court erred by submitting to the jury charges for both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury and by imposing consecutive sentences for these offenses in violation of their State and Federal constitutional rights to be free from double jeopardy. 358 N.C. 551, 578-79, 559 S.E.2d 515, 534 (2004). Our Supreme Court affirmed both convictions and stated, "assault with a deadly weapon with intent to kill inflicting serious injury requires proof of the use of a deadly weapon, as well as proof of serious injury, neither

of which are elements of attempted first-degree murder." *Id.* at 579, 599 S.E.2d at 534. "Similarly, attempted first-degree murder includes premeditation and deliberation, which are not elements of assault with a deadly weapon with intent to kill inflicting serious injury." *Id.* "Because each offense contains at least one element not included in the other, defendants have not been subjected to double jeopardy." *Id.* This assignment of error is overruled.

B. Attempted First-Degree Murder and Assault on a Female

As noted above, to convict a defendant for attempted first-degree murder the State must prove: (1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing. N.C. Gen. Stat. § 14-17; *Peoples*, 141 N.C. App. at 117, 539 S.E.2d at 28.

The elements the State must prove to convict a defendant of an assault on a female are: (1) an assault; (2) on a female; and (3) by a male person. N.C. Gen. Stat. § 14-33(c)(2) (2005); *State v. Craig*, 35 N.C. App. 547, 549-50, 241 S.E.2d 704, 705 (1978).

Different elements are required for attempted first-degree murder than for assault on a female. The State is not required to prove the attempted first-degree murder was perpetrated on a female by a male person. Different elements must be proved to convict a defendant of each of these crimes. Double jeopardy does not bar defendant's convictions for these crimes. This assignment of error is overruled.

V. Conclusion

The State's cross-examination of defendant regarding his prior convictions to cure defendant's misstatements and omissions of his prior convictions during direct testimony did not violate defendant's right to a fair trial. The State was required to prove separate elements on each crime defendant was convicted of committing. Double jeopardy does not bar any of these convictions. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued.

No Error.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).