NO. COA05-1003

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 04 CRS 24266
04 CRS 35283

DERRICK ANDRE POKE,
Defendant.

Appeal by defendant from judgments entered 9 December 2004 by Judge Edwin G. Wilson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 29 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Joan M. Cunningham, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Kelly D. Miller, for defendant-appellant.

GEER, Judge.

Defendant Derrick Andre Poke appeals from his convictions for attempted robbery with a dangerous weapon and for attaining violent habitual felon status. Defendant contends on appeal that, during the principal felony stage of his trial, he should have been allowed to argue the severity of the punishment he stood to receive under the violent habitual felon statute. We are, however, bound by this Court's prior rulings in *State v. Wilson*, 139 N.C. App. 544, 533 S.E.2d 865, *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000), and *State v. Dammons*, 159 N.C.

App. 284, 583 S.E.2d 606, *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382, 124 S. Ct. 1691 (2004), which hold that a defendant being tried as a habitual felon is not permitted to argue the severity of his punishment to the jury during his trial on the principal felony. Further, defendant's argument that his sentence of life in prison without parole is a cruel and unusual punishment has been rejected by our Supreme Court in *State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985). Because we find defendant's remaining arguments on appeal are likewise without merit, we hold that defendant received a trial free of error.

Facts and Procedural History

The State's evidence tended to show the following facts. About 10:00 p.m. on 8 April 2004, Linda McMickle was working as a cashier at the Crown gas station and convenience store in Greensboro, North Carolina. McMickle saw defendant enter the store and approach the beer cooler. McMickle waited on other customers while defendant lingered in front of the cooler until he finally made a selection. Defendant brought the beer to the checkout counter where McMickle was standing and set it down.

Defendant then moved away, and McMickle noticed an open beer bottle in his pocket. Although he appeared to be putting something in a trash can next to the counter, he suddenly took the open beer bottle out of his pocket and smashed the bottle on the edge of the counter. He ran behind the counter and began to poke and jab at McMickle with the jagged glass of the broken bottle, demanding

money. When McMickle tried to resist, defendant grabbed her with his free hand.

Several other customers inside the store saw what defendant was doing and heard McMickle calling for help. While yelling at defendant to stop, the customers started taking items off the convenience store shelves and throwing them at defendant. After a glass bottle struck defendant in the head and wounded him, he started towards the door of the shop, still holding the broken bottle. One of the customers tried to stop him, but defendant broke free and again headed for the door, bleeding from the cut on his head. As he attempted to leave the store, customers on both the outside and inside pinned his right arm in the door, immobilizing him.

The customers kept defendant's arm pinned in the door until McMickle was able to summon the police. When the police arrived, they noticed shards of a broken beer bottle lying on the pavement outside the doorway, about "a foot or two under [defendant's] right hand."

Defendant was indicted for attempted robbery with a dangerous weapon, for attaining violent habitual felon status, and for attaining habitual felon status.[1] A jury convicted defendant both of the attempted robbery charge and, following that conviction, of attaining violent habitual felon status. Defendant received a sentence of life imprisonment without parole.

I

[1]The State did not pursue the habitual felon charge at trial.

Defendant first contends that the State's closing argument during the attempted robbery trial improperly suggested that the jury should penalize defendant for failing to plead guilty to attempted robbery. Although defendant acknowledges he did not object to the closing argument at trial, he nonetheless contends that the trial court should have interrupted the prosecutor *ex mero motu*.

The challenged portion of the closing argument is as follows:

> So why are we here? Sometimes cases, especially cases where I contend the evidence is so clear, it's difficult for the jury to understand, there must be something more to this case, it's so obvious that the defendant committed the crime and why are we here? The fact of the matter is that cases, a lot of times, are tried for three different reasons. The first reason is sort of the whodunit reason, it was some other dude who did it, it wasn't me, I didn't do this. . . .
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> The second reason is more along the lines of not a whodunit, but more of a what is it. . . .
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> . . . .
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> And the third reason is, ladies and gentlemen, a lot of times people don't want to take responsibility for what they do. And that is what I think is the argument here, the reason we have to try this case, the reason you have to sit here for a day, two days, and listen to us is that the defendant doesn't want to take responsibility for his actions. . . . I mean, if he was just going to do violence, he would have gotten up there and choked her. He would have gotten up there and punched her. If his intent was just to do a common-law robbery of violence, he could have done it without busting that beer bottle. But instead, he broke that beer bottle because he wanted a weapon, a dangerous weapon, a weapon which, the way he used it, can cause serious bodily injury. The fact that Ms. McMickle was

> not injured is due to the fact that those two customers came in, and they hurt him, hit him in the head with a beer bottle, busted his skull wide-open and penned him in the door. He used a dangerous weapon in this case and he doesn't want to take responsibility for that.
>
> Hold him responsible. Take your reason, take your common sense back in the jury room with you and return a verdict of guilty as charged to attempted robbery with a dangerous weapon, and tell him, you are responsible for what you did out there. We are not letting you go. You will pay the price for the crime you committed. Find him guilty as charged.

Given defense counsel's failure to object to this argument at the proper time, we apply the standard of review set forth in *State v. Walters*, 357 N.C. 68, 101–02, 588 S.E.2d 344, 364, *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320, 124 S. Ct. 442 (2003): "When defendant fails to object to an argument, this Court must determine if the argument was 'so grossly improper that the trial court erred in failing to intervene *ex mero motu*.'" *Id.* at 101, 588 S.E.2d at 364 (quoting *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074, 123 S. Ct. 2087 (2003)). The Court elaborated:

> "In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made."

Id. at 102, 588 S.E.2d at 364 (quoting *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002)). Our Supreme Court has

stressed that: "'[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.'" *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160, 117 S. Ct. 229 (1996)), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791, 122 S. Ct. 2605 (2002).

It is well-settled that "[r]eference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial." *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 923, *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234, 118 S. Ct. 304 (1997). On the other hand, it is not improper for the prosecutor to urge the jury to hold a defendant responsible for his actions. *See, e.g.*, *State v. Walls*, 342 N.C. 1, 64, 463 S.E.2d 738, 772 (1995) (no error when the prosecutor argued that defendant was "the master of [his] destiny" and that "we are responsible for the consequences of our actions"), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794, 116 S. Ct. 1694 (1996). In this case, the prosecutor's statements appear to have crossed the line into an improper reference to defendant's failure to plead guilty. His reference to the jury's being required "to sit here for a day, two days, and listen to us" can only be construed as an allusion to the fact that if defendant had pled guilty, the case would not have needed to go to trial.

We are nonetheless unpersuaded that the trial court erred in failing to intervene *ex mero motu*. The improper comments were brief and occurred in the context of an otherwise proper exhortation to the jury to hold defendant responsible for his actions despite his claim that he was innocent of the crime charged.

Further, in light of the overwhelming evidence of defendant's guilt in this case — he was caught by his victims at the scene of the crime — coupled with the passing nature of the improper argument, we do not believe the prosecutor's comments resulted in "fundamental unfairness" during the trial. *State v. Anderson*, __ N.C. App. __, __, 624 S.E.2d 393, 400-01 (holding that the prosecutor's description of defendant's argument as "just crazy" was an improper statement of personal belief as to the truth or falsity of defendant's arguments, but did not rise to the level of reversible error), *appeal dismissed and disc. review denied*, 360 N.C. 484, __ S.E.2d __ (2006). *See also State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 536 (2004) (assuming *arguendo* that closing argument was erroneous, error was not reversible where substantial physical and testimonial evidence supported finding of guilt), *cert. denied sub nom Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285, 125 S. Ct. 1600 (2005); *State v. Williams*, 350 N.C. 1, 28-29, 510 S.E.2d 626, 644 (no reversible error due to very brief improper statement when viewed in context of State's lengthy and otherwise proper closing argument), *cert. denied*, 528 U.S. 880,

145 L. Ed. 2d 162, 120 S. Ct. 193 (1999). This assignment of error is overruled.

II

Defendant next argues that the trial court committed plain error when it admitted the broken bottle into evidence. He objects that the bottle should have been excluded as irrelevant because it was not clear that it was the same bottle defendant was holding when he attempted to rob the store. In support of his argument, defendant points to evidence of other broken glass lying in and around the convenience store as a result of the scuffling between defendant and the customers.

The Supreme Court has held that "evidence is relevant if it has '*any* logical tendency, however slight, to prove a fact in issue in the case.'" *State v. Payne*, 328 N.C. 377, 399-400, 402 S.E.2d 582, 595 (1991) (quoting *State v. Perry*, 298 N.C. 502, 510, 259 S.E.2d 496, 501 (1979)) (evidence that the fiber on defendant's shirt was not consistent with fiber from carpet samples taken from defendant's home was relevant because it had "some logical tendency to show that the source of the fiber was not this carpet"). In this case, evidence that a glass bottle was found immediately below defendant's outstretched hand has some logical tendency to show that defendant was indeed holding the bottle before the pinning of his arm in the door forced him to drop it. The fact that there was no direct evidence that the State's exhibit was the same bottle fragment that defendant used to threaten McMickle goes to the

weight, not the admissibility, of the evidence. *See id.* at 400, 402 S.E.2d at 595. The trial court, therefore, did not err in admitting the bottle.

III

Defendant next argues that the trial court committed plain error by failing to instruct the jury on the defense of voluntary intoxication. Our Supreme Court "has held on numerous occasions that it is the duty of the trial court to instruct the jury on all of the substantive features of a case. This is a duty which arises notwithstanding the absence of a request by one of the parties for a particular instruction." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988) (internal citations omitted). Nonetheless, in the absence of a request for a specific instruction, this Court will review the instruction's omission for plain error only. N.C.R. App. P. 10(c)(4).

Because defendant failed to request a voluntary intoxication instruction, he is limited to plain error review. "Under plain error review, 'reversal is justified when the claimed error is so basic, prejudicial, and lacking in its elements that justice was not done,'" *State v. Miller*, 357 N.C. 583, 592, 588 S.E.2d 857, 864 (2003) (quoting *State v. Prevatte*, 356 N.C. 178, 258, 570 S.E.2d 440, 484 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681, 123 S. Ct. 1800 (2003)), *cert. denied*, 542 U.S. 941, 159 L. Ed. 2d 819, 124 S. Ct. 2914 (2004), and, "absent the [claimed] error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

To raise the issue of voluntary intoxication, "a defendant must produce more than evidence of mere intoxication; he must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form the required *mens rea*." *State v. Yang*, __ N.C. App. __, __, 622 S.E.2d 632, 636 (2005) (internal quotation marks omitted), *disc. review denied*, ___ N.C. ___, 628 S.E.2d 12 (2006). "A person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary intent required to commit a criminal offense." *State v. Rogers*, 153 N.C. App. 203, 214, 569 S.E.2d 657, 665 (2002), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 442 (2003). *See also State v. Kornegay*, 149 N.C. App. 390, 395, 562 S.E.2d 541, 545 (2002) (defendant's statements upon arrest that he was "drunk and high from smoking [cocaine]" and that he was "coming down" from the night before were not enough evidence to entitle him to a voluntary intoxication instruction absent some further showing that he was intoxicated at the time he committed the crime), *appeal dismissed and disc. review denied*, 355 N.C. 497, 564 S.E.2d 51 (2002).

Here, two witnesses for the State testified that defendant looked like he was "on something" at the time of the crime. The arresting officer described defendant as "hot and sweaty and tired-looking" when the police arrived at the scene. Beyond this testimony, no other evidence as to defendant's mental or physical condition was offered at trial. Defendant, significantly, did not present any evidence tending to show that his intoxication rendered

him unable to form the requisite specific intent for the crime of attempted robbery with a dangerous weapon. We hold that the evidence "fall[s] short of requiring the judge, *sua sponte*, to instruct the jury on voluntary intoxication." *State v. Torres*, 171 N.C. App. 419, 423, 615 S.E.2d 36, 38 (2005).

IV

Defendant next argues that the trial court erred in denying his "motion to be allowed to question prospective [jurors] and argue to the jury the potential life without parole sentence for defendant upon conviction of attempted robbery with a dangerous weapon." It is well-established that, in cases where the defendant faces a habitual felon charge, the defendant is not permitted to argue the severity of his punishment to the jury during his trial on the principal felony. *State v. Wilson*, 139 N.C. App. 544, 548, 533 S.E.2d 865, 868 (observing that "the statutory provisions that an habitual felon trial be held subsequent and separate from the principal felony trial, and that an habitual felon indictment be revealed to the jury *only* upon conviction of the principal felony offenses . . . logically preclude argument of issues pertaining to the habitual felon proceeding, specifically and particularly including punishment, during the principal felony trial"), *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 394 (2000); *see also State v. Dammons*, 159 N.C. App. 284, 295, 583 S.E.2d 606, 613 (citing *Wilson* and noting that prior case law permits apprising the jury only of the punishment that may be imposed upon conviction of the crime for which defendant is being

tried), *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382, 124 S. Ct. 1691 (2004).

Defendant contends that this line of case law was incorrectly decided. We are, however, bound by *Wilson* and *Dammons* and may not revisit their holdings. *See In Re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent."). Defendant also attempts to distinguish *Wilson* on the grounds that in *Wilson*, the sentence at stake was a mere range of months, whereas here a life sentence hangs in the balance. Nothing in *Wilson* or *Dammons*, however, indicates that their reasoning turns on the length of the sentence at stake. We are, therefore, compelled to overrule this assignment of error.

V

Defendant's final argument is that his sentence of life in prison without parole is a cruel and unusual punishment for the crime of attempted robbery with a dangerous weapon. This argument was rejected by our Supreme Court in *State v. Todd*, 313 N.C. 110, 118, 326 S.E.2d 249, 253 (1985) (holding that a life sentence under the habitual felon statute does not violate the Eighth Amendment). *See also State v. Mason*, 126 N.C. App. 318, 321, 484 S.E.2d 818, 820 (1997) (holding that *Todd*'s holding applied to defendants convicted under the violent habitual felon statute), *cert. denied*, 354 N.C. 72, 553 S.E.2d 208 (2001). Since these cases are controlling, defendant's final assignment of error is accordingly overruled.

No error.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).