NO. COA02-214

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 00 CRS 56712, 00 CRS 56714, 01 CRS 15634, 00 CRS 40347

WILLIAM WAYNE STEWART

Appeal by defendant from judgments entered 17 September 2001 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 29 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General David R. Minges, for the State.

William D. Spence for defendant-appellant.

MARTIN, Judge.

Defendant appeals from judgments entered upon his conviction by a jury of feloniously breaking or entering into a motor vehicle, misdemeanor larceny, felonious financial transaction card theft, and feloniously attempting to obtain property by false pretenses, and upon his plea of guilty to having attained habitual felon status. We hold defendant's trial was free of prejudicial error.

Briefly summarized, the testimony at defendant's trial tended to show that on the morning of 15 July 2000, the victim, Judith Iannuzzi, arrived at the Westwood Country Club on Harper Street in

Winston-Salem at 9:15 a.m. to play tennis. She left her purse on the floor of the backseat of her mini-van. When she returned to the mini-van about two hours later, she noticed the sliding door was slightly ajar, but did not suspect a problem and drove to a shop to run an errand. When she arrived at the shop and reached for her purse, she realized it was missing. She drove back to the country club and called the police to file a report. She testified that the purse contained some cash, her driver's license, an American Express card, and a Merrill Lynch Visa Card. She also testified that, shortly after the incident, she had received a charge for gasoline on her Visa card bill from a gas station she had never patronized.

Shanna Delisa Young testified that she had grown up with defendant, but had not seen him for a while when he drove by her house in July 2000. Defendant stopped and asked her if she wanted to get some gas for her car; she followed him to a gas station where he paid for her to fill up her tank with a credit card. On a few occasions after that, he came by her house and they went shopping with credit cards he had. In a statement given to Detective Larry Snider on 18 September, Young stated that she had been with defendant on occasions when he had broken into cars to steal purses. Young testified that one day, she, defendant, and another woman rode in defendant's jeep to the parking lot of a private club where defendant got out, peered into various cars, and brought back a purse. Young at first stated that the club was on Harper Street, but then indicated she might not remember. After

going through the purse and throwing it away at a gas station, they bought gas and went to a local Wal-Mart. At the Wal-Mart, they tried to use one of the credit cards from the purse to buy a car stereo and speakers in the automotive department. Ms. Young testified that she presented the card to pay for the stereo equipment, but the store personnel would not accept it without identification. After the failed purchase, Young gave the card back to defendant and they went to the jewelry counter. After picking out merchandise, defendant tried to use the card to pay and it was rejected. The three left the store without the card. Ms. Young testified that she had viewed a video from the store showing herself and defendant at the jewelry counter of Wal-Mart on that day. She admitted that at the time of the alleged events she was using crack cocaine almost everyday and was involved in other crimes to support her habit. At the time of defendant's trial, she was on probation and not involved in substance abuse.

Witness Deborah Stevenson testified that she was working at the jewelry counter of the Wal-Mart store in question on 15 July 2000 when defendant, whom she had met before, came into the store, pulled out a credit card, and offered her $10.00 if she would "slide it through." He and the two women with him, one of whom she identified as Shanna Young, then went to another department. Stevenson called security and went to the other department to point them out, then returned to the jewelry counter. The three came back to the jewelry counter a few minutes later and picked out several hundred dollars' worth of jewelry. At some point, when she

turned to defendant and Young, Stevenson saw a credit card on the counter by them. Defendant and the second woman left and Young stayed to complete the transaction. When there were problems with the card, Young also left the store. Though Stevenson testified that the card was a Merrill Lynch card and bore a female's name with a foreign-sounding last name, she could not specifically identify Judith Iannuzzi's card as the one presented to her that day. The card was not admitted into evidence. Stevenson also testified that defendant called her some time after the incident and tried to convince her "it was those girls, they did it" and not him. Stevenson positively identified defendant from a photographic lineup as the person who possessed and tried to use the credit card at Wal-Mart on 15 July. Defendant presented no evidence.

By nine assignments of error, defendant argues the trial court erred in denying his motion to dismiss at the close of the evidence; erred by instructing the jury on the principle of acting in concert, the doctrine of recent possession, and the elements of financial card theft; erred in implying to defendant that he could appeal a plea of guilty to the status of habitual felon; erred in failing to strike *ex mero motu* evidence of prior bad acts of defendant, defendant's prior criminal record, and a description of the security camera videotape which was not admitted into evidence; and erred in calculating defendant's prior record level for sentencing. Defendant also contends that the admission of certain evidence without objection by his attorney demonstrates that he

received ineffective assistance of counsel at trial. We conclude defendant received a fair trial.

I.

Defendant first argues the trial court erred in denying his motion to dismiss for insufficiency of the evidence at the close of the State's evidence. When ruling on a motion to dismiss criminal charges for insufficiency of the evidence, the question before the trial court is whether there is substantial evidence of each element of the offenses charged and that defendant is the perpetrator. *State v. Wilson*, 354 N.C. 493, 521, 556 S.E.2d 272, 290 (2001). Substantial evidence is evidence which a reasonable person might accept as adequate to support a certain conclusion. *Id.* The evidence must raise more than a suspicion in order to survive a motion to dismiss, yet the State may rely entirely on circumstantial evidence in building its case. *Id.*

Defendant first contends the State failed to submit substantial evidence that he broke and entered Ms. Iannuzzi's mini-van, took her purse, or tried to use her credit card at Wal-Mart. Defendant bases his argument on Ms. Young's testimony that she was using crack cocaine regularly at the time and her uncertainty as to the exact date or place she saw defendant take a purse from a car before they went to Wal-Mart. He also focuses on the fact that the credit card recovered from Wal-Mart was not admitted into evidence and was not "positively shown" to be the card allegedly stolen from Ms. Iannuzzi.

Initially, we observe that the finder of fact, in this case,

the jury, is the sole judge of the credibility of witnesses. *See State v. Hyatt*, 355 N.C. 642, 566 S.E.2d 61 (2002). Whether or not a witness is credible does not figure into the trial court's determination of whether there is substantial evidence from which the jury might conclude that a defendant committed the offenses alleged.

Ms. Young testified that one day in July 2000, she went with defendant and another to the parking lot of a private club with a swimming pool, possibly on Harper Street, where he looked into cars and came back with a purse. Using a credit card from that purse, they attempted to buy items from Wal-Mart. Her testimony, combined with the testimony of Ms. Iannuzzi and Ms. Stevenson, helps to establish the date and place of these events. Ms. Iannuzzi testified that she went to a private tennis club with a pool and parked her car in the Harper Street parking lot on 15 July. She discovered a few hours later that her purse, which had contained a Merrill Lynch Visa card, had been taken from her car while she was at the club. Ms. Stevenson testified that, sometime after her 10:00 a.m. shift had begun at Wal-Mart on 15 July, she saw defendant, Young, and another woman enter the store and defendant offered her money to let him purchase items with a credit card. Ms. Stevenson testified that the card was a Merrill Lynch card, had a woman's name on it, and that she knew the card did not belong to defendant or Young because it had a "foreign" name on it. This testimony is substantial evidence that defendant broke and entered Ms. Iannuzzi's vehicle on the morning of 15 July, took her purse,

and removed her Merrill Lynch credit card from it with the intent to use it.

Defendant also argues there was insufficient evidence presented as to the charge of attempting to obtain property by false pretenses and as to his alleged role as the perpetrator.

> Obtaining property by false pretenses is defined as (1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person.

State v. Compton, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988); N.C. Gen. Stat. § 14-100. Contrary to defendant's argument, it is of no consequence that Ms. Stevenson did not accept his alleged offer of $10.00 to let him purchase items with the card. Moreover, we reject defendant's further contention that because Ms. Stevenson did not see defendant put the card on the counter and she testified that defendant left and Young remained to complete the transaction, there is no evidence that defendant was the perpetrator of the offense. Young testified that after the failed purchase in the automotive department, she "gave [the card] back to" defendant and they went to the jewelry counter, where "William Stewart had the card" and was the one who offered it to pay for the merchandise.

Defendant also asserts that because Ms. Stevenson testified at trial that she was not deceived by defendant's alleged attempt to use the credit card to obtain merchandise, the State failed to establish the actual deception necessary for a conviction under

G.S. § 14-100, and there was a fatal variance between the allegation of the indictment that defendant's actions were "calculated to deceive and did deceive," and the State's proof. However, as defendant acknowledges, this Court has held that actual deception is not an essential element of *attempted* obtaining property by false pretenses, and that the inclusion of related language in the indictment is mere surplusage. *See State v. Armstead*, 149 N.C. App. 652, 562 S.E.2d 450 (2002); *State v. Wilburn*, 57 N.C. App. 40, 290 S.E.2d 782 (1982).

Lastly, defendant contends that the indictment specifies that he tried to use a "Visa Credit Card" and the State did not prove that the card presented at Wal-Mart was a Visa card. It is true that Ms. Stevenson could not remember whether the card was a Visa or a Mastercard credit card. However, she did remember that it was a Merrill Lynch card, and Ms. Iannuzzi testified that her purse had contained a Merrill Lynch Visa card. Taken in the light most favorable to the State, we hold the evidence was substantial that defendant presented a Visa credit card at Wal-Mart, attempting to obtain property by false pretenses.

For the reasons above, we hold the trial court properly denied defendant's motion to dismiss the charges for insufficiency of the evidence. This assignment of error is overruled.

II.

Defendant next argues that the trial court committed plain error in instructing the jury on "acting in concert" with respect to the charges for financial transaction card theft and attempting

to obtain property by false pretenses.

> The test for plain error places the burden on a defendant to show that error occurred and the error "had a probable impact on the jury's finding of guilt." The error must be a "'"fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done."'"

State v. Doisey, 138 N.C. App. 620, 625-26, 532 S.E.2d 240, 244 (2000) (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983)), *cert. denied*, 531 U.S. 1177, 148 L. Ed. 2d. 1015 (2001).

A defendant found to be acting in concert with one who commits a crime may be held guilty as a principal for that crime. *See State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998).

> An instruction on the doctrine of acting in concert is proper when the State presents evidence tending to show the defendant was present at the scene of the crime and "acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime."

State v. Cody, 135 N.C. App. 722, 728, 522 S.E.2d 777, 781 (1999) (citations omitted). Defendant contends there was insufficient evidence to show that he acted in concert with anyone or was even present at the commission of the alleged offenses. We disagree.

The testimony of Ms. Iannuzzi, Ms. Young, and Ms. Stevenson is sufficient to establish defendant's presence at the scene of both crimes. Ms. Young's testimony as to both the theft of the card and their attempts to use it at Wal-Mart also tend to show that defendant and Ms. Young were acting together with common criminal

intentions. Specifically, Ms. Young testified on cross-examination regarding the attempted purchase in the automotive section of Wal-Mart that:

> William Stewart gave me the card. What he'll do, he'll have the cards and . . . he'll give them to you, and he'll stand back like, like he don't - - I mean, he'll be there with you to pick everything out, car stereos, speakers, Dream Casts, VCRs, TVS. He'll put everything . . . on, and then he'll stand back.

Thus, there was sufficient evidence to support the trial court's instruction to the jury on acting in concert for the charges of financial card theft and attempted obtaining property by false pretenses. This assignment of error is overruled.

III.

Next, defendant argues that the trial court erred in charging the jury on the doctrine of recent possession with regard to the charges for breaking or entering a vehicle, misdemeanor larceny, and financial transaction card theft.

> The doctrine of recent possession allows the jury to infer that the possessor of certain stolen property is guilty of larceny. . . . Under this doctrine, the State must show three things: (1) that the property was stolen; (2) that defendant had possession of this same property; and (3) that defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly.

State v. Osborne, 149 N.C. App. 235, 238, 562 S.E.2d 528, 531, *affirmed*, ___ N.C. ___, 571 S.E.2d 584 (2002). Defendant argues specifically that the evidence shows Shanna Young, not defendant, had possession of the credit card. Citing *State v. Maines*, 301

N.C. 669, 675, 273 S.E.2d 289, 294 (1981), he contends that where more than one person has access to allegedly stolen property, the State must show that the defendant had "complete dominion" over the property in order for the doctrine of recent possession to apply. However, the *Maines* Court explained that the required exclusive possession means that "possession [by] defendant must be to the exclusion of all persons *not party to the crime*." *Id.* (emphasis added). There was evidence that defendant shared control of the card with Shanna Young, with whom, the evidence indicates, he was acting in concert to commit the crime of credit card theft.

Defendant also argues the instruction was improper because no evidence showed the card presented at Wal-Mart was the same card stolen from Ms. Iannuzzi's mini-van. To the contrary, there was evidence that Ms. Iannuzzi's purse, containing a Merrill Lynch credit card, was stolen from her mini-van in the country club parking lot between 9:15 and 11:15 a.m. on 15 July. There was also evidence tending to show that defendant got out of his jeep at the country club parking lot and came back with a purse which was not his and which contained the Merrill Lynch credit card that defendant and Ms. Young then tried to use at Wal-Mart on 15 July. Officer J.A. Craig testified that the station received a call from Wal-Mart at 11:42 a.m. on 15 July regarding the incident. Evidence of this chain of events and circumstances is sufficient to support a reasonable inference that the credit card presented at Wal-Mart was Ms. Iannuzzi's stolen card. This assignment of error is overruled.

IV.

Defendant next asserts the trial court committed plain error in instructing the jury on the elements of financial transaction card theft where the trial court stated:

> First, that the defendant took Judith Iannuzzi's credit card from the possession of another.

Although trial counsel for defendant did not submit a written proposed instruction with which to replace that portion of North Carolina Pattern Jury Instruction 219B.10, he did object to the wording at trial, arguing that it was ambiguous and would allow the jury to find defendant guilty if he took the credit card from Shanna Young. Defendant employs this theory on appeal as well.

A person is guilty under G.S. § 14-113.9 if he or she:

> (1) Takes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it. . . .

Therefore, defendant could properly be found guilty if he took the card from the possession of another person, whether that person was Judith Iannuzzi or Shanna Young. In this case, all the evidence tends to show defendant took the card from the possession and custody of Judith Iannuzzi and defendant could not have been prejudiced by the instruction. *State v. Odom,* 307 N.C. 655, 300 S.E.2d 375 (1983) (no "plain error" unless probable impact on jury). This assignment of error is overruled.

V.

Defendant argues that the trial court erred in implying to him

that he could appeal his decision to plead guilty to habitual felon status. He contends he is entitled to a new trial on the charge of habitual felon. The portion of the plea discussion at issue is as follows:

> DEFENDANT: If I'm guilty of [habitual felon status], if I say I'm guilty, I can't come back for appeal.
>
> [COUNSEL FOR DEFENDANT]: Sir, you can appeal your convictions on the underlying charges.
>
> DEFENDANT: But guilty as habitual felon?
>
> THE COURT: If you're not guilty of the three, if the appellate courts rule something is wrong with the underlying, any one of the underlying ones, they can be - - that judgment can be changed.
>
> . . .
>
> THE COURT: That doesn't mean that you give up your right to appeal, do you understand?
>
> DEFENDANT: Yes.
>
> THE COURT: On that or this habitual felon, even - - you have the right to appeal anything by admitting that you're habitual felon, you're giving up the right that you voluntarily did it, that's the purpose we're going over the transcript to make sure that you understand what you're doing and your plea to being habitual felon, the plea is voluntary, is that right, sir?
>
> DEFENDANT: Yes, sir.

Under G.S. § 15A-1444(e) and *State v. Young*, 120 N.C. App. 456, 459, 462 S.E.2d 683, 685 (1995), "[h]aving pleaded guilty to being an habitual felon, and not having moved in the trial court to withdraw his guilty plea, defendant is not entitled to an appeal of right from the trial court's ruling." To the extent that the trial

court's explanation does not make this clear, it may constitute error. However, there is no indication in the record that defendant moved to dismiss the habitual felon charge on any basis, nor does he assign error on appeal to any other aspect of the habitual felon indictment, hearing, or conviction. This Court must therefore conclude that defendant desires the right to appeal his habitual felon conviction in case this Court reverses or vacates any of the underlying charges also at issue in this appeal. The trial court did make clear to defendant that if the underlying convictions were overturned, the judgments based on his conviction as an habitual felon could be changed. The trial court's statement was correct and thus defendant has failed to show any material flaw in the proceedings leading to his plea of guilty for habitual felon status. *See State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977) (being habitual felon is not crime, a charge for which is not basis for independent proceeding or criminal sentence, but rather serves only to enhance punishment for subsequent felony convictions). This assignment of error is overruled.

VI.

Defendant contends the trial court erred in failing to act *ex mero motu* to strike testimony by Shanna Young or to exclude from evidence a written statement by Ms. Young concerning prior bad acts and the character of defendant. In particular, defendant objects to testimony by Young that (1) she and defendant had gone "credit card using" on occasion, (2) she had been with defendant when he had broken into cars, (3) defendant "goes to clubs and take people

[sic] money," and (4) she was with defendant when he broke into a car to get a pocketbook that turned out to be a calendar. Trial counsel for defendant did not object to this testimony or the admission into evidence of Ms. Young's written statement detailing similar events. Therefore, defendant asks this Court to hold that the trial court committed plain error in not excluding this evidence and/or that he was prejudiced by ineffective assistance of counsel. An assertion of ineffective assistance of counsel requires that defendant show his trial counsel's "'conduct fell below an objective standard of reasonableness'" and that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *See State v. Quick*, ___ N.C. App. ___, ___, 566 S.E.2d 735, 737, *disc. review denied*, 356 N.C. 311, 570 S.E.2d 896 (2002) (citations omitted).

Defendant argues that the evidence in question was inadmissible under G.S. § 8C-1, Rule 404(b), which states in pertinent part:

> Other Crimes, Wrongs, or Acts.--Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

However, Young's testimony and statement are relevant, at the very least, to motive, identity, and *modus operandi*. The State prosecuted the four substantive charges in the present case on the

theory that they were one continuing criminal plan, i.e., that defendant broke into Ms. Iannuzzi's car to steal her purse to get her credit card to use it at Wal-Mart to obtain goods. Both the testimony and written statement defendant alleges should not have been admitted include passages in which Young attests to going riding with defendant when he broke into cars and came back with credit cards or a checkbook that he either distributed to his companions to use or took them to use at a store. The statement that defendant "goes to clubs and take people [sic] money" was made in the context of him breaking into a car on Harper Street, where Ms. Iannuzzi's country club is located. The contested evidence tends to tie together the alleged events of 15 July 2000 and demonstrates a *modus operandi* of defendant, as well as a motive for the alleged breaking and entering and larceny. Because the evidence concerning other occasions when defendant broke into cars and used stolen credit cards was admissible under Rule 404(b), we hold the trial court did not err in failing to exclude it and the failure of defendant's trial counsel to object does not indicate defendant received ineffective assistance of counsel at trial. Moreover, considering the other evidence presented, defendant has failed to show that exclusion of this evidence would probably have resulted in a different outcome at trial. This assignment of error is overruled.

VII.

Defendant also argues that the trial court erred in failing to act *ex mero motu* to strike two statements by Shanna Young regarding

defendant's prior criminal record. He argues that this failure was plain error and that the failure of his trial attorney to object demonstrates that he received ineffective assistance of counsel at trial. In her written statement, Young stated that defendant "goes to clubs and take people [sic] money. . . . he do it a lot. Until he got put on house arrest with the beeper." She also testified at trial that due to sounds she heard on the telephone when defendant called her the week before trial, "I know he was in jail." Assuming, *arguendo*, that these generalized indications that defendant had been incarcerated or put on house arrest for other offenses are improper character evidence, defendant has nonetheless failed to show that the exclusion of these two statements would probably have resulted in different verdicts in light of the other evidence against him. Therefore, he has shown neither plain error by the trial court nor ineffective assistance of counsel. This assignment of error is overruled.

VIII.

Defendant also asserts the trial court committed plain error in failing to strike *ex mero motu* Detective Snider's testimony describing the contents of a security camera videotape from Wal-Mart which was not admitted into evidence. Counsel for defendant first elicited this testimony when questioning the detective about an inconsistency between Ms. Stevenson's earlier statement and her testimony at trial regarding the time when defendant allegedly offered her the $10.00 to let him use the credit card. Counsel for defendant asked Detective Snider, "[B]ased on your direct

observation of this transaction, you don't know which of those versions is factual or correct, do you?" Detective Snider then proceeded to describe the incident as he had viewed it on the store videotape. On appeal, defendant claims that this answer was non-responsive and should have been stricken. However, considering that Snider had not testified that he was present at the alleged incident, the only "direct observation" he could have had was from the tape. Defendant's counsel then continued to ask him questions about the contents of the videotape. The State then asked similar questions on re-direct examination before offering the videotape for admission into evidence. Counsel for defendant objected to the admission of the videotape, but did not move to strike the testimony describing its contents. Defendant contends that his counsel's failure to do so also demonstrates ineffective assistance of counsel.

G.S. § 8C-1, Rule 1002, the "best evidence rule," provides "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." *See State v. Williamson*, 146 N.C. App. 325, 553 S.E.2d 54 (2001). The admission of testimony describing the content of the videotape was error since the tape itself was not admitted. However, considering the strength of the other evidence of defendant's guilt, and particularly Ms. Stevenson's testimony as to what occurred in her presence, we do not believe there is any reasonable possibility the outcome of the trial would have been different had defendant's

counsel objected to, or the trial court stricken *ex mero motu*, the disputed testimony. This assignment of error is overruled.

IX.

Finally, defendant argues the trial court erred in calculating defendant's prior record level in determining his sentence by counting one of his prior felony convictions twice and because the prior felony convictions used to support his habitual felon conviction were used in the point calculation. The record reveals that the trial court did count one of defendant's prior felony convictions twice, but subtraction of the points attributed to that error would only reduce defendant's point level from 21 to 19 points, and 19 points or more earns defendant a Prior Record Level VI as found by the trial court. *See* N.C. Gen. Stat. § 15A-1340.14(c)(6) (2002). Therefore, the error would not affect the presumptive range prescribed by statute for use in determining defendant's sentence.

However, defendant argues that had the trial court not erred in assigning him 21 points instead of 19, the trial court might not have sentenced him at the higher end of the presumptive range. Having been sentenced within the presumptive range, defendant has no appeal of right with regard to whether his sentence was supported by evidence introduced at the sentencing hearing. *See* N.C. Gen. Stat. § 15A-1444(a1) (2002).

With regard to the three felony convictions used to support defendant's conviction as an habitual felon, we note that they were chosen from three different dates on which defendant had been

convicted of more than one felony. Therefore, they were not required for the calculation of his prior record level. This assignment of error is overruled.

No error.

Judges GREENE and BRYANT concur.

Report per Rule 30(e).