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NO. COA05-347

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 02 CRS 207578

ANH VIET THAI

Appeal by defendant from judgment entered 28 May 2004 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General Q. Shanté Martin, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

TYSON, Judge.

Anh Viet Thai ("defendant") appeals from judgment entered after a jury found him to be guilty of assault with a deadly weapon with intent to kill inflicting serious injury. We find no prejudicial error in defendant's conviction and remand for resentencing.

I. Background

On 17 February 2002, Thien "Tony" Luong ("Luong") and Bang "Danny" Vo ("the victim") attended the 12:00 p.m. service at St. Joseph's Catholic Church in Charlotte. After the church service, Luong and the victim drove to the Asian Corner Mall ("the mall") to

eat and shoot pool. Upon arriving at the mall, Luong and the victim began walking through the parking lot toward the entrance. A black Honda Civic approached Luong and the victim and five men "jumped out". One of the men kicked the victim in the stomach and the others "jumped in" and began to fight with the victim. As the victim attempted to push the men away, defendant pulled a gun from his coat and shot him in the chest area. The victim began to run toward the entrance of the mall when defendant shot him again in the thigh. The victim testified that he did not know any of the five men who had attacked him, including defendant, and had never seen any of them before.

Off-duty Police Officer Michael Nguyen ("Officer Nguyen") was shopping at the mall when he heard the gunshots. Officer Nguyen ran outside, saw the victim holding his chest, and called 911. Bystanders pointed to a black Honda Civic leaving the parking lot. Officer Nguyen observed the vehicle was the same black Honda he had noticed circling the parking lot before he went into the mall. Another officer arrived on the scene. Officer Nguyen gave the officer a description of the car and remained with the victim until an ambulance arrived.

Two other police officers stopped the black Honda and removed the occupants, including defendant. The officers found a fully loaded revolver under the right front passenger seat of the car. Defendant was transported to the Law Enforcement Center where he was interviewed by Officer Nguyen in Vietnamese. Officer Nguyen

identified the vehicle as being the same black Honda he had seen at the mall earlier.

Defendant stated he had been at home when his sister called and told him that his friends had gotten into an argument at church. Defendant's sister had told him Luong was chasing defendant's friends, and she believed a shooting might have occurred. After defendant spoke with his sister, one of defendant's friends called and said that they were being chased. Four of defendant's friends came to defendant's apartment. Defendant told Officer Nguyen that he took two guns from the closet and went to the mall with his friends.

At trial, defendant denied having a weapon when he got into the black Honda and testified the guns were located in the car when he got in. Defendant drove to the mall separately, but entered the black Honda when his car overheated on the highway. Defendant testified that the five men saw Luong and the victim in the mall parking lot and a fight broke out.

Defendant admitted to Officer Nguyen to shooting the victim and discarding the gun after leaving the scene. Defendant testified that he took out the gun, pointed it in a downward direction, and fired the gun. The victim "jumped towards" defendant, who then fired the gun again. The victim testified defendant took out the gun, pointed it near the victim's chest, and fired.

Luong testified he had occasionally seen defendant with a group of men at St. Joseph's Catholic Church, but he had never

spoken with defendant until about a week before the shooting. Luong and the victim's brother had gone to the mall to celebrate the Vietnamese New Year on 9 February 2002. The victim was not present. Luong testified that as he walked by a group of five to ten teenagers, he heard defendant say, "F--k you, Tony." Luong, because he did not know defendant, asked defendant why he had "cussed" him. Defendant accused Luong of "talking back" to him because Luong knew two police officers were present.

As a result of the gunshot wounds, the victim's left lung collapsed and his liver and spleen were damaged. The jury found defendant to be guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was sentenced to a minimum of ninety months and a maximum of 117 months incarceration. Defendant appeals.

II. Issues

The issues on appeal are whether the trial court erred by: (1) failing to instruct the jury on self-defense; (2) admitting testimony regarding defendant's gang affiliation; (3) admitting evidence of a prior threat allegedly made by defendant against Luong; and (4) sentencing defendant as a prior record level II where the State did not prove to a jury beyond a reasonable doubt or allege in the indictment that defendant was on probation at the time the offense was committed. Defendant also argues he was denied effective assistance of counsel.

III. Self-Defense

Defendant argues an instruction on self-defense was supported by the evidence presented at trial and the trial court erred by failing to so instruct the jury. We disagree.

A defendant is entitled to an instruction on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm. If, however, there is no evidence from which the jury reasonably could find that the defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, the defendant is not entitled to have the jury instructed on self-defense.

State v. Bush, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982) (internal citations omitted).

The choice of jury instructions is a "matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152 (citation omitted), *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). A trial court abuses its discretion when its ruling is "so arbitrary that it could not have been the result of a reasoned decision." *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

The principles regarding the law of self-defense are well established. The elements that constitute perfect self-defense are:

(1) it appeared to defendant and he believed it to be necessary to kill the [victim] in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at

that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Reid, 335 N.C. 647, 670, 440 S.E.2d 776, 789 (1994) (citing *State v. McAvoy*, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992)). Imperfect self-defense arises when the defendant is only able to show the first two elements. *Bush*, 307 N.C. at 159, 297 S.E.2d at 568. "[B]oth elements (1) and (2) in the preceding quotation must be shown to exist before the defendant will be entitled to the benefit of either perfect or imperfect self-defense." *Id.*

The evidence presented was insufficient to support a jury instruction on self-defense. Defendant's own testimony establishes he did not believe it to be necessary to shoot the victim to protect himself. Defendant testified that he took out the gun, pointed it in a downward direction, and fired. Defendant testified that he did not intend to fire the shot at the victim. "Clearly, a reasonable person believing that the use of deadly force was necessary to save his or her life would have pointed the pistol at the perceived threat and fired at the perceived threat. The defendant's own testimony . . . disproves the first element of

self-defense." *State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996).

Further, defendant testified that he "took the small gun" instead of the bigger one because he did not intend to kill the victim. At trial, defendant was asked whether he believed firing the gun was necessary to protect himself or his friends. Defendant replied, "I am not so sure. Things happening so fast. All I knew is that I shot, and I didn't know whether that was for protection. All I knew is that I took out a gun and shot because [the victim] ran towards me." Defendant's own testimony clearly establishes that defendant did not "believe[] it to be necessary to kill the [victim] in order to save himself from death or great bodily harm." *Reid*, 335 N.C. at 670, 440 S.E.2d at 789. The trial court did not abuse its discretion in failing to give a jury instruction on self-defense. This assignment of error is overruled.

IV. Evidence of Gang Affiliation

A. Testimony

Defendant argues the trial court erred in admitting testimony of his gang affiliation.

During cross-examination, defense counsel questioned the victim about his gang affiliation. The victim stated that he was not and had never been a member of a gang. On redirect examination, the State questioned the victim as follows:

Q. Mr. Plumides asked you about gangs. Have you ever heard of the Charlotte Crypt Boys, CCB?

A. I have heard of them before.

Q. Do you know whether the defendant was a member?

MR. PLUMIDES: Objection.

THE COURT: Overruled.

THE WITNESS: I have heard that he was a member.

MR. PLUMIDES: Objection to what he heard.

THE COURT: Overruled.

Defendant contends the statement made by the victim that he "heard" defendant was a gang member is irrelevant under N.C. Gen. Stat. § 8C-1, Rules 401 and 402, inadmissible hearsay under N.C. Gen. Stat. § 8C-1, Rules 801 and 802, inadmissible under N.C. Gen. Stat. § 8C-1, Rule 403, and impermissible character evidence under N.C. Gen. Stat. § 8C-1, Rule 404.

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.

N.C. Gen. Stat. § 15A-1443(a) (2003). A reasonable possibility must exist that the complained of evidence contributed to the conviction. *State v. Milby and State v. Boyd*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981). Presuming *arguendo* that the trial court erred in admitting this statement over defense counsel's objection, defendant must show that a different outcome would have been reached if the statement would have been excluded. *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (2002). Other overwhelming evidence establishes defendant's guilt. *Id.* All

uncontradicted evidence and defendant's own testimony establishes he shot the victim and the shooting was not in self-defense. This assignment of error is overruled.

B. State's Exhibits

Defendant contends the trial court erred in admitting State's Exhibits Numbers 11, 12, 31, and 32 in violation of N.C. Gen. Stat. § 8C-1, Rules 401, 402, 403, and 404.

State's Exhibit Number 11 is an audiotape of the interview the police conducted with Luong after the shooting occurred on 17 February 2003. State's Exhibit Number 12 is a paper transcript of that interview. State's Exhibit Number 31 is an audiotape of the interview the police conducted with the victim after the shooting. State's Exhibit Number 32 is the paper transcript of that interview. The jury was permitted to hear the tape recordings of the interviews and copies of the transcripts were distributed to the jury. In the Luong interview, Luong was questioned about his knowledge of the Charlotte Crip Boys ("CCB"). Luong's statement linked the CCB with a group of men at the church, with whom Luong had a verbal altercation on the date in question. The victim's statement denies any involvement with or knowledge of the CCB.

Defendant argues the statements given by Luong and the victim in the police interviews are irrelevant and inadmissible under N.C. Gen. Stat. § 8C-1, Rule 401 and N.C. Gen. Stat. § 8C-1, Rule 402, constitute impermissible character evidence under N.C. Gen. Stat. § 8C-1, Rule 404, and are inadmissible under N.C. Gen. Stat. § 8C-1, Rule 403.

Defendant failed to object to the admission of these exhibits at trial and may only assert plain error. *State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378 (1983); N.C.R. App. P. 10(b)(2) (2005); N.C.R. App. P. 10(c)(4) (2005). Defendant specifically argues the trial court's admission of the statements contained in the police interviews constitutes plain error. To award a new trial for plain error, the trial court's error must be "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (citations omitted), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

Defendant has failed to show how the trial court's admission of these statements constitutes prejudicial error, much less plain error. *Id.*; *Mann*, 355 N.C. at 306, 560 S.E.2d at 784. Other overwhelming evidence was presented at trial to establish defendant's guilt including his own testimony. This assignment of error is overruled.

V. Evidence of a Prior Threat

Defendant argues the trial court erred in admitting evidence of a prior threat made by him against a State's witness, Luong. We disagree.

Prior to Luong's testimony, a *voir dire* hearing was held wherein the State presented evidence that defendant threatened Luong at the mall the week before the shooting. Luong testified on *voir dire*, that as he walked by a group of teenagers at the mall,

he heard defendant say, "F--k you, Tony." Luong asked defendant why he said that and defendant told Luong he would beat him up if he saw him at church the following day. Luong went to the 5:00 p.m. mass rather than the 12:00 p.m. mass so he would not get beaten up. Defendant was not at the 5:00 p.m. mass. The trial court ruled this evidence was admissible "to show motive, opportunity, intent, participation, plan, identity, absence of mistake" and "[a]ny prejudice to the defendant is outweighed by the probative value[.]" Defendant argues this evidence is irrelevant under N.C. Gen. Stat. § 8C-1, Rules 401 and 402, inadmissible under N.C. Gen. Stat. § 8C-1, Rule 403, and inadmissible character evidence under N.C. Gen. Stat. § 8C-1, Rule 404.

Defendant has failed to show how the exclusion of the prior threat made by him against Luong would have likely led to a different result. N.C. Gen. Stat. § 15A-1443(a). Presuming, without deciding the trial court erred in admitting this evidence, defendant has failed to show how his defense was prejudiced. This assignment of error is overruled.

VI. Sentencing

A. Indictment

Defendant contends the trial court erred in failing to allege in his indictment that he was on probation at the time of the offense. We disagree.

At the sentencing hearing, the prosecutor asserted defendant was on probation for a simple assault offense at the time of the shooting. Defendant was given one point on his prior record level

worksheet because he was on probation at the time of the offense. The trial court found defendant to be a Prior Record Level II based on the one point he was given. The trial court sentenced defendant in the presumptive range for a minimum of ninety and a maximum of 117 months incarceration.

In *State v. Allen*, our Supreme Court held that the State is not required to allege sentencing factors that might result in a sentence enhancement in the indictment. 359 N.C. 425, 438, 615 S.E.2d 256, 265 (2005). The trial court did not err in failing to allege defendant was on probation at the time he committed the offense in the indictment. This argument is overruled.

B. Submission to a Jury

Defendant argues the trial court erred by sentencing him as a Prior Record Level II when the fact that he was on probation at the time of the offense was not submitted to the jury and found beyond a reasonable doubt.

Under *Blakely v. Washington*, ___ U.S. ___, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt." *Allen*, 359 N.C. at 437, 615 S.E.2d at 265. In *Apprendi*, the Supreme Court stated that the fact of a prior conviction need not be proven to the jury because of the "certainty that procedural safeguards attached to any 'fact' of prior conviction[.]" 530 U.S. at 488, 147 L. Ed. 2d at 454.

This Court recently considered this issue in *State v. Wissink*, ___ N.C. App. ___, 617 S.E.2d 319, *temporary stay allowed*, ___ N.C. ___, 620 S.E.2d 527 (2005). In *Wissink*, this Court stated:

We recognize . . . that the fact of a defendant's probationary status is analogous to and not far-removed from the fact of a prior conviction. However, we find that we are bound by the language in *Blakely*, *Apprendi* and *Allen* that states that *only the fact of a prior conviction* is exempt from being proven to a jury beyond a reasonable doubt. Furthermore, we note that the fact of defendant's probationary status did not have the procedural safeguards of a jury trial and proof beyond a reasonable doubt recognized in *Apprendi* as providing the necessary protection for defendants at sentencing.

___ N.C. App. at ___, 617 S.E.2d at 325 (emphasis supplied). In accordance with *Wissink* and without a stipulation from defendant, we hold the trial court erred by adding a point to defendant's prior record level without submitting the issue of whether defendant was on probation at the time of the offense to the jury to prove beyond a reasonable doubt.

While we believe the same "procedural safeguards" which attach to the "fact" of a prior conviction, see *Apprendi v. New Jersey*, 530 U.S. 466, 488-90, 147 L. Ed. 2d 435, 454-55, 120 S. Ct. 2348 (2000), also attach to the "fact" of whether a defendant is on supervised probation, we are bound by the decision in *Wissink* [and] *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) .

. . . .

State v. Shine, ___ N.C. App. ___, ___, 619 S.E.2d 895, 901 (2005) (quoting *Wissink*, ___ N.C. App. at ___, 617 S.E.2d at 325); see *State v. Jordan*, ___ N.C. App. ___, ___, 621 S.E.2d 229, 234 (2005)

("[W]e are not free to revisit the decision in *Wissink*."). We remand this case to the trial court for resentencing.

VII. Effective Assistance of Counsel

Defendant argues he was denied the effective assistance of counsel where: (1) defense counsel's opening statement included assertions for which there was no supporting evidence and which contradicted defendant's own evidence; and (2) defense counsel failed to object and may have opened the door to the admission of evidence regarding gangs and defendant's alleged gang membership.

In his opening statement, defense counsel stated:

We contend that [defendant] was being followed by them in another vehicle. They followed them to what we call the Asian Mall. While they were following, everybody got out of their vehicle except [defendant]. [Defendant] was the last one to get out. All of a sudden [the victim] started chasing him through the mall. He turned around. He is much larger than him, as you can see, and heavier than him by far. He shot the ground, and the bullets ricocheted. That is borne out by the statement of the police; that he did not intend to kill this man.

Defense counsel further stated:

Many people have different cultures. I don't know what the culture of the Vietnamese people are in this country, any more than you do. I know there are rival gangs here. I will argue respectfully that these rival gangs ended up in a shooting, which was clearly more force than they intended. He knows that they were after him; that they were after him, and they were going to hurt him. He did everything he could to stop this man from hurting him.

Defendant asserts the evidence presented at trial failed to show: (1) that Luong and the victim were chasing the vehicle in which defendant was riding; (2) the victim chased defendant through

the mall prior to the shooting; (3) the bullet ricocheted off of the ground before hitting the victim; and (4) this was a shooting between rival gangs. Defendant argues that the failure of the evidence to support the assertions made in the opening statement constitutes ineffective assistance of counsel.

A defendant who attacks his conviction on the basis that his counsel was ineffective has the burden of satisfying a two-part test.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

The State contends that defendant's ineffective assistance of counsel argument is not properly before this Court "because evidentiary issues will need to be developed before defendant will be able to adequately raise a possible IAC claim." We agree. "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162

(2002). This assignment of error is dismissed without prejudice for defendant to file a motion for appropriate relief.

VIII. Conclusion

The trial court did not commit prejudicial error in failing to instruct the jury on self-defense, admitting evidence of defendant's gang affiliation, or admitting evidence of a prior threat made by defendant against Luong. The trial court did not err in failing to allege in defendant's indictment that he was on probation at the time of the offense.

The trial court erred in adding a point to defendant's prior record level without submitting the issue to the jury as to whether defendant was on probation at the time of the offense. We remand for resentencing consistent with this opinion. Defendant's ineffective assistance of counsel argument is dismissed without prejudice.

No Prejudicial Error at Trial; Remanded for Resentencing; Claim of Ineffective Assistance of Counsel Dismissed Without Prejudice.

Judges HUDSON and LEVINSON concur.

Report per Rule 30(e).