NO. COA10-133

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 08 CRS 222035

JEREMIAH SEAN ANDERSON

Appeal by defendant from judgment entered 20 July 2009 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 June 2010.

*Attorney General Roy Cooper, by Assistant Attorney General LaShawn S. Piquant, for the State.*

*Parish, Cooke & Condlin, by James R. Parish, for defendant-appellant.*

CALABRIA, Judge.

Jeremiah Sean Anderson ("defendant") appeals a judgment entered upon a jury verdict finding him guilty of first degree burglary. We find no error.

## I. BACKGROUND

On 4 December 2007, Eduardo Martinez ("Martinez"), Maria Elena Hernandez ("Hernandez") (collectively "the couple"), and three children lived on the ground floor at Royal Oak Apartments, 120 Deanna Lane, Apartment A ("the apartment"),[1] in Mecklenburg County,

[1]The street name is alternately spelled "Deanna" and "Dianna" in the transcript. We will use "Deanna" as it is the street name

North Carolina. At approximately 9:00 p.m., everyone in the apartment went to sleep. Both doors and all of the windows were closed and locked.

Some time after 9:00 p.m., a "really loud noise" awakened Martinez. He opened his bedroom door and saw a man standing in the hallway inside the apartment. Martinez and the man looked at each other. The man was approximately nineteen or twenty years old and stood approximately 5'5" to 5'6" tall. The man wore a large, black jacket with a fur-lined hood and large, black pants. At that moment, Hernandez entered the hallway, saw the man, and screamed. Neither Hernandez nor Martinez knew the man and had not given him permission to enter the apartment. The man exited the apartment through the back door, and Hernandez called 911.

While the couple waited for law enforcement officers to arrive, they discovered ten compact discs and their mp3 electronic music player were missing. They also noticed that a pane of glass from the sliding glass door to their apartment had been removed. Officer J. A. Sterette ("Officer Sterette") of the Charlotte-Mecklenburg Police Department ("CMPD") arrived and investigated the scene. Officer Sterette found pry marks on the sliding glass door to the apartment. In addition, the screens from the sliding glass door and the two rear windows of the apartment had been removed and were on the ground. Officer Sterette looked for fingerprints and observed a fresh, partial palm print on one of the rear windows.

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listed in the indictment.

Detective John Ormiston ("Detective Ormiston") of the CMPD reviewed the report of the crime scene and submitted a lab request for the lab to compare the partial palm print from the window with samples from defendant and another individual. The comparison revealed that the palm print found on the window at the couple's apartment belonged to defendant. Based on the results of the comparison, law enforcement officers arrested defendant on 16 May 2008.

After his arrest, defendant waived his *Miranda* rights and gave a statement to Detective Ormiston. When Detective Ormiston questioned defendant about the presence of his palm print on the couple's window, defendant stated that "he couldn't remember being involved in that, and that he didn't think he was involved because he doesn't do burglaries, which are at night." Defendant admitted he was "breaking and entering" during the day, but denied it was a burglary since burglaries are "at night."

Defendant was arrested, charged and indicted for first degree burglary and larceny of the residence. The case was heard in Mecklenburg County Superior Court before the Hon. Jesse B. Caldwell. Defendant moved to dismiss the burglary charge at the close of the State's evidence and at the close of all the evidence. The trial court denied both motions. Prior to jury deliberations, defendant did not appear for court but the trial continued. On 26 February 2009, the jury returned a verdict finding defendant guilty of first degree burglary, but the trial court continued judgment until defendant was apprehended.

Defendant's sentencing hearing was held on 20 July 2009 before the Hon. W. Robert Bell. Defendant was found to be a prior record level III for sentencing purposes. Defendant was sentenced to a minimum term of 100 months to a maximum term of 120 months in the custody of the North Carolina Department of Correction. Defendant appeals.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the trial court erred in denying his motion to dismiss the charge of first degree burglary due to the insufficiency of the evidence. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* "Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion." *State v. Hargrave*, ___ N.C. App. ___, ___, 680 S.E.2d 254, 261 (2009) (citation omitted). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . ." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). "The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the

time of the offense (vii) with the intent to commit a felony therein." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996) (citing N.C. Gen. Stat. § 14-51 (1993)).

In the instant case, the State's evidence shows that on the evening of 4 December 2007, Martinez closed and locked the doors and windows to his apartment before going to sleep. All of the screens were on the windows and doors before Martinez went to sleep. During the night, Martinez was awakened by a "loud bang." When he opened his bedroom door, he saw a man standing in the hallway wearing a large, black jacket with a fur-lined hood and large, black pants. The man was approximately 5'5" to 5'6" and nineteen or twenty years old. The man then exited the rear door and Hernandez called 911.

Martinez described the intruder and reported to Officer Sterette that some compact discs and an mp3 electronic music player were missing. One of the glass door window panes on the apartment had been removed, and the glass door screen and the screens from the two rear windows had been removed and placed on the ground. There were pry marks around the locking mechanism of the glass door. More importantly, Officer Sterette recovered a fresh, partial palm print that matched defendant's palm print from one of the windows. Martinez' description of the intruder matched a description of defendant.

The State presented evidence of each essential element of first degree burglary. Defendant was identified by his description and his palm print as the perpetrator who broke and entered into

defendant's apartment at night while Martinez was asleep, with the intent to commit a felony therein. The State presented substantial evidence of each essential element of first degree burglary and that defendant was the perpetrator. The trial court properly denied defendant's motion to dismiss. Defendant's assignment of error is overruled.

## III. DEFENDANT'S STATEMENT

Defendant argues the trial court committed prejudicial error in failing to exclude or redact his statements to Detective Ormiston pursuant to N.C. Gen. Stat. § 8C-1, Rules 401 ("Rule 401"), 403 ("Rule 403"), and 404(b) ("Rule 404(b)") (2009). We disagree.

### A. Standard of Review

We first determine the appropriate standard of review. Defendant argues that since admissibility of evidence is a question of law, the standard of review on defendant's objection to the admission of evidence is *de novo*, and cites *State v. Barber*, 335 N.C. 120, 436 S.E.2d 106 (1993), to support his argument. The State argues the standard of review is abuse of discretion, and cites *State v. Pierce*, 346 N.C. 471, 490, 488 S.E.2d 576, 587 (1997), to support its argument. We agree with the State that abuse of discretion is the proper standard of review.

In *Barber*, the trial court entered an order denying the defendant's motion to suppress a statement she made to law enforcement officers because the court found that the defendant was not in custody at the time she made the statement. 335 N.C. at

129, 436 S.E.2d at 111. In reviewing the trial court's order, our Supreme Court stated:

> While the trial court's findings of fact are binding on this Court if supported by the evidence, the conclusions are questions of law which are fully reviewable by this Court on appeal. Thus, we are not bound by the trial court's conclusion that defendant was not in custody at the time she made the statement in question. Rather, for purposes of this appeal, we assume, as defendant contends in her brief, that she was in custody and therefore entitled to the 5th and 14th Amendment protections of *Miranda* and *Edwards*.

*Id.*

In *Pierce*, the defendant was found guilty of first-degree murder and felonious child abuse of his two-and-a-half year-old niece. 346 N.C. at 479, 488 S.E.2d at 580. At trial, the defendant objected to a witness' testimony that the defendant abused his girlfriend's four-year-old daughter six months before the niece's death. *Id.* at 489, 488 S.E.2d at 586-87. The defendant argued that the testimony was inadmissible pursuant to Rule 403 and Rule 404(b). *Id.* at 489-90, 488 S.E.2d at 587. Our Supreme Court found that the testimony was relevant to establish the defendant's motive and intent, and to show absence of mistake on the defendant's part. *Id.* at 490, 488 S.E.2d at 587. Our Supreme Court held that the trial court did not abuse its discretion in determining that the probative value of the testimony was not substantially outweighed by its prejudice to the defendant. *Id.* at 490-91, 488 S.E.2d at 587. "We conclude that defendant has not shown that there is a reasonable possibility that, had the evidence at issue been excluded, a different result would have been

reached at trial." *Id.* at 491, 488 S.E.2d at 587-88 (citing N.C. Gen. Stat. § 15A-1443(a)).

In the instant case, defendant did not file a motion to suppress his statement to Detective Ormiston. Instead, defendant objected at trial to Detective Ormiston's testimony on the grounds that it was hearsay and was not the admission of a party opponent. Defendant seeks review of the trial court's decision to overrule his objection to this testimony. Therefore, since defendant seeks review of the trial court's ruling on an evidentiary objection, the abuse of discretion standard from *Pierce* applies in the instant case.

"The decision to admit or exclude evidence is in the sound discretion of the trial court and is reviewed under an abuse of discretion standard." *State v. Pulley*, 180 N.C. App. 54, 66, 636 S.E.2d 231, 240 (2006) (citing *State v. Smith*, 99 N.C. App. 67, 71, 392 S.E.2d 642, 645 (1990)). "It must be shown that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (internal quotations and citation omitted).

B. Rule 801(d) - Admissions by a Party Opponent

Defendant argues that his statements to Detective Ormiston were not admissions by a party opponent. We disagree.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009). However, the North Carolina Rules of Evidence provide for an exception to the hearsay rule for

admissions made by a party-opponent. "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity . . . ." N.C. Gen. Stat. § 8C-1, Rule 801(d) ("Rule 801(d)"); *see also State v. Chapman*, 359 N.C. 328, 354, 611 S.E.2d 794, 815 (2005) (citing Rule 801(d)) ("[A] defendant's own statement is admissible when offered against him at trial as an exception to the hearsay rule."). "'An admission is a statement of pertinent facts which, in light of other evidence, is incriminating.'" *State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995) (quoting *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 879-80 (1986)).

In the instant case, Detective Ormiston testified to the following, over defendant's objection:

> Q [the State]: What did you tell [defendant]?
> A [Detective Ormiston]: I told him - I asked him if he recalled or remembered this case, because of his fingerprints or palm prints were on this man's window at his apartment.
> Q: And what did he say?
> A: He said he couldn't remember being involved in that, and that he didn't think he was involved because he doesn't do burglaries, which are at night.
> Q: He doesn't think he was involved?
> A: Right. He said he couldn't remember being involved, and he didn't think he was involved because he doesn't do burglaries.
> Q: Did he say anything else?
> A: He told me that he had done a breaking and entering, which is during the day, but he does not do burglaries, which are at night.

Defendant's statements were clearly admissions by a party opponent and are admissible as an exception to the hearsay rule under Rule 801(d). In addition, there was other incriminating evidence against defendant, *e.g.*, his palm print was found at the scene, he matched the description of the perpetrator, and he did not deny that he committed the criminal act. Furthermore, defendant's statements to Detective Ormiston were incriminating.

"[A]dmissions of statements pursuant to Rule 801(d) are subject to the Rule 403 balancing of undue prejudice against probative value." *State v. Roache*, 358 N.C. 243, 286-87, 595 S.E.2d 381, 410 (2004) (citation omitted). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2009). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. However, "an incriminating statement . . . obviously has a tendency to prove a fact of consequence in the case and is, thus, relevant." *Lambert*, 341 N.C. at 50, 460 S.E.2d at 131 (citation omitted). Furthermore, "an admission of guilt . . . is highly probative; the fact that it is also very prejudicial does not make it unfairly so." *Id.*

In the instant case, the trial court balanced the probative value of defendant's admission with the potential for unfair prejudice and found that it helped explain the rest of defendant's statements. The trial court contemplated redacting the portions of defendant's statement concerning committing break-ins during the day, but found that doing so would render defendant's statement incomplete and would "take[] out the only categorical denial of any nighttime burglary[.]" This shows that the trial court's decision allowing defendant's statement was the result of a reasoned decision.

C. Rule 404(b) - Evidence of Other Crimes, Wrongs, or Acts

Defendant argues that his statements are inadmissible pursuant to Rule 404(b). We disagree.

"Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) ("Rule 404(a)") (2009). Furthermore:

> 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.

N.C. Gen. Stat. § 8C-1, Rule 404(b).

> Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or

> disposition to commit an offense of the nature of the crime charged."

*State v. Locklear*, 363 N.C. 438, 447, 681 S.E.2d 293, 301-02 (2009) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). "Thus, as long as the evidence of other crimes or wrongs by the defendant 'is relevant for some purpose other than to show [the] defendant['s] . . . propensity' to commit the charged crime, such evidence is admissible under Rule 404(b)." *Id.* at 447, 681 S.E.2d at 302 (quoting *Coffey*, 326 N.C. at 279, 389 S.E.2d at 54) (internal quotations and citation omitted).

"[I]n criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965). "In order to be relevant, . . . evidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611 (1991). "The value of the evidence need only be slight." *Id.* at 355, 402 S.E.2d at 610.

In the instant case, defendant's admission was not offered as character evidence or to show defendant acted in conformity with his other crimes, wrongs, or acts. His statements that "he *couldn't remember* being involved in that, and that he *didn't think* he was involved" were offered to show that he did not deny committing the crime and to clarify his statement to Detective Ormiston. (emphases added). Defendant's admission was helpful to understand his conduct. Furthermore, the trial court weighed the

probative value of defendant's admission with the potential for unfair prejudice and found that it helped explain the rest of defendant's statements. Defendant did not meet his burden of showing that the trial court abused its discretion in allowing his admission into evidence.

D. N.C. Gen. Stat. § 15A-1443(a) (2009)

Defendant argues that the trial court's decision to allow his admission into evidence was prejudicial error under N.C. Gen. Stat. § 15A-1443(a). We disagree.

> 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. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

N.C. Gen. Stat. § 15A-1443(a). "Defendant has the burden under N.C.G.S. § 15A-1443[a] of demonstrating that but for the erroneous admission of . . . evidence [in violation of Rule 404(b)], there is a reasonable possibility that the jury would have reached a verdict of not guilty." *State v. Burr*, 341 N.C. 263, 291, 461 S.E.2d 602, 617 (1995) (internal quotation marks omitted).

Assuming *arguendo* that the trial court erred in allowing defendant's admission into evidence, defendant has not met his burden of showing prejudice. Martinez and Hernandez gave a physical description of the perpetrator that matched defendant. Defendant's palm print was found at the scene. Defendant was

familiar with the location of the apartment and was in the neighborhood on 2 December 2007, two days prior to the burglary. Furthermore, although three of defendant's relatives testified that defendant was in South Carolina from 2 December 2007 until after Christmas, Officer P.B. Horner of the CMPD testified that on 8 December 2007, he arrested defendant in Mecklenburg County on an unrelated charge. The records manager with the Mecklenburg County Sheriff's Department testified that her records showed that defendant was admitted into the Mecklenburg County Jail on 8 December 2007 and was released on 12 December 2007. Defendant has not shown that the jury would have reached a different result had his admission been excluded. Defendant's assignments of error are overruled.

## IV. CHARACTER EVIDENCE

Defendant argues that he was denied a fair trial pursuant to N.C. Gen. Stat. § 15A-1443(a) (2009) when the State asked a defense witness whether defendant was a gang member. We disagree.

> "When a defendant introduces evidence of his good character, the State has the right to introduce evidence of his bad character, but it is error to permit the State to cross-examine the character witnesses as to particular acts of misconduct on the part of the defendant. Neither is it permissible for the State to introduce evidence of such misconduct. The general rule is that a character witness may be cross-examined as to the general reputation of the defendant as to particular vices or virtues, but not as to specific acts of misconduct."

*State v. Chapman*, 294 N.C. 407, 416, 241 S.E.2d 667, 673 (1978) (quoting *State v. Green*, 238 N.C. 257, 258, 77 S.E.2d 614, 615

(1953)). A defendant is entitled to a new trial based on erroneous admission of evidence only if the error was prejudicial. *State v. Alston*, 307 N.C. 321, 339-40, 298 S.E.2d 631, 644 (1983). "The defendant has the burden of showing that he was prejudiced by the admission of the evidence." *Id.* at 339, 298 S.E.2d at 644. In order to show prejudice, defendant must show that absent the error, there is a reasonable possibility that the jury would have reached a different verdict. N.C. Gen. Stat. § 15A-1443(a).

In *State v. Wilkerson*, the defendant argued that the State's cross-examination of his mother about his purported gang membership was prejudicial error because it was improper character evidence. 295 N.C. 559, 247 S.E.2d 905 (1978). On cross-examination, the State asked the defendant's mother four times about her son being involved in a gang. *Id.* at 571-73, 247 S.E.2d at 912-13. The trial court overruled the defendant's objection four times, and the defendant's mother answered in the negative each time. *Id.* Even though our Supreme Court noted that the State and the defendant agreed that the witness was a character witness, the Court concluded that "it was error to permit this kind of cross-examination." *Id.* at 573, 247 S.E.2d at 913. However, the Court concluded that the error was not prejudicial because other evidence was "quite persuasive of defendant's guilt[.]" *Id.*

In the instant case, defendant's brother, Terrance Jackson ("Jackson"), testified during cross-examination as follows:

> Q [the State]: Are you familiar with Five Points, or Five Point?
> A [Jackson]: No.
> Q: Okay. Are you familiar with the Bloods?

A: No.
Q: You and your brother are both members of the Bloods, are you not?
A: No.
Q: Isn't it true that on December 12th, 2008, you got in a gang fight at a funeral here in Charlotte?
A: No.
. . .
Q: Before the break, I believe we were discussing whether or not you were affiliated with a gang. Do you remember that?
A: Yes.
Q: Do you, now that you've had a little time to think about it, do you realize now that your brother is an admitted gang member, he's in the same gang as you?
A: Excuse me?
Q: Your brother is an admitted gang member, and in the same gang as you.

[Defendant's counsel]: Objection.
THE COURT: I'll sustain the objection to the form of the question. You're saying he's an admitted gang member; I think the form of the question is the objection.

Q: Do you realize that your brother is in a gang?
A: No.
Q: Do you know, do you realize that you're in the same gang as your brother?
A: Why do you say that?
Q: Can you answer the question?
A: Can you repeat the question?
Q: Do you realize that you're in the same gang as your brother?
A: No.

Jackson's testimony in the instant case is indistinguishable from the witness' testimony in *Wilkerson*; therefore, it was error for the trial court to permit this testimony during cross-examination.

Although the trial court erred in allowing this testimony, defendant cannot meet his burden of showing prejudice under N.C.

Gen. Stat. § 15A-1443(a) because defendant cannot show that, absent the error, the jury would have reached a different verdict. In the instant case, as in *Wilkerson*, there was ample other evidence of defendant's guilt. On 4 December 2007, Martinez and Hernandez awoke during the night to a "loud bang" and saw a stranger matching defendant's description in the hallway of their apartment. The glass from the couple's sliding glass door had been removed, along with door and window screens. Martinez' compact discs and an mp3 player were missing from the apartment. A fresh palm print recovered from one of the rear windows of the apartment matched defendant's palm print. Defendant was familiar with the location of the apartment and was in the neighborhood two days prior to the burglary. Defendant was in Charlotte for the period of 8 December 2007 to 12 December 2007. Defendant has not shown that the jury would have reached a different result had the State's exchange with Jackson been excluded. Defendant's assignments of error are overruled.

## V. JURY INSTRUCTIONS

Defendant argues that the trial court erred in instructing the jury regarding the concept of "entry" in response to a question from the jury. We disagree.

Defendant asks this Court to review for plain error because defendant did not object to the jury instruction at trial. *State v. Odom*, 307 N.C. 655, 656, 300 S.E.2d 375, 376 (1983); *see also* N.C.R. App. P. 10(b)(2), 10(c)(4) (2009). Plain error applies only to jury instructions and evidentiary matters in criminal cases.

*State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004). "[T]he burden on defendant to demonstrate plain error is high." *State v. Smith*, 155 N.C. App. 500, 511, 573 S.E.2d 618, 625 (2002). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79. "[E]ven when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212, 97 S. Ct. 1730, 1736 (1977)).

"A prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986). "[T]he trial court is not required to give a requested instruction in the exact language of the request." *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976) (citation omitted). If the jury instruction "'fairly and correctly presents the law, it will afford no ground for reversing the judgment[.]'" *State v. Tomblin*, 276 N.C. 273, 276, 171 S.E.2d 901, 903 (1970) (quoting *State v. Valley*, 187 N.C. 571, 572, 122 S.E. 373, 374 (1924)).

In the instant case, during jury deliberations, the foreman sent a written communication to the trial court asking the

following questions: "[W]hat does entering mean? Does he need to have both feet in the home? Did he just have to have removed the screen? [I]s intent to breaking and entering equal to breaking and entering?" Regarding the last question, defendant requested that the trial court instruct the jury that the answer should be "no." The trial court overruled defendant's request and stated that it was reinstructing the jury pursuant to N.C.P.I. - Crim. 214.10 (2002) as follows, in pertinent part:

> Now, Members of the Jury, I believe the appropriate way - I've decided the appropriate way to respond is to repeat the charge and to add a further definition about this time entry. So I'm going to respond to the first two questions by reviewing with you what I had previously given you as the law with regard to first degree burglary, but this time adding an additional elaboration on the definition about entry.
>
> Members of the Jury, the defendant has been charged with first degree burglary, which is breaking *and* entering the occupied dwelling house of another, without his consent, in the nighttime, with the intent to commit larceny. Members of the Jury, for you to find the defendant guilty of this offense, the State must prove six things beyond a reasonable doubt.
>
> First, that there was a breaking *and* an entry by the defendant. Now, Members of the Jury, the Court instructs you that an entry would include any portion of the defendant's body, and/or any implement under the defendant's control entering the premises.
>
> In other words, any portion of the defendant's body would constitute an entry. Also, Members of the Jury, any implement that would be like a tool, device or something like that, any implement under the defendant's control entering the premises would constitute an entry.

> So the first element is there must be a breaking *and* an entering by the defendant, and I've given you the further definition of entry or entering.

(emphases added).

Defendant argues that the trial court's instruction "completely blurred and blended" the elements of breaking and entering. However, a review of the trial court's instruction in the instant case reveals that the court stated on three separate occasions that first degree burglary required the State to show a breaking *and* an entry by defendant. Therefore, the trial court's instruction "fairly and correctly presented the law" on first degree burglary. Further, "[t]he trial court's instructions substantially conformed with the pattern jury instruction on [first degree] burglary, N.C.P.I. - Crim. 214.10 ([2002]), which was approved by [our Supreme] Court in *State v. Harold*, 312 N.C. 787, 325 S.E.2d 219." *Singletary*, 344 N.C. at 102, 472 S.E.2d at 899. The trial court did not err in reinstructing the jury on the elements of first degree burglary. Defendant's assignment of error is overruled.

## VI. CONCLUSION

Defendant received a fair trial free from error.

No error.

Judge HUNTER, Robert C., concurs.

Judge WYNN concurs in the result by a separate opinion.

Report per Rule 30(e).

Judge WYNN concurred in the result in this opinion prior to 9 August 2010.

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WYNN, Judge, concurring in result only.

I concur in the result of this opinion but specially do not join in the portion finding no error in the trial court's decision to admit evidence of Defendant's statement to Detective Ormiston.

I agree with the majority that Defendant's statement, as recounted at trial by Detective Ormiston, fell within an exception to the prohibition against hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 801(d) (2009)(establishing that a statement is admissible "if it is offered against a party and it is . . . his own statement"). However, the rationale for this exception is not based on the incriminating nature of the statement in question. Instead, the better support for the exception is the recognition that it would be irrational to permit a party to object to his own statements on hearsay grounds. *See State v. Cobb*, 295 N.C. 1, 14, 243 S.E.2d 759, 767 (1978); *see also* Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 199 (4th ed. 1993)(noting that "numerous cases have admitted statements [under the Rule 801(d) exception] which clearly were not against interest when made").

I do not agree with the majority that Defendant's statement, indicating that he had broken and entered into a house during the

day, constituted an admission to the burglary for which he was charged, especially when Defendant further stated that he "didn't think he was involved [in the crime charged] because he doesn't do burglaries." Also, I am not persuaded that this statement was relevant to any issue other than Defendant's propensity to commit the crime of breaking and entering, which would be an impermissible basis for the statement's admission. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009).

Notwithstanding my contention that the statement was erroneously admitted, in light of the additional evidence indicating Defendant's guilt, I agree with the result reached by the majority that the Defendant received a trial free from prejudicial error. *See* N.C. Gen. Stat. § 15A-1443(a) (2009).