

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-107
NORTH CAROLINA COURT OF APPEALS

Filed: 17 September 2013

STATE OF NORTH CAROLINA

v.

Wake County
No. 11 CRS 209117

TYQUON DEVOETA MEGGETT

Appeal by defendant from judgment entered 17 April 2012 by Judge James E. Hardin, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

CALABRIA, Judge.

Tyquon Devoeta Meggett ("defendant") appeals from a judgment entered upon jury verdicts finding him guilty of attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). We find no error.

I. Background

At approximately 1:00 a.m. on 21 April 2011, Rashaad McKnight ("Rashaad") and his brother Devyonte McKnight ("Devyonte") were walking to their home in Raleigh, North Carolina. While they were walking, they noticed a passing silver four-door automobile. Devyonte recognized defendant, who he knew had been involved in a previous altercation with Rashaad, as a passenger in the car. Devyonte concealed himself in the bushes, while Rashaad continued to walk.

Defendant and another individual exited their vehicle and approached Rashaad. Defendant pulled out a black 9 millimeter and shot Rashaad multiple times, including in his arm and lower back. A final shot struck the ground directly in front of Rashaad's face. Defendant and the other individual then fled the scene.

Rashaad was transported to Wake Medical Center for treatment. At the hospital, Rashaad was interviewed by, *inter alios*, Officer M.G. Cooper ("Officer Cooper") of the Raleigh Police Department's ("RPD") gang suppression unit. Rashaad provided Officer Cooper with a description of the shooter and indicated that he had previously been incarcerated with him. However, Rashaad did not know the shooter's name.

Based upon Rashaad's description, Officer Cooper concluded that defendant may have been the shooter. RPD Officer P.J. Hodge ("Officer Hodge"), who was not involved in the case, was directed to show a photographic lineup which included defendant to Devyonte. Around 5:00 a.m. on 21 April 2011, Officer Hodge administered the lineup and Devyonte selected defendant as the shooter.

Later that morning, RPD officers located a vehicle matching the description provided by Rashaad and Devyonte. Defendant was a passenger in the vehicle and was subsequently arrested by law enforcement. No weapons were found in the vehicle after defendant's arrest.

Based upon information gained during their investigation of Rashaad's shooting, law enforcement searched an apartment on Dansey Drive in Raleigh. During their search, officers discovered Perez Keyes ("Keyes") hiding in a laundry room. In addition, officers discovered a firearm which had been placed inside of a pillowcase that was inside of the washing machine in the laundry room.

Keyes initially denied having any knowledge of the firearm or where it came from. However, Keyes subsequently stated that he received a phone call from defendant in the early morning

hours of 21 April 2011 in which defendant asked Keyes to help him sell a firearm. Defendant then brought the firearm to Keyes's apartment. The firearm recovered from Keyes's apartment was subsequently determined to be the weapon which shot Rashaad.

On 25 April 2011, Detective Sean Brady ("Detective Brady") of the RPD visited Rashaad and administered a photographic lineup. Detective Brady was the lead investigator for Rashaad's shooting, but he administered the lineup because no other officers were available at that time. Rashaad identified defendant as his shooter.

Defendant was indicted for attempted murder and AWDWIKISI. Beginning 9 April 2012, defendant was tried by a jury in Wake County Superior Court. On 16 April 2012, the jury returned verdicts finding defendant guilty of both charges. The jury also found the existence of an aggravating factor. Prior to sentencing, defendant's mother was permitted to make a statement regarding the existence of possible mitigating factors. However, the trial court found no mitigating factors and sentenced defendant in the aggravated range. Defendant was sentenced to a minimum of 258 months to a maximum of 319 months in the North Carolina Division of Adult Correction. Defendant appeals.

II. Jury Instructions

Defendant argues that the trial court erred by failing to instruct the jury regarding the State's violations of the Eyewitness Identification Reform Act ("the Reform Act"). We disagree.

Defendant concedes that he did not request a jury instruction regarding the Reform Act at trial. Accordingly, we review this issue for plain error.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, 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. 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, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotations and citations omitted).

In the instant case, defendant contends that Rashaad's identification of defendant from a photographic lineup four days after the shooting violated the Reform Act and required the trial court to instruct the jury regarding the violation. However, even assuming, *arguendo*, that defendant is correct, he

has failed to establish that the trial court's alleged failure to provide this instruction amounted to plain error.

The State presented evidence that Devyonte, who witnessed the shooting, identified defendant from a photographic lineup four hours after the shooting occurred. Defendant does not challenge the propriety of this identification. Moreover, while Rashaad did not specifically identify defendant by name as the individual who shot him, he gave a general description which matched defendant and also indicated that he knew the perpetrator from prison. Rashaad had previously been incarcerated with defendant. In addition, defendant was apprehended traveling in a vehicle which matched the description of the shooter's vehicle provided by Rashaad and Devyonte. Finally, Keyes, the individual in possession of the firearm which was identified as the weapon used to shoot Rashaad, testified that defendant had asked him to get rid of the firearm shortly after the shooting and that defendant later hid the weapon in Keyes's home.

In light of the above evidence, defendant has failed to show that the trial court's alleged failure to instruct the jury regarding the Reform Act had a probable impact on the jury's finding that the defendant was guilty. Accordingly, defendant

has failed to show that this alleged error rose to the level of plain error. *See id.* This argument is overruled.

III. Mitigating Factors

Defendant argues that the trial court erred by refusing to consider evidence of potential mitigating factors during defendant's sentencing hearing. Specifically, defendant alleges that the court failed to consider a statement by defendant's mother as evidence in mitigation. We disagree.

N.C. Gen. Stat. § 15A-1340.16(a) (2011) requires the trial court to "consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court."

[T]he offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists. A defendant proves a mitigating factor when the evidence is substantial, uncontradicted, and there is no reason to doubt its credibility.

As this Court has previously explained, [a] trial judge is given wide latitude in determining the existence of . . . mitigating factors, and the trial court's failure to find a mitigating factor is error only when no other reasonable inferences can be drawn from the evidence.

State v. Mabry, ___ N.C. App. ___, ___, 720 S.E.2d 697, 702 (2011) (internal quotations and citations omitted). However,

while the trial court may determine whether mitigating factors have been adequately proven, "[t]he sentencing judge cannot, as a matter of law, refuse to consider mitigating factors" *State v. Brooks*, 68 N.C. App. 298, 300, 314 S.E.2d 565, 566 (1984).

In the instant case, the trial court allowed defendant's mother, Tabitha Grier, to address the court at sentencing:

I just wanted y'all to know that I, you know, I'm not here to say whether he's guilty or not because I don't know, but me as a single mother of five tried to do the best that I could in raising Tyquon. And in school he struggled because of his size. He struggled. He felt that he had to build this wall and be this macho person. He's always -
- I thought I had this together before I came up here.

THE COURT: Yes, ma'am.

MS. GRIER: He just -- me working so many hours every day trying to make ends meet was always able to just hang out in the streets because there was really no supervision at home because I was at work and he just fell in with the wrong crowd and I don't know. That's it. That's it.

After hearing this statement, defendant's own statement, and the arguments of counsel, the trial court stated:

Primarily in recognition of and in consideration of information as to mitigation, there's no evidence before this Court as it relates to specific mitigation. However, the Court has considered the

information you presented but chooses not to find that information as evidence by a preponderance of the evidence as it relates to any mitigation.

Contrary to defendant's argument, the trial court's statement does not demonstrate that the court erroneously refused to consider mitigating factors presented by defendant. Instead, the court's statement reflects that it determined that defendant failed to meet his burden of establishing any mitigating factors by a preponderance of the evidence. We discern no abuse of discretion in this determination. This argument is overruled.

IV. Conclusion

Defendant failed to meet his burden of showing that the trial court's failure to instruct the jury regarding an alleged violation of the Reform Act constituted plain error. The trial court properly determined that no mitigating factors were present for purposes of sentencing defendant. Defendant received a fair trial, free from error.

No error.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).