

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-694

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

STATE OF NORTH CAROLINA

v.

Wake County  
Nos. 00 CRS 1981-84

EARL CHARLES DURHAM

Appeal by defendant from judgment entered 26 May 2000 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 4 February 2002.

*Attorney General Roy Cooper, by Assistant Attorney General J. Douglas Hill, for the State.*

*Ligon and Hinton, by Lemuel W. Hinton, for defendant appellant.*

TIMMONS-GOODSON, Judge.

On 3 May 2000, a jury found Earl Charles Durham ("defendant") guilty of one count of robbery with a dangerous weapon and three counts of attempted robbery with a dangerous weapon. At trial, the State presented evidence tending to show that shortly after midnight on 9 January 2000, teenagers Christopher Robinson, Joshua Miller, Gina Esposito and Jason Wiggs walked out of the Carmike Cinema in Raleigh to their parked vehicle. As they entered the vehicle, a black, 1980's model Nissan automobile with a green and white bumper sticker on the left bumper appeared, blocking the teenagers' vehicle. Three of the Nissan's four occupants exited

the automobile. One man, armed with a gun, walked to the driver's side of the teenagers' vehicle, while a second man, also holding a gun, walked to the passenger side. The third man remained behind the teenagers' vehicle. The three men wore toboggans with eye and mouth holes and/or bandannas over their faces. The two men armed with guns ordered the teenagers to empty their pockets and hand over their valuables. The teenagers complied. The perpetrator on the passenger side seized two cases of compact discs from the vehicle. The three men returned to their vehicle and departed. The victims called the police by cellular telephone.

Shortly thereafter, approximately five miles from the Carmike Cinema, police officers stopped a vehicle similar to the description given by the victims. Four persons, later identified as Solomon Saitch, Denny Allebo, Beau Ballard, and Earl Charles Durham, occupied the stopped vehicle. The victims identified the occupants of the vehicle as the robbers. The victims also identified compact discs and cases, a watch, pager, and currency found in the vehicle as items taken from them. In addition, the police discovered several ski masks, bandannas and a pistol concealed behind a seat in the vehicle.

Beau Ballard ("Ballard") testified for the State that he, defendant, Solomon Saitch ("Saitch") and D.D. Allebo ("Allebo") were seated in a vehicle parked outside the theater when the four victims exited the theater and walked to a car. Defendant asked the others if they "wanted to get them[,] " meaning rob the teenagers. Earlier that evening, defendant had stated that he

needed money to repair his automobile. Ballard handed defendant a gun, and he, defendant, and Saitch pulled toboggans over their heads and approached the victims' vehicle. Allebo remained in the automobile. Defendant walked to the passenger side of the vehicle, while Saitch approached the driver's side. Ballard remained behind the teenagers' vehicle and served as a lookout while defendant and Saitch robbed the victims. The three men then returned to their automobile. Defendant distributed among them the compact discs he took from the victims' vehicle.

Defendant's wife testified for defendant that she and her husband were gainfully employed and that defendant had no reason to rob anyone to obtain money to repair his vehicle. Upon receiving the jury's guilty verdict, the trial court sentenced defendant to imprisonment for a minimum term of 146 months and a maximum term of 185 months. Defendant now appeals to this Court.

---

Defendant submits two assignments of error, contending (1) that the trial court erred in its instructions to the jury, and (2) that the trial court committed plain error in allowing certain testimony. For the reasons set forth herein, we conclude the trial court committed no reversible error.

Defendant assigns error to the court's refusal to submit two requested jury instructions. First, he contends the court erred by refusing to submit the following North Carolina Pattern Jury Instruction number 104.90:

I instruct you that the State has the burden of proving the identity of the defendant as

the perpetrator of the crime charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

N.C.P.I.-- Crim. 104.90 (1989). Defendant argues the court should have given the above-stated instruction because "a substantial factual dispute regarding the identification of the perpetrator arises from the presentation of the evidence." We disagree.

The trial court has the duty to instruct the jury on all substantial features of a case raised by the evidence. See *State v. Ferrell*, 300 N.C. 157, 163, 265 S.E.2d 210, 214 (1980). When the identification of the perpetrator is at issue, the court should give an instruction on identification. See *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). The failure to submit the instruction will not constitute prejudicial error, however, if the court repeatedly informs the jury during its charge that the jury must find beyond a reasonable doubt that the defendant perpetrated the charged offense, or if the evidence of the defendant's guilt is strong and essentially uncontradicted. See *id.* at 804-05, 370 S.E.2d at 550-51.

Assuming, *arguendo*, that the court erred by refusing to submit the instruction in the case at bar, we conclude that the error was not prejudicial. The trial judge repeatedly instructed the jury that in order for the jury to find defendant guilty of each offense, it had to find beyond a reasonable doubt that "the defendant, Earl Durham, or someone he was acting in concert with" committed the various elements of the offenses. Moreover, the

State presented uncontradicted eyewitness testimony that defendant was one of the three men who approached the victims' vehicle. There is no evidence that defendant remained seated in the robbers' vehicle during the course of the robberies or was otherwise merely present at the scene.

Second, defendant contends that the trial court erred by refusing to instruct the jury that the absence of motive is equally a circumstance to be considered on the side of innocence. Defendant acknowledges that our Supreme Court has held that the failure to give the foregoing instruction is not prejudicial error when the court has instructed that the absence of motive is a factor to be considered in determining guilt or innocence, as the trial court did in the present case. See *State v. Hales*, 344 N.C. 419, 423, 474 S.E.2d 328, 330 (1996). Defendant nevertheless argues that the Supreme Court incorrectly decided this issue. We do not address defendant's argument because we are bound by the Supreme Court's decision. See *State v. Parker*, 140 N.C. App. 169, 172, 539 S.E.2d 656, 659 (2000), *disc. review denied*, 353 N.C. 394, 547 S.E.2d 37, *cert. denied*, \_\_\_ U.S. \_\_\_, 149 L. Ed. 2d 777 (2001). We therefore overrule defendant's first assignment of error.

Defendant's remaining contention is that the court committed plain error by allowing an officer to testify that the bandannas worn by the robbers were identified to him as "crypts" bandannas. Defendant argues that there is no evidence that the victims identified the bandannas as "crypts" bandannas, and further, that

such evidence was prejudicial because it associated defendant with the Crips gang.

Plain error in the admission of evidence may be found only in the exceptional case where the evidence had a probable impact on the jury's verdict. See *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983). Given the strong evidence against defendant, we are unable to conclude that this testimony caused the jury to find defendant guilty. We therefore overrule defendant's second assignment of error.

In conclusion, we hold defendant received a fair trial, free of prejudicial error.

No error.

Chief Judge EAGLES and Judge McCULLOUGH concur.

Report per Rule 30(e).