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NO. COA05-373

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Wake County  
No. 03 CRS 114124

RAEFORD LEE MORGAN

Appeal by defendant from judgment entered 19 August 2004, by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 3 November 2005.

*Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.*

*Terry F. Rose for defendant appellant.*

McCULLOUGH, Judge.

Defendant appeals from judgment entered after a jury verdict of guilty on the charge of robbery with a dangerous weapon. We find no error.

FACTS

\_\_\_\_ On 10 February 2004, a Wake County grand jury indicted defendant for the offenses of assault with a deadly weapon with the intent to kill and robbery with a dangerous weapon. On 17 August 2004, the State dismissed the charge of assault with a deadly weapon with the intent to kill and proceeded to trial on the robbery charge in Wake County Superior Court.

The State presented evidence at trial tending to show the following: On 10 December 2003, there was a robbery at 1601 New Bern Avenue, New Bern Mini Mart. There was a videotape of the robbery which showed James Mitchell (Mr. Mitchell) and another person with a gun robbing the store. Initially Mr. Mitchell made a statement to the police by telephone that he went to the Mini Mart for a cake, when someone came in behind him, pulled a gun and robbed the store, firing a shot from the gun. Mr. Mitchell also stated that, after the event occurred, he ran out of the store to attempt to catch the suspect. He further stated that he did not know anything about the robbery or who the perpetrator was. After the initial conversation, Mr. Mitchell was arrested, taken into custody and read his Miranda rights. He waived his rights and began to make a statement which was consistent with the one given to the officer over the phone. Mr. Mitchell was shown a photo lineup and he picked defendant out as the person who robbed the store, but denied knowing him at all. When the officers confronted him regarding their lack of belief in his statement, Mr. Mitchell began to cry and stated "they are going to kill [me]." It was at this time that Mr. Mitchell indicated defendant had robbed the store and that Mr. Mitchell knew he was going to rob the store.

At trial, Mr. Mitchell testified for the State. He recounted the events of the night of 10 December 2003 stating that he was at his cousin's house on the night in question and that night he went to the Mini Mart with defendant where he and defendant worked together to rob the convenience store. Mr. Mitchell stated that

the plan was for him to go into the store and buy a cake and when the cash drawer was open, defendant was going to come in and rob the store, and that these were the events which occurred. Further, Mr. Mitchell admitted to having lied to the police several times in the investigation, including after being arrested. Testimony was also elicited showing that Mr. Mitchell wrote a letter while in jail stating that defendant was not involved in the Mini Mart robbery. The evidence further showed that Mr. Mitchell had not been charged, tried and convicted of or pled guilty to any other offense punishable by more than 60 days in the last ten years.

At the close of the State's evidence and at the close of all the evidence, defendant made a motion to dismiss the charges which was denied by the court. At the charge conference, the trial judge inquired of both counsel for defendant and the State as to whether either desired an instruction on impeachment or corroboration of a prior statement by a witness and both stated they did not. However, the trial judge did offer the following instructions to the jury regarding credibility:

I remind you again that you, and you alone, are the sole judges of the credibility and the accuracy of each witness.

You must decide for yourselves whether or not to believe the testimony of any witness. You can believe all or any part or none of what a witness has said on the witness stand.

In determining whether or not . . . those tests should include . . . any interest or bias or prejudice the witness might have in the case; the apparent understanding and fairness of the witness; whether or not a witness' testimony is reasonable; and whether

or not the testimony of the witness is consistent with other believable evidence in the case.

Further, the trial judge gave specific instructions regarding the testimony of Mr. Mitchell and considerations to be given to the testimony of an interested witness:

You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness you may take the interests of that witness into account.

. . . .

Ladies and gentlemen, in this case James Mitchell has testified regarding his activities on the night in question and his testimony tends to show that he was an accomplice in the commission of the crime charged in this case.

. . . An accomplice is considered by law or in law to have an interest in the outcome of the case.

Therefore, I instruct you that you should examine every part of the testimony of this witness James Mitchell with the greatest of care and caution. If after doing so you believe his testimony in whole or in part, then you should treat what you believe the same as any other believable evidence in the case.

The jury returned a verdict of guilty on the charge of robbery with a dangerous weapon.

Defendant now appeals.

#### ANALYSIS

On appeal, defendant contends that his attorney rendered ineffective assistance of counsel in failing to request jury

instructions regarding impeachment by conviction and impeachment or corroboration by prior statement. We disagree.

The preferred method for raising ineffective assistance of counsel is by motion for appropriate relief made in the trial court; however, a defendant may bring his ineffective assistance of counsel claim on direct appeal. On direct appeal, defendant's ineffective assistance of counsel claim "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).

A successful ineffective assistance of counsel claim requires the satisfaction of a two-prong test. *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). The defendant must first show that "counsel's performance fell below an objective standard of reasonableness." *Gainey*, 355 N.C. at 112, 558 S.E.2d at 488. Second, the defendant must also show that the error committed was so egregious that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984). Relief should be granted only when counsel's assistance is "'so lacking that the trial becomes a farce and mockery of justice.'" *State v. Montford*, 137 N.C. App.

495, 502, 529 S.E.2d 247, 252, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000) (citation omitted).

Further, a claim based on a failure to request a jury instruction requires the defendant to prove that without the requested jury instruction there was plain error in the charge. *State v. Swann*, 322 N.C. 666, 688, 370 S.E.2d 533, 545 (1988). Plain error is defined as "'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused.'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). To determine whether it was plain error for trial counsel to fail to request a jury instruction regarding inconsistent statements, this Court may look to whether trial counsel questioned the witnesses about said statements and whether the trial court provided instructions on witness credibility. See *Swann*, 322 N.C. at 681, 688, 370 S.E.2d at 541, 545.

This Court has held that strategic and tactical decisions "such as whether to request an instruction or submit a defense are within the 'exclusive province' of the attorney." *State v. Phifer*, 165 N.C. App. 123, 130, 598 S.E.2d 172, 177 (2004) (citation omitted). A defendant's counsel is presumed to act with reasonable professional judgment. *Gainey*, 355 N.C. at 112, 558 S.E.2d at 488. "Reviewing courts should avoid the temptation to second-guess the actions of trial counsel, and judicial review of counsel's performance must be highly deferential." *Gainey*, 355 N.C. at 113,

558 S.E.2d at 488. Mere allegations surrounding matters of trial tactics, without more, are not sufficient to meet the test set forth in *Strickland*. *State v. Piche*, 102 N.C. App. 630, 638, 403 S.E.2d 559, 563-64 (1991). "'The 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.'" *State v. Quick*, 152 N.C. App. 220, 222, 566 S.E.2d 735, 737 (2002) (citation omitted).

Impeachment by Conviction

In the instant case, defendant contends that ineffective assistance of counsel was rendered upon failure to request the court to instruct the jury on North Carolina Pattern Jury Instruction 105.35: Impeachment Of A Witness:

When evidence has been received tending to show that a witness has been convicted of (a) criminal charge(s), you may consider this evidence for one purpose only. If, considering the nature of the crime(s), you believe that this bears on truthfulness, then you may consider it, together with all other facts and circumstances bearing upon the witness' truthfulness, in deciding whether you will believe or disbelieve his testimony at this trial. Except as it may bear on this decision, this evidence may not be considered by you in your determination of any fact in this case.

N.C.P.I., Crim. 105.35. The plain meaning of this pattern jury instruction states that a conviction is contemplated. In the footnotes to the jury instruction there is a reference to N.C. Gen. Stat. § 8C-1, Rule 609 which allows impeachment by evidence of

**conviction of a crime.** The evidence at trial was clear that Mr. Mitchell had no prior convictions. The only evidence elicited at trial regarding prior crimes at all was that Mr. Mitchell had been charged in the same crime that was at issue at trial. This is in no way a conviction as contemplated by this pattern jury instruction, and therefore there was no evidence warranting that the jury be so instructed. It would have been improper for this instruction to be submitted to the jury on the basis of the testimony of Mr. Mitchell.

Impeachment by Corroboration or Prior Statement

Defendant further contends that ineffective assistance of counsel was rendered upon failure to request the court to instruct the jury on North Carolina Pattern Jury Instruction 105.20:  
Impeachment Or Corroboration By Prior Statement:

When evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with his testimony at trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made, and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve his testimony at this trial.

N.C.P.I., Crim. 105.20. In the instant case, the jury was fully aware that credibility was at issue even though this instruction was not given to the jury. ("To determine whether it was plain



error for trial counsel to fail to request a jury instruction regarding inconsistent statements, this Court may look to whether trial counsel questioned the witness about said statements and whether the trial court provided instructions on witness credibility." *State v. Pratt*, 161 N.C. App. 161, 165, 587 S.E.2d 437, 440 (2003)). Trial counsel extensively cross-examined Mr. Mitchell and Detective Huger about the inconsistent statements made by Mr. Mitchell. The trial court also instructed the jury regarding the credibility of witnesses, interested witness testimony and, moreover, accomplice testimony of Mr. Mitchell. Where the jury was aware that credibility was an issue in the case, this Court will not second-guess the strategical and tactical decisions of trial counsel. Therefore this assignment of error is overruled.

Accordingly, we find that there is no merit in defendant's contention that ineffective assistance of counsel was rendered by failure to request certain jury instructions. The jury was fully aware that credibility was at issue and to include the instructions discussed above would have added little to the jury's awareness.

No error.

Judges ELMORE and LEVINSON concur.

Report per Rule 30(e).