NO. COA01-886

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 00 CRS 83053, 85297

DAVID ALBERT EFFINGHAM

Appeal by defendant from judgments filed 11 January 2001 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 26 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kevin L. Anderson, for the State.

John Bryson for defendant-appellant.

GREENE, Judge.

David Albert Effingham (Defendant) appeals judgments filed 11 January 2001 entered consistent with a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury, N.C.G.S. § 14-32(b) (1999), and robbery with a dangerous weapon, N.C.G.S. § 14-87 (1999).

On 12 June 2000, Defendant was indicted on charges of attempted murder, robbery with a dangerous weapon, and assault with a deadly weapon inflicting serious injury. The case was tried at the 8 January 2001 Criminal Session of Guilford County Superior

Court. The State presented evidence at trial which tended to show that on 13 March 2000, Armitt Stone, Jr. (Stone), a seventy-four-year-old man, went to a laundromat in High Point, North Carolina, to do his laundry. After completing his laundry, Stone had plans to purchase a John Deere lawnmower and had brought a large sum of money, approximately $3,000.00, with him to pay for the lawnmower. At the laundromat, seventeen-year-old Sean Sizemore (Sizemore) approached Stone and asked him for change for a dollar bill. Sizemore had tried to get change from a change machine, but the machine would not accept his dollar bill because it was wrinkled. Instead of giving Sizemore change, Stone exchanged a new dollar bill for Sizemore's dollar bill. While Stone was doing his laundry, Defendant, who was thirty-eight years old, entered and talked with Sizemore. A short time later, Defendant and Sizemore left the laundromat.

Sizemore went home to an apartment where he lived with his mother Deborah Coltrane (Coltrane) and Defendant, his mother's boyfriend. At the apartment, he told Coltrane about the problems he had with the change machine and how he had exchanged dollar bills with Stone. Soon thereafter, Defendant entered the room where Sizemore and Coltrane were conversing. Sizemore told Coltrane, while in the presence of Defendant, that Stone "had so much money in his pocket, I [have] never seen that much money in my life." A short time later, Sizemore went into the kitchen, and Defendant followed. Coltrane noticed Sizemore and Defendant whispering to each other and went into the kitchen to break up the

conversation. Subsequently, Sizemore returned to the laundromat to retrieve the clothes he had left. When Defendant also left the apartment, Coltrane observed he was wearing a thick coat and had a hammer concealed in his coat sleeve. Coltrane watched out the window as Defendant went straight to the laundromat.

According to Stone's testimony, Defendant went into the laundromat, approached him from behind, hitting him in the head with the hammer several times. Defendant then cut out Stone's pant pocket, taking his wallet and money. Coltrane testified Defendant returned to the apartment sometime later but was wearing different clothes than when he had left. Later, Defendant counted out $2,900.00 in $100.00 bills in front of Coltrane and Sizemore. Coltrane confronted Defendant and asked if he had robbed Stone. Defendant did not say anything, but Sizemore nodded his head affirmatively.[1] Defendant then admitted he had tried to rob Stone and had hit him in the head several times with the hammer when Stone would not hand over the money. Defendant tried to give Coltrane some of the stolen money, but she refused it, stating that she thought they should "let somebody know about this." Defendant threatened that if she went to the police, he would kill her. Defendant then gave Coltrane approximately $1,100.00. Stone later identified Defendant from a photographic lineup and at trial.

Dr. Cedric Deang (Dr. Deang) testified that Stone had a history of coronary bypass and high blood pressure and that Stone's age and infirmities probably contributed to the seriousness of his

[1]Defendant did not object to this testimony at trial.

injuries.

Defendant was convicted of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. During sentencing, the trial court found several factors in aggravation, including the fact that the victim was very old and that Defendant "occupied a position of leadership or dominance of other participants in the commission of the offense." The trial court declined to find any factors in mitigation.

The issues are whether: (I) the trial court committed plain error by allowing Coltrane to testify that when she asked Defendant if he had robbed Stone, Sizemore shook his head "yes"; (II) the trial court erred by finding as aggravating factors (A) that the victim was very old, and (B) that Defendant induced others to participate in the offense or occupied a position of leadership.[2]

I

We first consider whether the trial court erred in permitting Coltrane's testimony that when she asked Defendant if he had robbed Stone, Sizemore shook his head affirmatively. Defendant contends this was clearly hearsay, an out-of-court statement offered to prove the truth of the matter asserted. As Defendant did not object to the admission of Coltrane's testimony at trial, our review is restricted to plain error analysis.

The test for plain error places the burden on the defendant to

[2]As Defendant's additional assignments of error are not discussed in his brief to this Court, they are deemed abandoned. N.C.R. App. P. 28(a).

show that an error occurred and that the error "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). The error must be a "'"*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done."'" *Id.* at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

After careful review of the record, briefs, and contentions of the parties, we find no error. Pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(d), "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . a statement of which he has manifested his adoption or belief in its truth. . . ." N.C.G.S. § 8C-1, Rule 801(d) (1999). "A person may expressly adopt another's statement as his own, or an adoptive admission may be implied from 'other conduct of a party which manifests circumstantially the party's assent to the truth of a statement made by another person.'" *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 278, 354 S.E.2d 767, 772 (1987). In this case, after Sizemore nodded affirmatively when Coltrane asked Defendant whether he had robbed Stone, Defendant adopted the admission as his own by explaining that he had hit Stone in the head with the hammer when Stone would not give him the money.

Even assuming *arguendo* that Coltrane's testimony regarding Sizemore's nod of the head was inadmissible hearsay, Defendant can show no prejudice when considering the evidence against him,

including: (1) his admission to Coltrane that he had beaten Stone with the hammer to get the money; (2) Coltrane's testimony that Defendant left the apartment with a hammer concealed in his coat sleeve; (3) Stone's identification of Defendant as his attacker from a photographic lineup and again at trial; and (4) Coltrane's testimony that Defendant counted out $2,900.00 in front of her and threatened to kill her if she went to the police. Accordingly, the admission of Coltrane's testimony did not have "a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 379.

II

A

We next consider whether the trial court erred by finding as an aggravating factor that the victim was very old. Defendant asserts there was no evidence the victim was targeted because of his age and argues the evidence of the victim's old age is insufficient by itself to establish that the victim was more vulnerable or that the victim was targeted due to his age.

Pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(11), the trial court may find as a factor in aggravation that "[t]he victim was very young, or very old, or mentally or physically infirm or handicapped." N.C.G.S. § 15A-1340.16(d)(11) (1999). "The policy underlying this aggravating factor is to deter wrongdoers from taking advantage of a victim because of his age or mental or physical infirmity." *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (citation omitted). Our Supreme Court has

stated that:

> Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, *recovering from its effects*, or otherwise avoiding being victimized. Unless age has such an effect, it is not an aggravating factor under the Fair Sentencing Act.

State v. Hines, 314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985) (citations omitted) (emphasis added).

In this case, Dr. Deang testified that Stone, who was seventy-four years of age when attacked, had a history of coronary bypass as well as a history of high blood pressure, and that Stone's age and infirmities probably contributed to the seriousness of his injuries. Thus, the trial court could properly find that Stone was more vulnerable to the assault because of his age and that his age constituted an aggravating factor.

B

Defendant next argues the trial court erred by finding as an aggravating factor that he induced others to participate in the offense or occupied a position of leadership. Defendant contends there was no evidence he induced Sizemore to participate in the robbery or occupied a position of leadership in relation to Sizemore. In fact, Defendant contends Sizemore induced Defendant to commit the robbery.

Pursuant to N.C. Gen. Stat. § 15A-1340.16(d)(1), the trial court may find as a factor in aggravation that "[t]he defendant induced others to participate in the commission of the offense *or* occupied a position of leadership or dominance of other participants." N.C.G.S. § 15A-1340.16(d)(1) (1999). This Court has stated that since the aggravating factor "is stated in the disjunctive, proof of either type of conduct, by the preponderance of the evidence, is sufficient to support the finding of an aggravating factor." *State v. SanMiguel*, 74 N.C. App. 276, 278, 328 S.E.2d 326, 328 (1985). In this case, the evidence tended to show that Defendant occupied a role of leadership or dominance. First, Defendant was the one who approached Sizemore regarding the robbery and who concealed the hammer in his coat when leaving the apartment. After the robbery, Defendant distributed the proceeds and also threatened to harm Coltrane if she told the police about the crime. Finally, as noted by the State, Defendant was thirty-eight years old, while Sizemore was only seventeen years old. Thus, we conclude there was sufficient evidence that Defendant occupied a position of leadership or dominance to support the trial court's finding of the aggravating factor.

No error.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).