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NO. COA11-582
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 06 CRS 257752; 257754

BRYANT DAVID THOMPSON

On writ of *certiorari* to review judgment entered 18 January 2008 by Judge James E. Hardin in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 October 2011.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

Richard E. Jester, for defendant-appellant.

CALABRIA, Judge.

Bryant David Thompson ("defendant") appeals from a judgment entered upon jury verdicts finding him guilty of robbery with a dangerous weapon ("RWDW") and possessing a weapon on educational property. We find no error.

I. Background

On 14 December 2006, Donald,¹ a student at Hopewell High School in Huntersville, North Carolina, entered a restroom. Two males ("the robbers") were inside the restroom, one of which was defendant. When Donald attempted to leave, the robbers stopped him and forced him into the back of the restroom. Defendant demanded that Donald give the robbers his wallet.

The robbers told Donald that they had a knife and then defendant took a knife out of his pocket. Upon seeing the knife, Donald surrendered his wallet. The robbers took a twenty dollar bill and other currency from the wallet, returned the wallet to David, and then left the restroom.

After a few moments, Donald left the restroom and reported the robbery to the school security officer, Thomas Sanders ("Sanders"). Sanders and David saw the robbers enter a classroom. Sanders removed two students from the classroom and brought them to Donald, who positively identified them as the robbers. Sanders escorted the robbers to the office of Assistant Principal Reginald Coles ("Coles").

Coles had Sanders place the robbers in his office and then conferred briefly with Sanders and Donald outside the door. Sanders heard one of the robbers throw something in Coles' trash

¹ "Donald" is a pseudonym used to protect the identity of the minor child victim.

can. He went into the office to investigate and discovered the knife inside the can. Sanders brought the knife to Coles.

Coles asked the two robbers to identify the owner of the knife. Defendant admitted the knife was his. When Coles asked defendant why he threw the knife in the trash can, defendant replied that he "didn't know."

Officer C. A. Jones, II ("Officer Jones") of the Huntersville Police Department was called to Coles' office. When he arrived, Donald told him about the robbery and Coles gave him the knife. Officer Jones went into Coles' office and asked the robbers, "whose knife is this?" Defendant responded that the knife was his. Officer Jones arrested both robbers and, while searching defendant incident to the arrest, discovered a twenty dollar bill in defendant's sock.

Several weeks after defendant was arrested, he approached Donald to encourage him not to testify against defendant. Donald refused, and provided a written statement regarding this encounter to Officer Jones.

Defendant was indicted for RWDW and possession of a weapon on educational property. Beginning 14 January 2008, defendant was tried by a jury in Mecklenburg County Superior Court. At trial, defendant allowed his attorney to admit that he was

guilty of possession of a weapon on educational property. Defendant testified on his own behalf and admitted both that he possessed the knife on school property and that he pulled it out during the robbery, but he denied that he intentionally participated in robbing Donald.

On 18 January 2008, the jury returned verdicts finding defendant guilty of both charges. The trial court, after determining that mitigating factors were present, sentenced defendant to a minimum of 38 months to a maximum of 55 months in the North Carolina Department of Correction. After failing to give notice of appeal, defendant filed a petition for writ of *certiorari*, and this Court granted review.

II. Questioning of Defendant

Defendant argues that the trial court erred by failing to rule *sua sponte* that defendant was improperly questioned by Coles and Officer Jones in violation of his *Miranda* rights. We disagree.

A. Preservation at Trial

Defendant's attorney did not object to this evidence at trial; therefore he has failed to preserve this issue for appellate review. See N.C.R. App. P. 10(a)(1) (2010). While defendant's argument also references plain error,

"[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error[.]" *State v. Gopal*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007) (citations omitted). Thus, this argument is not properly before this Court.

B. Motion for Appropriate Relief

However, in the alternative, defendant has filed a motion for appropriate relief ("MAR") with this Court pursuant to N.C. Gen. Stat. § 15A-1418 (2009). Defendant's MAR is based upon N.C. Gen. Stat. § 15A-1415(b)(7) (2009), which allows a defendant to seek relief where "[t]here has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required." Defendant contends that the United States Supreme Court's decision in *J.D.B. v. North Carolina*, 564 U.S. ___, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011), which held that a juvenile's age must be taken into consideration for purposes of the *Miranda* custody analysis, constituted a significant change in the law. Defendant further argues that applying *J.D.B.* in the instant case would have required Coles and Officer Jones to inform defendant, who was sixteen years old at the time of the

robbery, of his *Miranda* rights before questioning him in Coles' office.

However, it is unnecessary to determine what effect, if any, *J.D.B.* had upon the propriety of defendant's questioning. Even assuming, *arguendo*, that the introduction at trial of defendant's answers to Coles and Officer Jones violated his constitutional rights, the violation would not entitle defendant to relief as it was harmless beyond a reasonable doubt. See N.C. Gen. Stat. §§ 15A-1420(c)(6) (2009) ("A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443.") and 15A-1443(b) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.").

In the instant case, both Coles and Officer Jones testified about the questions they asked defendant in Coles' office after the robbery. Their individual testimony indicates that the only questions asked of defendant pertained to the identity of the owner of the knife. Coles testified:

Um, I asked whose knife is this and initially, um, no one wanted to speak up but

about then, [defendant's accomplice] stated that it wasn't his. Bryant did say -- Mr. Thompson did say it was his. I asked him, "Why did you throw it in the trash can?", and he said, he didn't know.

Officer Jones' testimony was similar: "I then went into Mr. Coles' office. I pulled the knife out and I said, you know, 'Whose knife is this?'. And that's when Mr. Thompson -- Bryant Thompson, he said, 'That's my knife.'" Neither Coles nor Officer Jones asked defendant any questions regarding the actual events of the robbery.

Since these questions and defendant's subsequent answers were limited to his ownership of the knife, the introduction of these answers could not have been prejudicial. Prior to trial, defendant specifically assented to his attorney admitting that he was guilty of possession of a weapon on school property. In addition, defendant testified, at trial, that the knife was his and that he had brought it to school on the day of the robbery. In light of defendant's admissions, any constitutional violation defendant suffered by the introduction of his answers to Coles and Officer Jones would be harmless beyond a reasonable doubt. Consequently, defendant is not entitled to relief on his MAR and his motion is denied.

III. Donald's Statement to Officer Jones

Defendant argues that the trial court erred by refusing to allow defendant to fully examine the State's witnesses. This portion of defendant's brief is confusing, but it appears that defendant specifically contends that the trial court erred during defendant's cross-examination of Officer Jones by sustaining the State's objections to questions regarding Donald's written statement after the robbery. Defendant argues there was a contradiction between Donald's testimony at trial regarding how he felt while he was being robbed and the statement.

However, the record does not reflect that the trial court ever took the action alleged by defendant, and defendant's record references certainly do not contain any such ruling by the trial court. First, defendant cites portions of the transcript during which defendant's counsel was attempting to question Officer Jones about a statement which was provided by Sanders, not Donald. Next, defendant references a portion of the transcript regarding Donald's written statement to Officer Jones describing his encounter with defendant a few weeks *after* the incident. The statement reflected how Donald felt when defendant attempted to persuade Donald not to testify against him. How Donald felt after this incident, which occurred weeks

after the robbery, was wholly irrelevant to how Donald felt at the time of the robbery and thus, immaterial to defendant's argument.

In fact, defendant's trial counsel never questioned Officer Jones about Donald's statement in the context of how David felt during the robbery, and so the trial court could not have sustained any objections to a cross-examination that never took place. Since the trial court never took the action defendant argues as an issue on appeal, the trial court necessarily could not have erred. This argument is overruled.

IV. Conclusion

Defendant failed to show prejudice in his MAR because his answers to Coles and Officer Jones related only to his ownership of the knife, and defendant repeatedly acknowledged his ownership during trial. As a result, defendant's MAR is denied. The trial court did not err in sustaining the State's objections during Officer Jones' cross-examination.

No error.

Judges McGEE and HUNTER, Robert C. concur.

Report per Rule 30(e).