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NO. COA05-1280

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v.

Durham County
No. 04CRS053630

LEVETTE LYNN LIPSCOMB

Appeal by defendant from judgment entered 1 June 2005 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 8 May 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David J. Adinolfi II, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

HUNTER, Judge.

Levette Lynn Lipscomb ("defendant") appeals from a judgment sentencing him to an active term of imprisonment for a minimum of sixty-two months and a maximum of eighty-four months upon his conviction by a jury of robbery with a dangerous weapon. The sole assignment of error argued by defendant presents the issue of whether the trial court committed prejudicial error by allowing the State to cross-examine defendant regarding his membership in the Crips street gang. For the reasons stated herein, we find no error.

George Dare ("Dare") testified that on the evening of 15 August 2004, he had just returned a female friend to her home when a black male, whom he identified as defendant, approached Dare's vehicle, pointed a gun at Dare's head, and asked Dare to give him all of his money. As Dare reached for his wallet, defendant grabbed it and ran.

On 2 November 2004, a police officer conducted a stop of a vehicle being operated by defendant. During a search of the vehicle, the officer seized a .22 caliber handgun. Dare identified the gun as the one pointed at his head on 15 August 2004.

Defendant testified that he conspired with another man and Dare's female friend to rob Dare. He asserted that the other man pointed a toy BB gun, not a real gun, at Dare, and that defendant did not point the gun. Defendant's girlfriend testified that she subsequently sold the toy BB gun to a friend she could identify only as "T.J" for the sum of \$60.00.

During cross-examination of defendant, the prosecutor showed defendant the .22 caliber handgun seized from defendant's vehicle and asked him about certain markings that appeared on the gun. The following transpired:

Q What's that marking right there that you're looking at?

A It's a star.

Q And then over here what is this marking?

A It's a 30 sign.

Q Did you put these markings on the weapon?

A Yes.

Q What does the 30 stand for?

MR. AUS: I'm going to object at this point, Your Honor.

THE COURT: Overruled.

THE WITNESS: It's a symbol of a gang.

CROSS EXAMINATION RESUMED - BY MR. GARRELL

Q Okay, and the star, what does that stand for?

A It's a six month star. It's a symbol of a gang.

Q Are you in a gang?

MR. AUS: Objection.

THE COURT: Overruled.

THE WITNESS: Yes.

CROSS EXAMINATION RESUMED - BY MR. GARRELL

Q How long have you been in a gang?

A Ever since I was 15.

Q What's the name of the gang?

A The Crips.

Q Did you give -- how much money did you get on this robbery?

A Twelve dollars.

Q Have you ever committed any other robberies for The Crips?

A No, sir.

MR. AUS: I'm going to object and move to strike on that.

THE COURT: Objection sustained. Motion to Strike allowed. Members of the jury,

disregard the question, have you ever done any other robberies with The Crips. That will take no part in your deliberations. Dismiss that from your minds. . . .

Unless relevant to an issue in the case, evidence of one's membership in a gang or other nefarious group is not admissible.

State v. Atkins, 349 N.C. 62, 94-95, 505 S.E.2d 97, 117 (1998);

State v. Freeman, 313 N.C. 539, 548, 330 S.E.2d 465, 473 (1985).

Notwithstanding,

the law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.

State v. Albert, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981).

Moreover, when a defendant takes the stand and offers evidence of good character, he subjects himself to impeachment by evidence of acts which tend to discredit his character and his credibility.

State v. Ammons, 167 N.C. App. 721, 728, 606 S.E.2d 400, 405

(2005). "Whether cross-examination transcends propriety or is

unfair is a matter resting largely in the sole discretion of the trial judge, and his ruling thereon will not be disturbed absent a

showing of gross abuse of discretion." *State v. Ruof*, 296 N.C.

623, 633, 252 S.E.2d 720, 726 (1979).

Here, defendant opened the door to cross-examination regarding his association in a gang notorious for engaging in violent criminal activity by testifying "it's just been tearing me up because I robbed someone. I'm not a person that robs anyone. I

don't want anyone looking at me like I'm a bad guy or anything like that." Defendant further testified when asked why he robbed the victim that he was, "[t]rying to be somebody that I'm not. Trying to be cool. Just listening to other people when I should have been getting away from that kind of stuff." By testifying as to his good character as someone who was not a "bad guy" or robbed people, and that his actions in robbing the victim was the result of trying to be something he was not, defendant subjected himself to impeachment by acts which discredited his credibility. Further, by testifying that his motivation for the robbery was a result of "listening to other people" when he "should have been getting away from that kind of stuff[,] " defendant opened the door for further questions as to his associations upon cross-examination.

Even if the admission of the testimony was error, we are not persuaded that the error was prejudicial. See *State v. Mann*, 355 N.C. 294, 305-06, 560 S.E.2d 776, 784, (2002). We do not believe it is reasonably possible that without this evidence a jury may have found defendant guilty of common law robbery, as defendant urged the jury to find, instead of robbery with a dangerous weapon. Dare told an investigating officer the day after the incident that the gun pointed at him was "a black revolver with a long barrel." The gun seized from defendant was a "Caliber .22 long rifle" firearm. Dare positively identified the gun seized from defendant as the one used to rob him. On the other hand, defendant could not produce the toy BB gun. Defendant's girlfriend could only identify the purchaser as a friend named "T.J.," who could not be located.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).