NO. COA01-954

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

STATE OF NORTH CAROLINA

v. Wake County
Nos. 99 CRS 5323-5325
CHARLES DAVID BECTON 99 CRS 63111

Appeal by defendant from judgments entered 15 September 1999 by Judge James C. Davis in Superior Court, Wake County. Heard in the Court of Appeals 15 May 2002.

*Attorney General Roy Cooper, by Assistant Attorney General William McBlief, for the State.*

*John T. Hall, for the defendant-appellant.*

WYNN, Judge.

Charles David Becton argues the following issues on appeal from his convictions for two counts of robbery, possession of a firearm by a convicted felon, and speeding to elude arrest: (I) Did the trial court's refusal to allow him to represent himself *pro se* violate his constitutional and statutory rights? (II) Did the trial court err in recommending that he pay restitution to the alleged victims before his release from prison? and (III) Did the trial court erroneously fail to find that he was denied effective assistance of counsel? We find no error in his trial.

The evidence at trial tended to show that on 21 January 1999,

a masked man with a silver handgun robbed the Carolinas Telco Federal Credit Union on Creedmoor Road in Raleigh, North Carolina taking approximately $6,800.00. As the robber climbed over the counter during the robbery, the handgun discharged, striking Fran Donovant, a bank teller. After the robber fled with the money in a dark bag, Ms. Donovant and her co-worker, Linda Bennett, called for help. A fellow employee in the same building saw the robber run from the building and enter a white Chevrolet Blazer with chrome rims; the vehicle left the bank and proceeded south on Glenwood Avenue.

Raleigh Police Department officers heard the radioed description of the suspect and the vehicle, and spotted defendant in a white Blazer. Following an extended high-speed chase at speeds approaching 100 miles per hour, defendant drove the Blazer into the median and jumped from the vehicle, clutching a bag. Defendant then ran across several lanes of oncoming traffic and up a hill. The pursuing officers caught up to defendant at the top of the hill, where defendant dropped the bag and raised his hands. While the officers took defendant into custody, he stated several times, "I didn't mean to shoot the lady." A silver handgun was found beside the highway where defendant had jumped out of the vehicle. The recovered bag contained the money stolen from the bank. The mask worn during the robbery was found on the seat of defendant's vehicle. Defendant was returned to the bank, where he was identified by Ms. Donovant and Ms. Bennett as the robber.

Defendant was convicted on 15 September 1999 of two counts of

armed robbery under N.C. Gen. Stat. § 14-87 (2001), possession of a firearm by a felon under N.C. Gen. Stat. § 14-415 (2001), and speeding to elude arrest under N.C. Gen. Stat. § 20-141 (2001). Defendant appeals.

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(I) Did the trial court's refusal to allow defendant to represent himself *pro se* violate his constitutional and statutory rights?

We answer: No, because defendant did not make a clear and unequivocal request to invoke his constitutional and statutory rights to represent himself. *See* U.S. Const. amends. VI and XIV; N.C. Const. art. I, § 23; N.C. Gen. Stat. § 15A-1242 (2001); *State v. LeGrande*, 346 N.C. 718, 487 S.E.2d 727 (1997), *reh'g denied*, 351 N.C. 365, 542 S.E.2d 650 (2000).

Preliminarily, we note that defendant failed to preserve this issue by raising an objection at trial, *see* N.C.R. App. P. 10(b)(1) (2002), and furthermore failed to assert plain error in his assignments of error, thereby waiving plain error review. *See* N.C.R. App. P. 10(c)(4) (2002); *State v. Truesdale*, 340 N.C. 229, 456 S.E.2d 299 (1995); *State v. Moore*, 132 N.C. App. 197, 511 S.E.2d 22, *disc. review denied and appeal dismissed*, 350 N.C. 103, 525 S.E.2d 469 (1999); *see also State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1996) (our Supreme Court has elected to review unpreserved errors for plain error when they involve errors in jury instructions or rulings on the admissibility of evidence). We nonetheless consider defendant's argument, and find it to be

without merit. *See* N.C.R. App. P. 2 (2002).

N.C. Gen. Stat. § 15A-1242 provides that a trial judge may permit a defendant to proceed *pro se* only after the judge makes thorough inquiry and is satisfied that the defendant:

> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

G.S. § 15A-1242. A defendant's waiver of the right to counsel and concomitant election to proceed *pro se* must be clearly and unequivocally expressed. *See State v. Thomas*, 331 N.C. 671, 417 S.E.2d 473 (1992). In the absence of a clear expression of desire to have counsel removed and proceed *pro se*, the trial court need not make an inquiry under G.S. § 15A-1242 to determine if the defendant understands the consequences of his election and voluntarily and intelligently waives his right to representation. *See State v. Johnson*, 341 N.C. 104, 459 S.E.2d 246 (1995).

In this case, the record shows that defendant did not make a clear and unequivocal request to represent himself as is necessary to invoke G.S. § 15A-1242. Before jury selection, defendant's court-appointed counsel, Gordon B. Kelley, informed the court that defendant had told him that he wanted to employ private counsel. Defendant clarified, stating:

> I didn't want to say I employ private counsel. I no longer want Mr. Kelley representing me in

> this matter. I would ask if the Court could reappoint me another court-appointed counsel. If not, I'd rather not have one at all.

At the close of the State's evidence, the trial judge questioned defendant regarding his collaboration with Mr. Kelley on his defense, asking if defendant would have done anything differently. Defendant expressed some dissatisfaction, stating "I still stand by that I want to represent myself."

Asked for specific questions or challenges he would have posed, defendant stated that he wanted to go over certain matters "with [his] attorney." Following a short recess during which defendant conversed with Mr. Kelley, the defense, at defendant's urging, re-called Ms. Bennett and Ms. Donovant to the stand for further questioning. The defense then replayed the bank's security video for the jury, following which defendant testified in his own defense.

When all the defendant's statements and actions are considered together, it is apparent that he never clearly and unequivocally asserted his desire to conduct a *pro se* defense. *See State v. McGuire*, 297 N.C. 69, 83, 254 S.E.2d 165, 174, *cert. denied*, 444 U.S. 943, 62 L. Ed. 2d 310 (1979). While the better practice may have been for the court to have questioned defendant more extensively at the time he first ambiguously expressed his desire to represent himself, "we cannot say the court's failure to question the defendant earlier warrants the grant of a new trial." *Id.* at 84, 254 S.E.2d at 174. *See also State v. Gerald*, 304 N.C. 511, 284 S.E.2d 312 (1981). Furthermore, any alleged error by the

court was harmless beyond a reasonable doubt, as defendant has not shown that, absent the error, the jury would likely have reached a different verdict. *See State v. Torain*, 316 N.C. 111, 340 S.E.2d 465, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). Defendant's first argument is without merit.

(II) Did the trial court err in recommending that defendant pay restitution to the alleged victims before his release from prison?

We do not address this issue because defendant failed to preserve it for our review.

At trial, defendant raised no objection to the court's recommendation to pay restitution, *see* N.C.R. App. P. 10(b)(1), and defendant failed to assert plain error in his assignments of error, thereby waiving even plain error review of this issue. *See* N.C.R. App. P. 10(c)(4). Additionally, we note that the trial court did not *order* defendant to pay the restitution, *see State v. Hughes*, 136 N.C. App. 92, 524 S.E.2d 63 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000), nor did the trial judge recommend the imposition of a "fine." *See State v. Alexander*, 47 N.C. App. 502, 267 S.E.2d 396 (1980). Furthermore, after sentencing defendant the trial court asked Mr. Kelley if there was anything further from defendant; Mr. Kelley deferred to defendant, who indicated he had nothing further to say. Under these circumstances, defendant failed to preserve the restitution issue for consideration on appeal, and we decline to consider defendant's objection on the merits. *See State v. Applewhite*, 127 N.C. App.

677, 493 S.E.2d 297 (1997).

(III) Did the trial court erroneously fail to find that defendant was denied effective assistance of counsel?

We answer: No, because defendant essentially contends in this argument that he was denied the right to represent himself and we have already determined that his rights to represent himself were not violated.

Defendant contends in his brief that the "trial court's failure to act *ex mero motu* to dismiss the verdicts and to decline to enter the judgments . . . was plain error," resulting in denial of defendant's constitutional rights to (1) effective assistance of counsel, (2) due process, and (3) equal protection of the laws. Defendant acknowledges that no action was taken at trial to challenge Mr. Kelley's effectiveness or bring it to the trial court's attention. Nonetheless, defendant contends that he was denied effective assistance of counsel (without providing an argument in support thereof or an assertion of prejudice arising therefrom), stating that he never waived his right to proceed *pro se*, and that the trial court denied him his "constitutional right to self-representation."

As noted above, defendant failed to properly preserve this issue for appellate review; even so, our analysis above indicates that defendant never clearly and unequivocally asserted his desire to proceed *pro se*. This assignment of error is without merit.

No error.

Judges HUNTER and THOMAS concur.

Report per Rule 30(e).