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NO. COA12-346
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

STATE OF NORTH CAROLINA

v.

JAMES LESTER VASQUEZ,
and JIMMY DEAN LOCKLEAR,
Defendants.

Robeson County
Nos. 09 CRS 55921 & 55922

Appeal by Defendants from judgments entered 6 April 2011 by Judge Claire V. Hill in Superior Court, Robeson County. Heard in the Court of Appeals 11 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell and Special Deputy Attorney General Dahr Joseph Tanoury, for the State.

M. Alexander Charns for Defendant James Lester Vasquez; Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for Defendant Jimmy Dean Locklear.

McGEE, Judge.

Defendant James Lester Vasquez (Vasquez) and Defendant Jimmy Dean Locklear (Locklear) (together, Defendants) were convicted of three felonies related to the shooting of James Deese (Deese) on 5 August 2009. According to testimony at trial, at the time the shooting occurred, Vasquez and Deese had

been friends for approximately ten years. Deese also knew Locklear prior to 5 August 2009.

Deese testified that on 5 August 2009, at about 1:00 p.m., he was parked at the car wash of a convenience store (the store) when he saw Defendants pull into the parking lot of the store. Locklear was driving and Vasquez was sitting in the passenger seat. Locklear was driving a PT Cruiser. Locklear parked near Deese, and Vasquez made eye contact with Deese. Vasquez got out of the PT Cruiser, looked at Deese, pointed his finger at Deese, and shook his head before entering the store. Deese believed that Vasquez was threatening him. Vasquez came out of the store and got back into the PT Cruiser. Locklear then drove the PT Cruiser up beside Deese's car and parked. Vasquez and Deese spoke through the open windows of the two vehicles. Vasquez told Deese that Vasquez had heard Deese had been hired to kill Vasquez. Deese testified that Vasquez stated to Deese: "I'm going to start killing people that is talking about me[.]"

Later that evening, Deese was driving past the Spirit Store on Highway 711 when he saw the PT Cruiser in the Spirit Store parking lot. Vasquez was standing outside on the passenger side of the PT Cruiser, and Locklear was in the driver's seat. Shortly thereafter, Deese noticed that the PT Cruiser was travelling on Highway 711 and was approaching him from behind.

Deese turned onto a perpendicular street, and the PT Cruiser did not follow. Deese stopped at a friend's house for about five minutes, and then drove back the way he had come. At the stop sign at Highway 711, Deese saw the PT Cruiser pass by on Highway 711, in front of his vehicle. The headlights of Deese's vehicle shone into the PT Cruiser, and Deese could see Locklear in the driver's seat and Vasquez in the passenger seat.

Deese turned left onto Highway 711 and looked into his rearview mirror. Deese saw the PT Cruiser turn around and begin to follow him. Deese then noticed that the PT Cruiser was approaching him from behind at a high speed. The PT Cruiser came within ten to fifteen feet of Deese's rear bumper. Deese then saw the PT Cruiser turn sharply to the left, heard gunshots, and saw what appeared to be muzzle flashes coming from the PT Cruiser. Deese was hit by gunfire, including bullets that impacted his right elbow, shoulder, and the back of his head. One of his tires was blown out by the gunfire, but Deese attempted to drive away from the PT Cruiser. Deese looked in his rearview mirror and saw the PT Cruiser turn around and go in the opposite direction.

Deese began to feel dizzy and his vision was blurred. Deese stopped his vehicle across from a mobile home park and got out of his vehicle. Deese remembered that someone came to help

him and that person called 911. Others came to assist, and Deese was taken to the hospital. Deese sustained serious injuries, but survived the shooting. This incident occurred at approximately 10:00 p.m. on 5 August 2009.

Dustin Snarski (Snarski) was driving along Highway 711 between 10:00 p.m. and 10:20 p.m. on 5 August 2009 when he noticed a man lying in the middle of the road. Snarski stopped, and called 911. The 911 operator asked Snarski to try and determine what had happened. Snarski then asked Deese what happened and Deese told Snarski that: "James Lester had shot him [Deese]." Snarski relayed this information to the 911 operator.

Deputy Michael Ellis (Deputy Ellis) of the Robeson County Sheriff's Office was the first uniformed officer to arrive at the scene. Deese told Deputy Ellis what had happened, and identified Vasquez as the person who had shot him. Detective James Obershea (Detective Obershea) of the Robeson County Sheriff's Office was the lead investigator in the shooting. Detective Obershea took a statement from Deese several hours after the shooting. Deese told Detective Obershea about seeing Vasquez at the store earlier in the day. Deese told him about the threat Vasquez had made earlier, and that Locklear was driving the PT Cruiser. Deese also told Detective Obershea about the shooting.

Detective Obershea located the PT Cruiser the day after the shooting, and Locklear was driving it. Locklear told Detective Obershea that he and Vasquez had been driving around in the PT Cruiser the previous night, but that they had not shot at Deese. Detective Obershea conducted a video-taped interview with Vasquez on 20 August 2009. At the time of the interview, Vasquez was in jail on unrelated charges. Vasquez not only denied shooting Deese, but also denied having been in the PT Cruiser at the time of the shooting.

Vasquez testified at trial. He testified that he knew Deese, and that he had heard that Deese had been paid to kill him. Vasquez admitted to having discussed this with Deese in the parking lot of the store on the day of the shooting. Vasquez also confirmed that he was a passenger in the PT Cruiser on that day, and that Locklear was driving. Vasquez further testified that he and Locklear were at the Spirit Store and on Highway 711 at some point that night, but that Locklear had dropped him at his home around the same time Deese had been shot. Vasquez testified that he did not shoot Deese, and did not know Deese had been shot until days later.

Locklear also testified at trial. He denied having had anything to do with the shooting. Locklear did admit that his trial testimony concerning his whereabouts at the time of the

shooting conflicted with the statement he had given to Detective Obershea. Locklear's testimony also conflicted with his earlier statement to Detective Obershea that he left the Spirit Store with a drug addict named Dustin Steen (Steen), and that Vasquez was not with him at that time. At trial, Locklear could not explain how, just a day after the shooting, he could have forgotten that Vasquez was with him. Vasquez testified that Steen had been with him and Locklear during part of the night when the shooting occurred. When Vasquez was asked why his story and Locklear's story concerning the events of that night were different, Vasquez said: "I can't explain it."

While Vasquez was in jail, an ex-girlfriend, Monica Scott (Scott), visited Vasquez and, at trial, was asked the following:

> Q All right. And did you recall asking Mr. Vasquez in the course of [your jail visit with Vasquez] if he, in fact, had shot Mr. Deese?
>
> A Yes.
>
> Q Tell us what [Vasquez's] reaction was?
>
> A He just nodded.
>
> Q Nodded what?
>
> A His head.
>
> Q And did you further tell him your reaction to that and indicate some displeasure or upset with that?
>
> A I just told him he lied to me.

Scott's conversation at the jail was recorded, and that recording was played at trial. Scott testified that, in response to her asking Defendant if he had shot Deese, Vasquez nodded his head just before he said on the tape, "I ain't gonna lie." Scott testified that Vasquez had originally told her he did not shoot Deese; then, in response to her question concerning whether he did shoot Deese, Vasquez nodded, said he was not going to lie, and told Scott there was a reason for why he shot Deese. Scott then testified that Vasquez changed his story again, and claimed that he had not shot Deese.

Vasquez called Steen from jail, and that conversation was played for the jury. The State questioned Vasquez about that conversation, as follows:

> Q And in that call--and this is the first call, you had two, basically a continuation of the same so you could go beyond ten minutes; right? You asked him not to come to court. In fact, you heard it, you were pretty insistent: don't come to court.
>
> A Yes, sir.
>
> Q All right. And at the time you said that, you knew that [Steen] had been in the car with you the night of the shooting, with you and Jimmy Dean Locklear, during a portion of that evening; correct?
>
> A Yes, sir, that's correct.
>
> Q And [Steen] could have cleared up what happened as far as you recall just by coming

and telling the truth, since you said you were not guilty.

A Yes, sir.

Q All right. Yet, you asked him not to come to court. In fact, you asked him several times not to come to court.

A Yes, sir.

Q Okay.

A Well, I didn't say not to come to court. I said, you know, he didn't have to or, you know, something like that.

Q Well, you are saying now that you were not telling him don't come to court, they can't do anything to you?

A Yes, sir, I recall saying that.

Q Okay. And you didn't repeat that? In fact, when he was--do you recall him saying he was only sticking around to help you, you told him not to stay around for that.

A Well, when he said sticking around to help me, I said he was against me to hurt me.

Q That's right. You said we would try to get him to help prosecute somebody. Now, you didn't have any idea at the time that he could just ignore a subpoena and nobody would do anything to him, did you? You knew he would get in trouble, didn't you?

A No, sir, I didn't.

Q All right. And you recall saying, "If I'm going to court for assault in Pembroke and the witness that says I done it doesn't show up, what are they going to do? They're going to throw the court case out of court." Right?

> A Yes, sir.
>
> Q Now, you were saying that in discussing with [Steen] whether or not he would show up, didn't you?
>
> A More or less, yes, sir.
>
> Q Okay. So, you really were telling him you didn't need him to come to court, you didn't want him to come to court; correct?
>
> A Yes, sir.

The jury found both Defendants guilty of assault with a deadly weapon with intent to kill inflicting serious injury, guilty of discharging a weapon into an occupied vehicle in operation inflicting serious bodily injury, and guilty of felony conspiracy to discharge a weapon into an occupied vehicle in operation inflicting serious bodily injury. Defendants appeal.

I.

Vasquez brings forth four issues on appeal, while Locklear brings forth three issues on appeal. Three of the four issues brought forth by Vasquez are the same as the three issues brought forth by Locklear. They are whether: (1) the trial court committed plain error by not instructing the jury on certain lesser-included offenses, (2) the trial court committed plain error by instructing the jury on flight when such an instruction was not supported by the evidence, and (3) Defendants' attorneys were ineffective. Vasquez's fourth issue

is whether the trial court committed plain error by allowing the State to mention multiple times that, at the time Vasquez was arrested on the matter in the present case, he had been in jail on an "unrelated charge[.]"

II.

Defendants' first two arguments involve claims that the trial court committed plain error.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4). In order to prove plain error,

> a defendant must establish prejudice that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." *[S]ee also Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be "applied cautiously and only in the exceptional case," the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]"

State v. Lawrence, __ N.C. __, __, 723 S.E.2d 326, 334 (2012) (citations omitted).

III.

The trial court read aloud its intended instruction for assault with a deadly weapon with intent to kill inflicting serious injury. The trial court then asked:

> Any objection from the State or defense with regards to those two charges?
>
> MR. BERK [prosecutor]: No, none from the State. I would ask if the defense is requesting in any of these charges any lesser included offense.
>
> THE COURT: Mr. Bullard, Mr. Ransom?
>
> MR. BULLARD [Vasquez's attorney]: Your Honor, I'm not asking for a lesser included.
>
> MR. RANSOM [Locklear's attorney]: No, Your Honor, we are not as well.

Defendants now argue that the trial court should have ignored the preferences they stated at trial and should have instructed on certain lesser included offenses. "If the State's evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than defendant's denial that he committed the offense, defendant is not entitled to an instruction on the lesser offense." *State v. Smith*, 351 N.C. 251, 267-68, 524 S.E.2d 28, 40 (2000) (citation omitted). We hold that the State presented sufficient evidence to prove the elements of assault with a deadly weapon with intent to kill

inflicting serious injury. Defendants did not argue that they were involved in a lesser offense; they denied having been involved at all. Instruction on any lesser included offenses was not required.

Even assuming *arguendo* that the trial court erred in honoring Defendants' requests at trial, Defendants' arguments still fail. Because Defendants did not request these instructions at trial, and did not object when the instructions were not given, Defendants must prove that failure to instruct on the lesser included offenses rises to the level of plain error.

As stated in the facts above, and in light of the overwhelming evidence presented at trial that supported Defendants' convictions for assault with a deadly weapon inflicting serious injury, we hold that, even if the jury had been instructed on any lesser included offenses, Defendants have failed to prove that the "jury probably would have reached a different verdict[.]" *Lawrence*, __ N.C. at __, 723 S.E.2d at 334 (citation omitted). This argument is without merit.

IV.

Defendants next argue that the trial court committed plain error by instructing the jury on flight. The jury was instructed as follows:

> The State contends and . . . [D]efendant denies that . . . [D]efendant fled. Evidence of flight may be considered by you, together with all other facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or a show of consciousness of guilt. However, proof of this circumstances is not sufficient in itself to establish . . . [D]efendant's guilt.

"[O]ur courts have long held that a trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.'" *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (citation omitted). Defendants argue that the State failed to present any evidence that Defendants fled after commission of the crime.

On the facts of the present case, the flight instruction, even if erroneously given, could not have prejudiced Defendants. At trial, the State contended that Defendants followed Deese on Highway 711, and that Vasquez shot Deese as Deese was driving away. Defendants argued that they were not present at the shooting. Had the jury believed Defendants, it could not have found that Defendants fled because the jury would have had to believe that Defendants were not at the scene. If the jury believed that Defendants did flee, then it believed that Defendants were at the scene and were responsible for the

shooting. Whether or not Defendants fled from the scene after shooting Deese was not material on these facts in showing an admission of, or consciousness of, guilt. Defendants fail to prove plain error. This argument is without merit.

V.

Vasquez argues that the trial court committed plain error by allowing testimony and statements of the prosecutor that indicated Vasquez was in jail on an unrelated charge when he was first questioned by police in this matter. We disagree.

Vasquez points to four instances at trial where a witness indicated that Vasquez had been incarcerated on another charge when he was arrested for the shooting of Deese, and two instances where the State mentioned this fact. Vasquez never objected to any of these remarks; thus, Vasquez never gave the trial court the opportunity to make a ruling as to whether these remarks were improper and, if so, the opportunity to instruct the jury to disregard the remarks. Vasquez now argues that the trial court should have intervened *sua sponte*, and that failure to do so constituted plain error.

Initially, we note that though Vasquez acknowledges that plain error is the proper standard of review, Vasquez does not specifically argue that, absent the statements indicating Vasquez was incarcerated on an unrelated charge, the jury would

have probably reached a different outcome. *Lawrence*, __ N.C. at __, 723 S.E.2d at 334. It is Vasquez's duty to prove plain error on appeal, and he has failed to meet his burden. Even assuming *arguendo* that the statements constituted error, in light of the overwhelming evidence of Vasquez's guilt, we hold that there is no probability that, absent the statements, a different verdict would have been reached. This argument is without merit.

VI.

Defendants both argue that their attorneys were ineffective for failing to request instructions on lesser included offenses and for failing to object to the flight instruction. We disagree.

For Defendants to establish ineffective assistance of counsel, Defendants must prove not only that their attorneys were ineffective, but that Defendants were prejudiced by this ineffectiveness. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006). "Generally, to establish prejudice, a 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citations and quotation marks omitted).

We hold that there is no reasonable probability that the result of the trial would have been different had the trial court instructed the jury as Defendants argue on appeal. Defendants have failed to prove prejudice, even assuming *arguendo* Defendants' counsel committed unprofessional errors. *Id.* This argument is without merit.

No prejudicial error.

Judges BEASLEY and THIGPEN concur.

Report per Rule 30(e).