NO. COA01-563

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Durham County
No. 98 CRS 50929

RICHARD LAMONT BROWN,
Defendant.

Appeal by defendant from judgment entered 20 December 1999 by Judge Anthony M. Brannon in Durham County Superior Court. Heard in the Court of Appeals 11 March 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General George W. Boylan, for the State.

Marshall Dayan, for defendant-appellant.

BRYANT, Judge.

Defendant Richard Lamont Brown was charged with first degree murder. The State's evidence tended to show that during the early morning hours of 20 August 1998, defendant and a neighborhood drug dealer, Marquis Barrett, were sitting on the porch of a residence on Hopkins Street in Durham, North Carolina. Barrett observed a car parked behind the residence of Sandra Patricia Foster's residence, which was located at 601 North Elm Street and known to Barrett as a crack house. Barrett thought he recognized the car as belonging to someone who had stolen drugs from him. Defendant, who

was in possession of a firearm, gave a gun to Barrett and told him "to go handle his business." Barrett then proceeded to Foster's residence and knocked on the door. When Foster answered the door, Barrett asked to use the bathroom. Foster consented, and Barrett entered the residence and proceeded to the back of the house. However, before reaching the bathroom, Barrett turned toward the kitchen where Gilbert Everett, Linda Pipkin and two others were smoking crack cocaine, and pulled out a gun. Pointing the gun, Barrett asked Everett why he had taken his marijuana and run. Everett responded, "I don't know you. I don't know what you talking about." Barrett demanded his money. Pipkin questioned Barrett about why he was doing this, and when Barrett turned to look in her direction, Everett charged at him with a tire iron.

Everett, with tire iron in hand, struggled with Barrett over the weapon. Foster and Pipkin were yelling at the two to stop fighting. At this time, defendant was knocking on the front door saying, "Open the door, Trish. It's Rich, it's Rich." Barrett told Foster to answer the door. When Foster opened the door, defendant entered with a gun in his hand. Upon entering the residence, defendant pointed the gun at Everett and instructed him to let go of Barrett's gun. When Everett refused and kept pulling on Barrett's gun, defendant fired his gun twice. Everett pleaded, "Please don't kill me, please don't kill me." Defendant told Everett that he was not going to shoot him, but again demanded that Everett let Barrett's gun go. Everett finally let go of Barrett and the gun, whereupon Barrett felt a stinging in his wrist.

Everett then ran toward defendant and the front door of the residence. Barrett then heard three more shots, and in response, fired two additional shots. When Barrett saw Everett lying on the street curb, his body twitching, Barrett exited the house, giving his gun to defendant who was sitting on the porch, and fled the scene. Grace Mitchell, a friend of Foster, who was asleep in the residence on the evening of the shooting also testified that she saw defendant holding Everett at gunpoint, demanding his money. Mitchell further testified that she saw defendant shoot Everett, after Everett insisted, "I ain't got nothing." Mitchell stated that after she saw Everett lying down on the steps in front of Foster's residence, she saw Barrett and another person by the name of Kyle going through Everett's wallet at the back of the residence.

At trial, defendant testified on his own behalf, disputing Barrett's testimony that defendant gave him a gun to go to Foster's residence. Defendant testified that Barrett told him that he was going to Foster's house to make a drug sale. Defendant stated that after waiting for Barrett to return, he went over to Foster's residence to see the cause for the delay. Defendant testified that he entered the residence with a gun because he heard voices raised in anger and wanted to protect himself from danger. He insisted that upon entering the residence, he fired a shot into Everett's leg after seeing Everett struggling with the smaller Barrett over a gun. When Everett began to move towards defendant with the tire iron, defendant stated that he shot Everett four times, without

really aiming.

The jury subsequently convicted defendant of second degree murder. The trial court sentenced defendant to a presumptive term of 200-249 months imprisonment. Defendant appeals.

By his first assignment of error, defendant argues that the trial court erred in failing to grant defendant's motion to dismiss because his short-form indictment for murder is constitutionally deficient in several respects under the United States Supreme Court decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), and *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999). As appellate counsel concedes, our appellate courts have previously rejected similar arguments and held North Carolina's short-form indictments to be constitutional. *See State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (2000), *cert. denied*, ___ U.S. ___, 149 L. Ed. 2d 360 (2001); *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). We decline counsel's offer to re-visit this issue at this juncture, and summarily overrule this assignment of error.

By his second assignment of error, defendant argues that the trial court erred in failing to instruct the jury that the State bears the burden of proving unanimously each and every element of the offense(s) charged. We note at the outset, however, that at no time did trial counsel, who is now serving as appellate counsel, object to, or request anything in addition to, the trial court's instruction. After giving his final instruction to the jury, the trial court inquired, "is there anything further or different

pursuant to Rule 21 of the General Rules of Practice and General Statute 15A-1231?" Each responded negatively. Counsel's failure to object to the trial court's jury instructions or request additional instructions constitutes a waiver under N.C. R. App. P. 10(b)(2). Accordingly, this argument must be addressed under the plain error standard of review, which requires that "'the appellate court . . . be convinced that absent the [alleged] error the jury probably would have reached a different verdict . . . .'" *State v. Bowen*, 139 N.C. App. 18, 23, 533 S.E.2d 248, 252 (2000) (quoting *State v. Morgan*, 315 N.C. 626, 645, 340 S.E.2d 84, 96 (1986) (citations and quotations omitted)). To that end, "[the] jury charge must be construed contextually and will be upheld when the charge as a whole is correct." *State v. Stephens*, 347 N.C. 352, 359, 493 S.E.2d 435, 439 (1997), *cert. denied*, 525 U.S. 831, 142 L. Ed. 2d 66 (1998).

In the instant case, the trial court instructed the jury as to each substantive offense charged. Specifically, the court charged the jury that the State must prove each element of each substantive offense beyond a reasonable doubt. As a last instruction to the jury, the court stated:

> I instruct you that a verdict is not a verdict until all 12 jurors agree unanimously as to what your decision shall be and you should not render a verdict by majority vote.

While defendant argues otherwise, construing the court's charge contextually and taken as a whole, the charge was sufficient to instruct the jury that their unanimity must be as to each and every element of the crime charged. Having failed to establish plain

error, this assignment of error is also overruled.

By his third assignment of error, which this Court allowed defendant to add by order entered 18 May 2001, defendant argues that the trial court erred by examining his expert witness on *voir dire* beyond the area of expertise for which the witness was tendered. Defendant contends that the court's questioning "gave the State an entire panorama of cross-examination material about the defendant's use of drugs that it had not pursued in its case in chief, though it knew from the defendant's statement to the police that the defendant had been smoking marijuana immediately preceding the homicide." We disagree.

Even assuming arguendo that the court's questioning of defendant's expert witness was error, defendant cannot show that such error prejudiced him. First, this questioning took place out of the presence of the jury. Moreover, as defendant admits, the State already knew of defendant's drug use. To the extent that drugs could have affected defendant's ability to premeditate and deliberate so as to commit the offense of first-degree murder, we note that the issue was mooted by the jury's verdict of second-degree murder. *See, e.g., State v. Golden*, 143 N.C. App. 426, 546 S.E.2d 163 (2001) (finding no prejudicial error as to defendant's murder conviction where the trial court did not instruct the jury on voluntary intoxication, and the jury found the defendant guilty of first degree murder based upon felony murder, but acquitted the defendant of first degree murder based upon premeditation and deliberation). Accordingly, this assignment of error is overruled.

In light of all of the foregoing, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).