NO. COA11-431
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Buncombe County
No. 08 CRS 55652, 09 CRS 7

WILLIAM RAYMOND MILLER

Appeal by defendant from judgments entered 15 April 2010 by Judge James L. Baker, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 13 October 2011.

Roy Cooper, Attorney General, by David J. Adinolfi, II, Special Deputy Attorney General, for the State.

Staples S. Hughes, Appellate Defender, by Andrew DeSimone, Assistant Appellate Defender, for Defendant.

THIGPEN, Judge.

At the trial of William Raymond Miller ("Defendant"), the State introduced evidence inferring that Defendant may have been affiliated with the Crips gang. Defendant did not object to the testimony. We must determine on appeal whether the admission of this testimony constituted plain error. We conclude it did not

and further conclude Defendant had a fair trial, free from prejudicial error.

The evidence of record tends to show the following. On the evening of 28 April 2008, Stephanie Surrett ("Surrett") was at the apartment of her fiancée, David Allison ("Allison") in Arden, North Carolina. Elizabeth Miranda ("Miranda") and Preston Mitchell ("Mitchell") were also present. At 12:05 a.m., Surrett awoke to two intruders, Defendant and purportedly, Boyce Plemmons ("Plemmons"). Defendant had a gun, and Plemmons had a knife. Both men wore bandannas. According to Surrett, the gunman wore a red bandanna and the "knifeman" wore a blue one. However, according to Miranda, the gunman wore the blue bandanna, and the "knifeman" wore the red one.

Defendant pointed the gun at Surrett and told Surrett the gun was cocked and he would shoot. Surrett screamed, and Allison put his arms over her to protect her. Defendant then stated, "Someone took some money from my sister" and asked, "Who's Mike?" to which Allison replied that no one named Mike was there, and "we've never stolen anything from anyone; . . . if it did happen, it wasn't us; take what you want; just leave." Plemmons took money out of Allison's wallet and a laptop from a

nearby desk, and the men instructed the four individuals not to call the police. Allison had approximately $300 in his wallet.

At trial, Surrett gave a detailed description of the gunman and said she was "99.9%" sure she recognized the gunman as Defendant; Surrett also said Defendant recognized her. Surrett and Defendant knew each other from high school. Allison had "a really clear look at" the gunman and identified Defendant in a photo lineup. Allison said he was "100%" sure Defendant was the gunman. Mitchell also identified Defendant in a photo lineup and was "almost 100 percent sure" the gunman was Defendant.

Two days after the burglary, Jeanine Roberts ("Roberts") told Allison she had recovered his laptop. Roberts stated that Defendant and Plemmons were at a party bragging about the burglary. Roberts said Defendant laughed about Surrett screaming during the burglary and made reference to money and a laptop. Roberts also saw the laptop at the party and, upon seeing photographs stored in the laptop, recognized that the laptop belonged to Allison. Roberts told her brother to purchase the laptop so it could be returned to Allison, and Roberts' brother purchased the laptop from Defendant for $300. Roberts remembers her brother putting the money for the laptop in Defendant's hands and receiving the laptop from Defendant.

On 5 January 2009, Defendant was indicted on charges of robbery with a dangerous weapon and first degree burglary. Defendant was tried at the 12 April 2010 session of Buncombe County Superior Court, and the jury found Defendant guilty of both charges. On 15 April 2010, the trial court entered judgments consistent with the jury's verdict, convicting Defendant of robbery with a dangerous weapon and first degree burglary, and sentencing Defendant to two consecutive terms of 77 to 102 months incarceration. The trial court also ordered Defendant to pay $325 in restitution. From these judgments, Defendant appeals.

I: Rule 404(b) Evidence of Gang Affiliation

In Defendant's first argument on appeal, he contends the court committed plain error by allowing the State to introduce evidence that Defendant may have been affiliated with a gang. We disagree.

Rule 10(a)(4) of the North Carolina Rules of Appellate Procedure governs this Court's review of matters employing the plain error standard: "In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial

action questioned is specifically and distinctly contended to amount to plain error."[1]

Plain error analysis applies to evidentiary matters and jury instructions. *State v. Cummings*, 361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007), *cert. denied*, 552 U.S. 1319, 170 L. Ed. 2d 760, 128 S. Ct. 1888 (2008). "A reversal for plain error is only appropriate in the most exceptional cases." *State v. Raines*, 362 N.C. 1, 16, 653 S.E.2d 126, 136 (2007), *cert. denied*, 557 U.S. __, 174 L. Ed. 2d 601, 129 S. Ct. 2857 (2009) (quotation omitted). "The plain error rule is critical in the context of admitting physical evidence or testimony without an objection because the trial court is not expected to second-guess a party's trial strategy[;] [t]he possibility always exists that a party intentionally declines to object for some strategic reason." *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634, *cert. denied*, __ U.S. __, 175 L. Ed. 2d 362, 130 S. Ct. 510 (2009) (citation omitted).

To show plain error, the "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result," *State*

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[1]Defendant did not object at trial to the admission of the testimony pertaining to Defendant's inferred gang affiliation. Therefore, plain error review is appropriate.

v. Allen, 360 N.C. 297, 310, 626 S.E.2d 271, 282, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116, 127 S. Ct. 164 (2006) (quotation omitted); or we must be convinced that any error was so "fundamental" that it caused "a miscarriage of justice." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation omitted). Defendant bears the burden of showing that an error arose to the level of plain error. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

On appeal, Defendant argues the admission of the testimony of Defendant's fiancé, Tiffany Wilson ("Wilson"), and the prosecutor's references to Wilson's testimony in closing arguments, constituted plain error. Wilson testified at trial that Defendant was not in a gang; however, Wilson also gave testimony inferring Defendant's possible gang affiliation, including the following:

> Q. Is the defendant in a gang?
>
> A. No.
>
> Q. Then why does he have gang signs up on the MySpace page?
>
> A. He just likes them, I guess.
>
> Q. He likes gangs?
>
> A. Yeah.
>
> Q. Does he like gangster activity?

A. I guess you could say that. He's not in a gang. He is not in a gang.

Q. But he likes that lifestyle?

A. Yeah, I guess you could say that.

Q. Robbing, beating, stealing, killing people, is that what he's into?

A. No. He likes the graffiti.

. . . .

Q. What else does he like?

A. The colors.

Q. What colors does he wear?

A. Blue.

Q. What's the significance of wearing blue colors?

A. That's his favorite color, really.

Q. But you said that has something to do with gangs.

A. It's affiliated with Crips, but he's not a Crip.

Q. He's not a Crip?

A. No.

Q. In any of those photographs on his page, is he making gang signs?

A. Possibly.

Q. Is he or isn't he? Do you know?

A. I'd have to look at them. I don't look at the pictures on a daily basis, but he could be in some of them. He knows a lot about gangs. He knows a lot about the Crips, but he is not a member.

. . . .

Q. Was he in a gang with Boyce Plemmons?

A. No.

Q. How do you know?

A. Because from -- I understood Boyce was a Blood.

Q. Well, the Bloods and the Crips, that's like cats and dogs, isn't it?

. . . .

Q. So your understanding was that Boyce Plemmons was in a gang?

A. Uh-huh.

Q. And in a gang called the Bloods?

A. Yes.

Q. And this one is of your boyfriend's associates and friends?

A. Yeah.

Q. How good of friends were they?

A. Associates. They hung out here and there. They weren't, you know, best friends. I wouldn't assume they were best friends.

Q. How much did they hang out?

A. Maybe once a week.

In the prosecutor's closing argument, the prosecutor made the following references to Wilson's testimony regarding Defendant's interest in gangs:

> You know, this is a rhetorical question, so don't answer, but what's your favorite organized crime gang? You know, we learned that the defendant's favorite gang of murderers, drug dealers, pimps, and other – thieves and other criminals is the Crips. I don't know how you pick a favorite gang. Maybe – maybe you have one. Maybe you all like the Mongol motorcycle gang. Maybe that's your favorite criminal outfit, organization. But he likes the Crips, and that's something he's really into. And we found out that his – that the colors for the Crips are blue. And multiple – and those statements, if you take a look at them, as Mr. Sutton has asked you to, the gunman was wearing the blue bandanna. And Boyce Plemmons, he's different; he's a Blood. Now, I don't know if a guy who looks like Boyce Plemmons is really into the Bloods, or maybe this is kind of a Asheville wannabe kind of thing, but he's into the Bloods. And, you know, you look at somebody's blood color, that's red. The guy with the knife, you look in those statements, guess who – what color bandanna he's wearing in covering up his face?

Defendant specifically argues that by allowing the foregoing evidence and closing argument the trial court committed plain error because the State "encouraged the jury to find [Defendant] guilty" due to "that dangerous [gang]

affiliation." Defendant further contends there was insufficient evidence of the identity of Defendant as the perpetrator of the offense, and therefore, the introduction of evidence of gang affiliation "amounted to plain error[.]" We disagree. The evidence in this case supports a conviction, with or without the gang testimony. There was plenary evidence of the identity of Defendant as the perpetrator of the offense. In fact, Defendant was identified by three victims. Surrett, who knew Defendant from high school, stated she was "99.9% sure" the gunman was Defendant. Mitchell testified he was "almost 100% sure" the gunman was Defendant, and Allison gave the following testimony about the photo lineup: "[W]hen it got to the page of the defendant, I was 100 percent sure. The hair was the exact same, the manicured eyebrows, and the dark eyes. There was just no doubt in my mind." Moreover, Roberts testified that Defendant and Plemmons were bragging about a robbery, referencing "a gun" and "a laptop," and "making fun of the girl screaming." There is no indication that the jury probably would have reached a different result but for the gang evidence. Therefore, we conclude the introduction of evidence of possible gang affiliation did not amount to plain error.

II: Plain Error by Admission of Evidence

In Defendant's second argument on appeal, he contends the trial court committed plain error by allowing the State to "use [Defendant's] exercise of his . . . rights to silence against him as substantive evidence of his guilt." We disagree.

To show plain error, the "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result," *Allen*, 360 N.C. at 310, 626 S.E.2d at 282; or we must be convinced that any error was so "fundamental" that it caused "a miscarriage of justice." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

Defendant specifically argues on appeal that the admission of the following testimony by Detective Jeff Eaton ("Detective Eaton")[2] violated Defendant's right to remain silent under the Fifth Amendment to the United States Constitution, and Article I, Section 23 of the North Carolina Constitution, and constituted plain error:

> Q: Did you attempt to interview the defendant about this case?
>
> A. I did.
>
> Q. And did you obtain a statement from the –

[2]Defendant did not object at trial to the admission of Detective Eaton's testimony regarding Defendant's statement. Therefore, plain error review is appropriate.

did the defendant make a statement to you?

A. No, sir.

Defendant is correct in his assertion that the exercise of his constitutionally protected right to remain silent may not be introduced as evidence against him by the State at trial. *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779; *State v. Jackson*, 202 N.C. App. 564, 568, 688 S.E.2d 766, 768 ("Once the defendant has been arrested and advised of his *Miranda* rights, however, the State's use of his silence against him violates his constitutional right against self-incrimination"), *disc. review denied*, 364 N.C. 130, 696 S.E.2d 695 (2010). "However, even when a defendant objects, this constitutional error will not merit a new trial where the State shows that the error was harmless beyond a reasonable doubt." *Bishop,* 346 N.C. at 385, 488 S.E.2d at 779 (citing N.C. Gen. Stat. § 15A-1443(b)). "Where, as in this case, a defendant has failed to object, the defendant has the burden of showing that the error constituted plain error[.]" *Id.* Because the evidence against Defendant was substantial, it is unlikely that a different result probably would have been reached absent Detective Eaton's comment on Defendant's exercise of his right to remain silent. Four victims gave similar testimony as to what transpired in the

early morning on 29 April 2008, three of whom identified Defendant as the perpetrator of the offense with ninety-nine or one-hundred percent certainty. We conclude Defendant has failed to show plain error in the introduction of the foregoing testimony.

III: Restitution

In Defendant's final argument on appeal, he contends the trial court erred by ordering Defendant to pay restitution in the amount of $325.00 because the State failed to present sufficient evidence to support the restitution order. We agree.

"[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004). "[W]hen . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005) (quotation omitted).

In this case, Allison testified on direct examination that he had "about 300 bucks" in his wallet. The amount of $325.00 was raised on cross-examination by defense counsel:

> Q: How much – did you have cash around as well?
>
> A: Just what I had in my wallet.

> Q: Just the $325. Was there cash stowed somewhere else, other than the apartment?
>
> A: No.

We believe that defense counsel's misstatement as to the amount of money Allison had in his wallet does not constitute evidence elicited from a testifying witness. In fact, there was no evidence adduced at trial or during sentencing supporting restitution in the amount of $325.00. The only evidence of the amount of money Allison had in his wallet was Allison's statement that he had "about 300 bucks." Accordingly, the $325.00 restitution order is not supported by the evidence, and we must vacate the trial court's restitution order and remand for rehearing on this issue.

NO ERROR, in part, VACATED and REMANDED, in part.

Judges HUNTER, JR., and BEASLEY concur.

Report per Rule 30(e).