NO. COA13-61
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v. Rowan County
No. 07 CRS 56055

SCOTT JAMES ROBY

Appeal by defendant from judgment entered 5 July 2012 by Judge W. David Lee in Rowan County Superior Court. Heard in the Court of Appeals 19 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State.

Unti & Lumsden LLP, by Margaret C. Lumsden, for defendant-appellant.

DILLON, Judge.

A jury found Scott James Roby (Defendant) guilty of assault inflicting serious bodily injury. The trial court sentenced him to an active prison term of sixteen to twenty months. Defendant filed timely notice of appeal from the judgment.

The evidence at trial showed that Defendant punched Eric Shuping in the side of the head on the morning of 1 September

2007, as Mr. Shuping walked to a friend's vehicle after a night of drinking at a nightclub in Salisbury. The blow caused Mr. Shuping to fall and strike his head on the asphalt. He suffered two skull fractures and was rendered comatose. Mr. Shuping remained in a coma for seventeen days, was hospitalized until 28 September 2007, and required physical, occupational, and speech therapy to recover. After being released to return to work in November of 2007, Mr. Shuping lost his job due to an inability to focus. At the time of Defendant's trial in 2012, Mr. Shuping continued to experience memory problems and remained on prescription medication for seizures, clotting, and pain.

On appeal, Defendant claims that the trial court committed plain error by allowing two friends of Mr. Shuping to offer opinion testimony regarding Defendant's state of mind or intentions on 1 September 2007. In describing Defendant's behavior toward Mr. Shuping before the assault, Mr. Shuping's then girlfriend, Randi Miller, described Defendant as "looking to start something[,]" and "looking for a fight that night." She later added that "it was like [Defendant] was targeting [Mr. Shuping] that night." Randy Jones, when asked about the "confrontation" between Ms. Miller and Defendant outside the nightclub, responded, "*Supposedly*, [Defendant] was picking on

[Mr. Shuping]." (emphasis added). Jones immediately clarified, however, "I didn't see none [sic] of it, no." Because these witnesses had no personal knowledge of his state of mind, Defendant contends their appraisals were inadmissible under N.C.R. Evid. 701 and prejudicial in "suggesting that he was searching for an opportunity to attack Shuping" or otherwise "targeting" him.

Because Defendant did not object to the challenged testimony at trial, he must now show plain error in its admission. *See* N.C.R. App. P. 10(a)(1), (4). We review claims of plain error under the following standard:

> . . . [D]efendant 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. . . . [B]ecause 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) (third alteration in original) (citations and internal quotation marks omitted).

A lay witness may testify to "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical

state of persons," *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911) (quotation omitted), provided this testimony is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.R. Evid. 701. Accordingly, our courts have long held that "[o]pinion evidence as to the demeanor of a criminal defendant is admissible into evidence." *State v. Stager*, 329 N.C. 278, 321, 406 S.E.2d 876, 900 (1991).

Assuming, *arguendo*, that Ms. Miller and Mr. Jones improperly ascribed an intention or motive to Defendant, we find no probability that their testimony affected the outcome at trial. Assault inflicting serious bodily injury is a general intent crime. *Cf. State v. Woods*, 126 N.C. App. 581, 587, 486 S.E.2d 255, 258 (1997) (assault with a deadly weapon inflicting serious injury); *State v. Hunt*, 100 N.C. App. 43, 46, 394 S.E.2d 221, 223 (1990). The State was obliged to prove only "'(1) the commission of an assault on another, which (2) inflicts serious bodily injury.'" *State v. Williams*, 150 N.C. App. 497, 501, 563 S.E.2d 616, 619 (2002) (quoting *State v. Hannah*, 149 N.C. App. 713, 717, 563 S.E.2d 1, 4 (2002)).

We further note that both Defendant and his witness, Kenneth Osbourne, Jr., offered the jury their own accounts of Defendant's motive in punching Mr. Shuping. Although the two men admitted to making fun of Mr. Shuping as he was getting sick in the bathroom and outside of the club, they described their behavior as "light-hearte[d]" and "nothing aggressive." Mr. Osbourne blamed Ms. Miller for escalating the conflict by cursing at Defendant's friends and ordering them to leave Mr. Shuping alone and go home. Defendant explained that he became "scared" when Mr. Shuping and Ms. Miller's brother, Mickey Miller, started toward their vehicle, because he believed they were going for a gun. Only when Mr. Shuping lunged and grabbed his shirt collar, Defendant claimed, did he throw the punch. Inasmuch as the jury heard Defendant's and Mr. Osbourne's versions of the incident, we find no probability of a different outcome at trial but for the alleged error.

In a related claim, Defendant asserts that his trial counsel rendered constitutionally ineffective assistance by failing to object to the aforementioned testimony from Ms. Miller and Mr. Jones regarding his intentions toward Mr. Shuping. In reviewing claims of ineffective assistance of counsel ("IAC"), we employ the familiar two-part test

articulated in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), and adopted for state constitutional purposes in *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Defendant must show that (1) his counsel's performance fell "'below an objective standard of reasonableness[,]'" and (2) "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Waring*, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010) (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698), *cert. denied*, __ U.S. __, 181 L. Ed. 2d 53 (2011). Moreover, under *Strickland*, we "need not determine whether counsel made errors if the record does not show a reasonable probability that a different verdict would have been reached in the absence of counsel's deficient performance." *State v. Banks*, 163 N.C. App. 31, 36, 591 S.E.2d 917, 921 (2004) (citing *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248-49), *disc. review denied*, 358 N.C. 377, 597 S.E.2d 767 (2004).

In his brief before this Court, Defendant describes the *Strickland* standard for ineffective assistance of counsel claims as follows: "[A] defendant must show that the defense lawyer's performance was deficient . . . and that the deficient performance prejudiced the defendant." Nowhere does Defendant

acknowledge *Strickland*'s heightened prejudice threshold – "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Defendant's entire argument to this Court on the issue of prejudice consists of the following two sentences:

> As stated above, the admission of the improper testimony prejudiced Defendant by allowing the State to characterize the conflict between two groups of bar patrons as an intentional attack on Shuping. Without that characterization, the jury *could have* found Defendant not guilty, or guilty of a lesser offense.

(emphasis added); *see* N.C.R. App. P. 28(b)(6).

Defendant fails to articulate how the challenged testimony had a *probable* impact on the outcome of his trial. *See State v. Simmons*, 191 N.C. App. 224, 229, 662 S.E.2d 559, 562 (2008) (stating that "though defendant . . . claims that the admission of the testimony constituted error 'so serious that a reasonable probability exists that the trial result would have been different absent the error,' he neglects entirely to establish why that is so") (quotation omitted). "It is not the job of this Court to make Defendant's argument for him." *State v. Mills*, __ N.C. App. __, __, 741 S.E.2d 427, 433 (2013) (COA12-855). Absent a meaningful argument of prejudice under the well-

known *Strickland* standard, we overrule this claim. *See Simmons*, 191 N.C. App. at 229, 662 S.E.2d at 562; *State v. Pendleton*, 175 N.C. App. 230, 233, 622 S.E.2d 708, 710 (2005) (rejecting conclusory claim of prejudice).

As discussed above, assault inflicting serious bodily injury is not a specific intent crime. The lesser included offenses of assault inflicting serious injury and simple assault differ not in the *mens rea* of the defendant, but in the degree of harm inflicted. Defendant has thus failed to show how he would have obtained a more favorable outcome at trial had counsel objected to Ms. Miller's and Mr. Jones' testimony.

Defendant next excepts to the trial court's failure to find mitigating factors at sentencing based on his uncontroverted evidence of a positive employment history, community support system, and prior military service. We find no merit to this claim. It is well-established that a court is not obliged to make written findings of aggravating and mitigating factors when it imposes a sentence from within the applicable presumptive range. *State v. James*, __ N.C. App. __, __, 738 S.E.2d 420, 426 (2013) (quoting *State v. Allah*, 168 N.C. App. 190, 197, 607 S.E.2d 311, 316, *disc. review denied*, 359 N.C. 636, 618 S.E.2d 232 (2005)). "As defendant was sentenced . . . in the

presumptive range, the trial court did not err in failing to make findings as to mitigating factors." *Allah*, 168 N.C. App. at 197, 607 S.E.2d at 316. To the extent Defendant claims a violation of his right to due process under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), or other constitutional rights, we find that he failed to preserve these constitutional issues. *See State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) (stating that a "constitutional error will not be considered for the first time on appeal"). Furthermore, the decision in *Blakely* had no application to defendant's presumptive-range sentence, which was fully supported by the facts found by the jury in reaching its guilty verdict. *State v. Norris*, 360 N.C. 507, 516, 630 S.E.2d 915, 920, *cert. denied*, 549 U.S. 1064, 166 L. Ed. 2d 535 (2006).

NO ERROR.

Judges GEER and ERVIN concur.

Report per Rule 30(e).