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NO. COA11-424
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v.

Robeson County
No. 07 CRS 57594

JASON RYAN SMITH,
Defendant.

Appeal by defendant from judgment entered 27 August 2010 by Judge James Floyd Ammons, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 11 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Jason Ryan Smith appeals from a judgment entered on 27 August 2010 after a jury found him guilty of second degree murder. Defendant argues on appeal that the trial court: (1) committed plain error by allowing the State to introduce evidence of defendant's prior convictions without first conducting the required balancing test to determine if the

probative value of the evidence outweighed its prejudicial effect, and (2) erred by failing to intervene *ex mero motu* when the prosecutor referenced defendant's tattoos during closing argument. After careful review, we find no prejudicial error.

Background

The evidence at trial tended to establish the following facts: Defendant owned and operated a dry wall installation company in Lumberton, North Carolina. The victim, Jesus Isidro Reyes Soto, was one of defendant's employees.

On 21 November 2007, Soto and three other employees went to defendant's home to pick up their paychecks. According to the State's witness, Timothy Hunt, who was one of the employees present that day, when defendant gave the men the envelopes containing their pay, Soto stated that his pay was incorrect. Defendant then took Soto's envelope, handed it to one of the other employees who spoke English, and went back into his house. When defendant came back outside, he told the English-speaking employee to tell Soto "'to get out of his yard.'" Defendant then shot into the ground twice approximately two feet away from Soto's foot. According to Hunt, Soto began walking toward the van he arrived in, but defendant began beating him in the head with his gun, knocking him to the ground. When defendant

stopped beating him, Soto stumbled into the back seat of the van. Defendant's wife ran out of the house and yelled, "'get that motherfucker.'" Hunt saw defendant lean into the van and heard defendant's gun go off. Defendant then appeared to be in a state of panic, exclaiming, "'I believe I killed him, I believe I killed him.'" Soto was taken to the local hospital by the other employees and then air lifted to Duke University Hospital where he later died of a gunshot wound to the head.

Defendant testified at trial and stated that he routinely kept a pistol in his back pocket when giving his employees their pay due to the large amount of cash he kept at his home. Defendant claimed that on 21 November 2007, Soto became enraged when he thought his pay was less than it should have been. Defendant asked Soto to leave his property, and, when Soto refused to do so, defendant put his arm around him and attempted to lead him to the van. Defendant shot two rounds into the ground and then began pushing Soto toward the van. Soto turned, ripped defendant's shirt, and the two men began "tussling." Defendant stated that he hit Soto multiple times in the back of the head with his gun and that Soto "assault[ed] [him] back." Defendant pushed Soto into the van and struck him again on the

head with the gun. According to defendant, the gun involuntarily discharged and Soto was shot in the head.

Dr. Cynthia Gardner testified regarding the autopsy she performed on Soto. She stated that the "stippling" around the gunshot wound indicated that Soto was shot from more than two feet away. Defendant's gun was inspected by the State Bureau of Investigation ("SBI"). A safety warning had been issued by the gun manufacturer, informing owners that the gun could potentially discharge if the back of the gun was hit while the trigger was slightly pulled back; however, the SBI could not recreate a scenario in which defendant's gun would accidentally discharge.

Defendant was charged with first degree murder. On 27 August 2010, the jury found defendant guilty of second degree murder. The trial court sentenced defendant within the presumptive range to 180 to 225 months imprisonment. Defendant timely appealed to this Court.

Discussion

I.

Defendant argues that the trial court erred in allowing the State to ask defendant on cross-examination about his 1997 convictions for breaking and entering and larceny without first

conducting the mandatory balancing test and entering findings of fact pursuant to Rule 609 of the North Carolina Rules of Evidence. Defendant claims that "[t]he court's failure to determine whether the probative value outweighed its presumptively prejudicial effect and failure to identify specific facts and circumstances justifying its decision requires that [defendant's] conviction be reversed." We disagree.

Defendant argued before the trial court that the evidence concerning defendant's prior conviction should not be admitted at trial; however, defendant failed to object to the admission of this evidence in the presence of the jury when the evidence was offered. Consequently, defendant is only entitled to plain error review. *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (holding that, "in order to preserve for appellate review a trial court's decision to admit testimony, 'objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence' and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony" (quoting *State v. Thibodeaux*, 352 N.C. 570, 581-82, 532 S.E.2d 797, 806 (2000), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976 (2001))). Defendant must,

therefore, establish "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

Rule 609 provides in pertinent part:

(a) General rule.--For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony . . . shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) Time limit.--Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

N.C. Gen. Stat § 8C-1, Rule 609(a)-(b) (2009).

Rule 609(b) requires the trial court to make findings of fact which demonstrate that the probative value of the evidence outweighs its prejudicial nature. This requirement of the Rule establishes "a rebuttable presumption that prior convictions more than ten years old [are] more prejudicial to defendant's defense than probative of [his] general character for credibility and,

therefore, should not be admitted in evidence."

State v. Shelly, 176 N.C. App. 575, 581, 627 S.E.2d 287, 293 (2006) (quoting *State v. Blankenship*, 89 N.C. App. 465, 468, 366 S.E.2d 509, 511 (1988)). "Further, it is settled that the prior conviction evidence is used properly only to impeach the defendant's credibility. This is the reason that the trial judge must make specific findings as to how the prior convictions are probative on credibility issues when balancing probative value against prejudicial effect." *Id.* (internal citation omitted).

Here, the two convictions at issue occurred around 13 years prior to trial. It is undisputed that the trial court made no findings of fact demonstrating that it conducted the required balancing test. Despite the trial court's failure to make the appropriate findings, and assuming, *arguendo*, that the convictions should have been excluded, we hold that admission of the evidence at trial did not amount to plain error. Given the overwhelming evidence, eyewitness and forensic, that defendant intentionally shot and killed Soto, we cannot say that the jury would have reached a different result had this evidence been excluded. Moreover, these convictions were only mentioned briefly and the trial court offered a limiting instruction. See

State v. Muhammed, 186 N.C. App. 355, 364, 651 S.E.2d 569, 576 (2007) ("Even if it had been error to admit evidence of defendant's prior conviction, it does not rise to the level of plain error in light of the other evidence of defendant's intent, the limited evidence presented of the conviction, and the court's instruction that the prior conviction evidence could be considered only for the limited purpose of determining credibility."), *appeal dismissed*, 362 N.C. 242, 660 S.E.2d 537 (2008). In sum, we cannot say that admission of this evidence amounted to plain error, and, therefore, defendant is not entitled to a new trial.

II.

Next, defendant argues that the trial court erred in failing to intervene *ex mero motu* when the prosecutor stated during closing argument: "[Mr. Soto] questioned the defendant in front of the other men, and the defendant with the tattoos of Jay Dog Thug and Thug Life, who continues to flaunt the law because he has to support his family, didn't approve of Jesus' questioning him in front of his men." Again, we disagree.

Defendant did not object to the prosecutor's statement, therefore, "defendant must show that the prosecutor's comments so infected the trial that they rendered his conviction

fundamentally unfair. Moreover, the comments must be viewed in the context in which they were made and in light of the overall factual circumstances to which they referred." *State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 519 (1998). "Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Wiley*, 355 N.C. 592, 620, 565 S.E.2d 22, 42 (2002) (internal citations and quotation marks omitted).

While defendant's tattoos had no bearing on whether defendant committed the crime charged, we hold that the prosecutor's reference to the tattoos and his statement that defendant "continues to flaunt the law" did not amount to an "extreme impropriety," *id.*, and certainly did not render defendant's conviction fundamentally unfair given the overwhelming evidence that defendant intentionally shot and killed Soto, *see State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 841 (2001) ("Assuming *arguendo* that the prosecutor's comment in the present case was error, we conclude, in light of the overwhelming evidence of defendant's guilt, that the

prosecutorial error and the trial court's failure to intervene *ex mero motu* were harmless").

Conclusion

Based on the foregoing, we hold that admission of defendant's prior convictions did not amount to plain error. We further hold that the trial court did not err in failing to intervene *ex mero motu* during the prosecutor's closing argument.

No prejudicial error.

Judges MCGEE and CALABRIA concur.

Report per Rule 30(e).