NO. COA05-1293

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v. Guilford County
No. 04 CRS 68948

CHAMRATH PEAN

Appeal by defendant from judgment entered 18 May 2005 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 29 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

Brian Michael Aus for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from a judgment imposed on a jury conviction of robbery with a dangerous weapon.

The State presented evidence tending to show that Thuy Ha and her husband, Thao Nguyen, operated the Me Kong Market on High Point Road in Greensboro. At approximately 3:00 p.m. on 27 December 2003, two men entered the Me Kong Market and demanded money. One of the men, whom Thuy Ha identified as Chinh Nguyen, held a gun to the head of Thuy Ha while the other man grabbed a bag of money and ran. Three other men, with faces covered, then entered the store and held guns to the head of Thao Nguyen. Chinh Nguyen grabbed the

cash register and ran out of the store. One of the other men fled when Thao Nguyen told them that the police were coming. The remaining two men fled after Thao Nguyen hit one of them in the head with a tea box. Thao Nguyen chased the men and saw them get into an Oldsmobile automobile. Thao Nguyen memorized the last four digits of the license plate of the vehicle and provided it to the police.

A police officer searched a computer database for vehicles matching the description given by Thao Nguyen and bearing the same last four digits on the registration plate. He located an Oldsmobile automobile bearing the same last four digits registered to a resident of 3915 Clifton Road. The officer went to this residence. Kevin Aker answered the door. Although the officer asked to speak to the registered owner, who was a different person, Aker asked, "Are you here for me?" The officer replied, "Why would I be here for you?" Aker responded, "Because of what happened at the shopping center on High Point Road."

Aker testified for the State that on 27 December 2003, Chinh Nguyen called him and asked for a ride. Aker agreed to give a ride in exchange for some marijuana. Aker picked up four men, whom he identified as Chinh Nguyen, defendant, defendant's brother, and a man named Kauven at a store. He drove and parked in the back parking lot of the Me Kong Market. While he remained in the vehicle, the four men got out and went into the store. He heard a scream. He looked in his rearview mirror and saw the four men at his door and a lady screaming. The four men jumped into his car.

They told him that they had robbed the store. He saw that Chinh Nguyen, who was seated with him on the front seat, had a gun in his hand. They directed him to drive back to the same place where he had picked them up. The men exited his vehicle, and he drove home.

Defendant testified that he rode with Aker and the others to the store; that he accompanied the three other men into the store; and that when he saw the others were armed, he fled from the store.

Defendant contends the court committed plain error by allowing two police officers to testify regarding the disposition of charges against non-testifying codefendants. He argues that the evidence had a probable impact upon the jury's verdict because the jury could have reasoned that since the others pled guilty, defendant must also be guilty.

By assigning plain error, defendant concedes that he did not object to admission of the evidence. *See State v. Oliver*, 309 N.C. 326, 335, 307 S.E.2d 304, 312 (1983). Review for plain error is limited to determining whether this case is

> "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has '"resulted in a miscarriage of justice or in the denial to appellant of a fair trial"' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'"

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.

1982) (footnotes omitted) (emphasis in original)).

Prior to admission of the testimony to which defendant has assigned as plain error, defendant elicited from Aker, one of the codefendants, testimony that he had been charged with robbery with a dangerous weapon arising out of this incident. Chinh Nguyen, another codefendant, also testified prior to admission of the officers' testimony that he had pled guilty to robbing the Me Kong Market on 27 December 2003. Defendant's testimony tended to show that he had no knowledge of his codefendants' plans to rob the store and that once he saw they had guns, he fled the store. Evidence that the codefendants pled guilty did not make it any more or less probable that defendant had knowledge of their plans to rob the store. For these reasons, we conclude that there was no plain error in the trial court's admission of the officers' testimony concerning the disposition of the charges against the non-testifying codefendants.

Defendant also contends the court committed plain error by failing to instruct the jury that "mere presence" at the scene of a crime is not evidence of guilt of the crime. Again, we do not find plain error. The trial court's instructions made clear that in order to find defendant guilty, the jury had to find defendant joined together with the others in a common purpose to commit the armed robbery. *See State v. Lucas*, 353 N.C. 568, 592, 548 S.E.2d 712, 728 (2001), *overruled on other grounds by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) (holding no plain error when the trial court's instructions as a whole adequately convey the

principle that a person's presence at the scene, by itself, is not sufficient to support a conviction).

No error.

Judges HUDSON and STEELMAN concur.

Report per Rule 30(e).