

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-147

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

STATE OF NORTH CAROLINA

v.

Union County
No. 99 CRS 17290; 00 CRS 3018;
00 CRS 3020

JOHN CAROL RICHARDSON

Appeal by defendant from judgments entered 29 August 2000 by Judge Marvin K. Gray in Union County Superior Court. Heard in the Court of Appeals 10 January 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.

Bobby Khan for defendant-appellant.

MARTIN, Judge.

Defendant was indicted for robbery with a dangerous weapon, possession of a firearm by a convicted felon, and being an habitual felon. He was convicted by a jury and appeals from the judgments entered upon the verdicts.

Briefly summarized, the evidence at trial tended to show that an Arby's restaurant was robbed on the evening of 28 November 1999 in Indian Trail, North Carolina. The manager of the restaurant, Jesse Watts, testified that around 11:00 p.m. he went outside to his car to retrieve cigarettes, when he saw two men walking nearby. One man was tall, wore a gray sweatsuit, and had a mole on his

cheek. Although Watts admitted that he never saw the second man's face, he did see that the second man had long dreadlocks, wore a green army jacket, and a "Rastafarian" style hat. Watts testified that the tall man told him to "come here," and when Watts approached, the man put him in a headlock and walked him back into the restaurant. Watts stated that he saw a brief flash of silver in the hand of the second man, whom he identified as defendant, and that defendant put the barrel of a gun in his back. Once inside the restaurant, both men went to the restaurant office, where Kennitha Hammond was on the phone. Hammond described defendant as being shorter than the other man, around 5'6" or 5'7", having dark skin, a goatee, and dreadlocks. She testified that the lighting inside the restaurant was bright and that she saw defendant from one foot away. According to Hammond, defendant stuck the handgun in Hammond's stomach and told her to get on the floor. Hammond recalled that both men told Watts to open the safe. Money was stolen from the safe. Watts observed the men leave the store with an Arby's bag. Before leaving, however, one of them ripped the phone off the wall.

On 30 November 1999, Hammond met with detectives and picked defendant's picture out of a photographic line-up. Hammond stated she was certain defendant was one of the perpetrators.

The State also offered evidence of defendant's alleged involvement in a separate robbery occurring on 22 November 1999, for the limited purpose of identifying defendant and for demonstrating a plan, scheme, system, or design similar to the

crime charged in the instant case. Shirley Gaskins testified that she had just finished working an evening shift at a Burger King restaurant in Indian Trail, near the Arby's restaurant, when two men who had been standing outside the restaurant approached her. Gaskins stated one man was tall and slender, and the other man was short and had shoulder length dreadlocks. The taller man asked if she had jumper cables. Gaskins returned to the restaurant and asked another employee if he had jumper cables. The taller man, who had followed Gaskins to the door, then announced that they were going to rob the restaurant. Once inside, he ordered Melissa Harris, the Burger King assistant manager, to open the safe. Harris testified that a masked man with a gun ordered her to open the safe. Harris led him to the safe and handed him the money from the safe's drawers. She noticed the second perpetrator, who wore his hair in dreadlocks, pacing in front of the registers after the gunman received the money. After demanding that the employees and Jane Gaskins lie down on the floor, the perpetrators left the restaurant.

Jane Gaskins, Shirley Gaskins' mother, testified that she was in the Burger King parking lot on the evening of 22 November 1999, waiting to pick up her daughter at the end of her work shift, and noticed defendant and the taller man waiting outside the restaurant. She observed the tall man pull a gun from his jacket and announce that he was going to rob the restaurant. When Jane Gaskins attempted to call the police from her cell phone, defendant walked up to her and grabbed the phone from her hand. Defendant

then ordered Jane Gaskins inside the restaurant, whereupon the two men completed the robbery. Approximately eight days after the Burger King robbery, Shirley Gaskins identified defendant from a photographic line-up prepared by the detectives assigned to the case. Gaskins testified that she saw defendant's face.

After the State had rested its case, the trial court permitted the State to reopen the evidence to recall Janet Flanner, an assistant clerk of court, to provide evidence regarding defendant's prior felony convictions in order to establish defendant's status as an habitual felon.

I.

In his first assignment of error, defendant contends the trial court erred by overruling defendant's objection to the admission of a prior conviction of assault with a deadly weapon inflicting serious injury as the underlying felony on the current charge of possession of a firearm by a felon. Defendant alleges the trial court's admission of such evidence was unfairly prejudicial. This argument is without merit.

N.C. Gen. Stat. § 14-415.1, which prohibits the possession of a firearm by a convicted felon, provides:

When a person is charged under this section, records of prior convictions *of any offense*, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section. The term "conviction" is defined as a final judgment in any case in which felony punishment, or imprisonment for a term exceeding one year, as the case may be, is

permissible, without regard to the plea entered or to the sentence imposed. A judgment of a conviction of the defendant or a plea of guilty by the defendant to such an offense certified to a superior court of this State from the custodian of records of any state or federal court shall be prima facie evidence of the facts so certified. (emphasis added).

Thus, evidence of prior convictions of any offense is admissible in establishing the elements for conviction under G.S. § 14-415.1. Defendant cites *Old Chief v. United States*, 519 U.S. 172, 136 L.Ed.2d 574 (1997) for support of his argument that introduction of this evidence was unfairly prejudicial. In *Old Chief*, the United States Supreme Court held that although evidence of a prior conviction for felonious assault with a deadly weapon was relevant to prove defendant's status as a felon in a prosecution for possession of a firearm by a felon and assault with a deadly weapon, under the facts of that case the probative value of such evidence was substantially outweighed by the danger of unfair prejudice under Fed. R. Evid. 403. *Id.* However, a non-constitutional decision of the United States Supreme Court does not control the interpretation of North Carolina's evidence laws by the courts of this State. *State v. Jackson*, 139 N.C. App. 721, 535 S.E.2d 48 (2000) (citations omitted), *rev'd in part on other grounds*, 353 N.C. 495, 546 S.E.2d 570 (2001). Moreover, the facts in *Old Chief* are distinguishable from the facts in the present case. The defendant in *Old Chief* offered to stipulate to his status as a felon; the trial court declined the stipulation and permitted the prosecution to offer evidence with respect to defendant's conviction for felonious assault. Defendant in the

present case made no such offer to stipulate. The trial court did not abuse its discretion, nor commit error, in overruling defendant's objection to the admission of this evidence.

II.

Defendant next argues the trial court erred by making remarks to the jury venire before defendant's case was called for trial from which, defendant contends, the jurors could infer that the court had an opinion that defendant was guilty. We reject his argument.

Defendant did not object to the trial court's remarks, though his counsel was in the courtroom when they were made. In general, "failure to object to alleged errors precludes raising those errors on appeal." *State v. Faison*, 128 N.C. App. 745, 746, 497 S.E.2d 111, 112 (1998) (citation omitted). To preserve a question for appellate review, "a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1). A criminal defendant can nevertheless assign error to a question not properly preserved for review if the judicial action amounts to plain error. N.C.R. App. P. 10(c)(4). In order to do so, however, the defendant must "specifically and distinctly" contend the error amounted to plain error. *Id.* Though defendant has argued plain error in his brief, he did not assert such in his assignments of error related to the issue. N.C.R. App. P. 10(a).

Nevertheless, we will consider his argument in our discretion.
N.C.R. App. P. 2.

The trial transcript reflects that prior to the beginning of jury selection, and before defendant had been brought to the courtroom, the trial court made remarks to the entire venire summarizing the history of North Carolina's court system and briefly explained this State's Structured Sentencing Act. The trial court noted that under the Act the court is prohibited from imposing sentences outside statutory guidelines and, as an example, explained that a defendant with no prior convictions would serve no jail time for a Class I felony conviction under the sentencing laws.

Citizens who don't know about this, which is most of you, complain, can't understand why the Court doesn't put this particular individual under the jail, so to speak. Well, I've just given you the answer. It doesn't rest with the Court. There's nothing we can do about it. Call the Legislature. Those are the people you need to talk to.

The remarks were general in nature and not directed to the defendant. We fail to see how the trial court's statements could be interpreted as an expression of opinion with respect to any aspect of defendant's case or how they could be prejudicial to a fair determination of his guilt or innocence of the charges. Defendant has not carried his burden of showing that the trial court erred, or that such an error had a probable effect on the jury's verdict. See *State v. Najewicz*, 112 N.C. App. 280, 294, 436 S.E.2d 132, 141 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994) (defendant has burden of showing (1) error, and

(2) without the error, jury would probably have reached a different result). Defendant's assignments of error are overruled.

III.

Defendant next alleges the trial court erred by permitting the introduction of other crimes allegedly committed by defendant. Evidence of other crimes or acts is inadmissible for the purpose of showing the character of the accused or for showing his propensity to act in conformity with a prior act. N.C. Gen. Stat. § 8C-1, Rule 404(b). Such evidence, however, may be admissible for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident." *Id.* The use of evidence under Rule 404(b) is guided by two constraints: "similarity and temporal proximity." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L.Ed.2d 604 (1990).

When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor.

Id. The similarities between the crime charged and the prior act need not "'rise to the level of the unique and bizarre'" in order to be admissible. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (citation omitted). Finally, the North Carolina Supreme Court has held that Rule 404(b) is a rule of inclusion.

State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000) (citation omitted). In the present case, the State offered the testimony of several witnesses to a second restaurant robbery which occurred six days earlier at a Burger King located adjacent to the Arby's restaurant in Indian Trail. The trial court permitted this evidence to show the identity of defendant and to demonstrate a plan, scheme, system, or design similar to the crime charged. Shirley Gaskins, an employee at Burger King, testified that she saw defendant and described his appearance. Like Kennitha Hammond, she was able to identify defendant from a photographic lineup. The robberies occurred six days apart at adjacent fast food restaurants in the town of Indian Trail; the crimes took place at the end of the day when the restaurants were closed, and both were robbed by what witnesses described as a tall man and a man with dreadlocks. The perpetrator with dreadlocks brandished a handgun in both robberies, and in both robberies the employees were ordered to lie down on the floor. Finally, on both occasions the men demanded that an employee open the restaurant safe, whereupon they stole money. The evidence was properly admitted under Rule 404(b) for the limited purposes for which it was offered.

IV.

Defendant next contends the trial court erred in denying his motion to suppress the photographic line-up. Identification evidence "must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable

misidentification." *State v. Powell*, 321 N.C. 364, 368-69, 346 S.E.2d 332, 335, *cert. denied*, 488 U.S. 830, 102 L. Ed. 2d 60 (1988) (citation omitted). Two inquiries must be made when determining whether to suppress identification testimony: (1) "whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification," and if so, (2) "whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification." *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984) (citation omitted). The Supreme Court noted several factors to be considered in making this determination:

(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated at the confrontation (5) the time between the crime and confrontation.

State v. Powell, 321 N.C. at 369, 346 S.E.2d at 335 (citations omitted).

In the present case, Kennitha Hammond testified that the perpetrator, whom she later identified as defendant, was five feet six or five feet seven inches tall, wore a green army jacket, a Rastafarian-style hat, and gloves. She also stated that he had a goatee, dark skin, and wore his hair in dreadlocks. She also said that the lighting in the restaurant was bright and that she observed the person from one foot away. She testified that the person pointed a gun at her stomach and ordered her to get on the floor. On 30 November 1999, two days after the robbery, Hammond

picked out defendant's photograph from a photographic lineup prepared by detectives assigned to the investigation. The photographic lineup contained photographs of six African-American men. On cross examination, Hammond admitted that four of the men in the photographic line-up wore dreadlocks, and that two of the men wore plats or braids. Nevertheless, Hammond stated that she recognized defendant as soon as she looked at the photographic line-up, and that she was very certain defendant was one of the men who robbed the restaurant. Under these facts, the photographic lineup was not so suggestive as to give rise to the likelihood of a misidentification. *Powell*, 321 N.C. 364, 346 S.E.2d 332. Defendant's assignments of error are overruled.

V.

Defendant next argues the trial court committed prejudicial error in permitting a detective involved in the case to testify that he obtained pictures for the photographic line-up from "jail files." An error "is not prejudicial unless a different result would have been reached at the trial if the error in question had not been committed." *State v. Smith*, 87 N.C. App. 217, 222, 360 S.E.2d 495, 498 (1987) (citing N.C. Gen. Stat. § 15A-1443), *disc. review denied*, 321 N.C. 478, 364 S.E.2d 667 (1988). Defendant objects to Detective Tony Rushing's answer to the State's question regarding the photographic line-up:

Q. Do you know why there are no people in that lineup that have characteristics such as gross obesity, elderly, advanced age, facial scarring, or tattoos, or prominent jewelry such as gold teeth or earrings?

A. That would not have been consistent with the information that I had received from the witnesses. As far as jewelry or anything, most of these photos we get in our file, there's - none of those photos have jewelry, would have any jewelry on. *They come from our jail files.* (emphasis added).

Defendant argues he was prejudiced by this statement because it made the jury aware that defendant had an existing criminal record. However, defendant had been indicted not only for robbery with a dangerous weapon, but also for the possession of a firearm by a convicted felon. The jury in this case, therefore, was already aware that defendant was being charged with a crime the elements of which included a prior felony conviction. Moreover, in view of the testimony of Kennitha Hammond, who identified defendant as the man who pointed a gun at her, there is no reasonable possibility that a different verdict would have been reached even had Detective Rushing not mentioned that the photographs had come from "jail files."

VI.

Defendant next assigns error to the denial of his objection to joinder and his motion to sever the robbery with a dangerous weapon offense from the possession of a firearm by a felon charge. We find no abuse of discretion.

Criminal charges may be joined for trial when the offenses are based on "the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a). The decision to join offenses is within the discretion of the trial court. *State*

v. Perry, 142 N.C. App. 177, 541 S.E.2d 746 (2001) (citation omitted). If the offenses have a transactional connection, the trial court must decide "whether the accused can receive a fair hearing on more than one charge at the same trial." *Id.* at 180-81, 541 S.E.2d at 748-49 (2001) (citations omitted).

In the present case, the trial court permitted the State to consolidate two charges against defendant in a single trial: robbery with a dangerous weapon and possession of a firearm by a felon. The State presented evidence that defendant pled guilty to assault with a deadly weapon inflicting serious injury on 15 May 1996 as part of its case against defendant regarding the charge of possession of a firearm by a convicted felon. Defendant alleges that this evidence was unfairly prejudicial, and that there existed a reasonable possibility that a different result would have been reached regarding the robbery charge had the trial court severed the two charges and permitted separate trials. This argument has no merit. First, the underlying felony which served to establish an element of the possession of a firearm by a felon charge was an assault with a tire tool, not a firearm, which was the weapon employed by defendant in the Arby's armed robbery. Second, substantial evidence was presented establishing defendant's guilt of the robbery with a dangerous weapon charge, including Ms. Hammond's testimony that she was able to see defendant from one foot away in a brightly lit restaurant, and that she was "certain" defendant was the individual who pointed a gun at her stomach and ordered her to get on the floor. On this record we cannot say that

the joinder of the two offenses, both arising out of the same transaction and involving the same evidence, prejudiced defendant's ability to receive a fair trial as to either of them.

VII.

Defendant next assigns error to the admission of alleged hearsay statements. Defendant objects to the admission of certain out-of-court statements attributed to a non-testifying co-conspirator, in spite of Rule 801(d)(E), which explicitly permits the introduction into evidence of statements made by a co-conspirator "during the course and in furtherance of the conspiracy." N.C. Gen. Stat. § 8C-1, Rule 801(d)(E). Moreover, most of the allegedly inadmissible statements were made during the *voir dire* testimony of Kennitha Hammond and were not presented to the jury. The only hearsay statement to which defendant assigns error, which was offered in evidence before the jury, involved the eye-witness testimony of Jane Gaskins, who observed two men rob the Burger King on the evening of 22 November 1999. Ms. Gaskins testified:

Q. All right. What happened next?

A. And they asked her if she had any jumper cables.

MR. KHAN: Objection to "they."

THE COURT: The objection is sustained as to "they."

After the trial court sustained defendant's objection, the State clarified its question, asking the witness which of the two men requested jumper cables outside the restaurant; the witness answered: "[t]he man without the dreadlocks" This statement was admissible as an exception to the general prohibition

against hearsay evidence. N.C. Gen. Stat. § 8C-1, Rule 801(d)(E).

VIII.

Defendant also contends the trial court abused its discretion by denying his motion to dismiss the habitual felon charge and allowing the State to reopen its case so as to introduce the requisite third felony conviction. It is well established that "[t]he trial court has discretionary power to permit the introduction of additional evidence after a party has rested." *State v. Jackson*, 306 N.C. 642, 653, 295 S.E.2d 383, 389 (1982) (citing *State v. Revelle*, 301 N.C. 153, 270 S.E.2d 476 (1980); *State v. Carson*, 296 N.C. 31, 249 S.E.2d 417 (1978); *State v. Coffey*, 255 N.C. 293, 121 S.E.2d 736 (1961)). Indeed, the trial judge "in his discretion may permit any party to introduce additional evidence at any time prior to verdict." N.C. Gen. Stat. § 15A-1226(b). No abuse of discretion appears from the record in the present case and defendant's assignment of error to the contrary is overruled.

IX.

We have carefully reviewed defendant's assignments of error regarding allegedly improper testimony by various State's witnesses and find no merit in any of those assignments. They are overruled. Defendant has offered no argument in support of the remaining assignments of error contained in the record and they are deemed abandoned. N.C.R. App. P. 28(b)(5). Even so, none of the errors asserted afford defendant any grounds for relief from the verdicts

or the judgments entered. Defendant received a fair trial, free from prejudicial error.

No error.

Judges TIMMONS-GOODSON and BRYANT concur.

Report per Rule 30(e).