NO. COA 05-1687

NORTH CAROLINA COURT OF APPEALS

Filed: 16 January 2007

STATE OF NORTH CAROLINA,

v. Forsyth County
Nos. 02 CRS 38882
02 CRS 38885
02 CRS 38886

JERMAL MATTHEW TOLLIVER,
DORRELL BRAYBOY and
CHRISTOPHER BRYANT

Appeal by defendants from judgments entered upon guilty verdicts rendered 20 May 2005 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 20 September 2006.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey, for the State.

Attorney General Roy Cooper, by Special Deputy Attorney General Norma S. Harrell, for the State.

Attorney General Roy Cooper, by Special Attorney Deputy Attorney General Richard L. Harrison, for the State.

Parish & Cooke, by James R. Parish, for Jermal Matthew Tolliver, defendant-appellant.

Paul F. Herzog for Dorrell Queshawn Brayboy, defendant-appellant.

Haral E. Carlin for Christopher Levon Bryant, defendant-appellant.

CALABRIA, Judge.

Jermal Matthew Tolliver ("Tolliver"), Dorrell Queshawn Brayboy ("Brayboy"), and Christopher Levon Bryant ("Bryant") appeal from judgments entered upon jury verdicts finding them guilty of second degree murder and common law robbery. We find no prejudicial error.

Nathaniel Fredrick Jones ("the victim") was found murdered at his home on the evening of 15 November 2002. The victim's body was discovered lying beside a vehicle in his carport. He had been beaten, and electrical tape was used to bind his hands and was wrapped around his mouth.

At trial, the State presented expert medical testimony that the victim suffered multiple blows to the head, and that the beating was the cause of his death. The medical examiner testified the victim had an enlarged heart and this condition contributed to his death, but he would not have died but for the beating he suffered.

An eyewitness, Jessicah Black ("Black"), age 16 years, testified that on 15 November 2002 she picked up five teenage boys in her car: Rayshawn Banner ("Banner"), Nathaniel Cauthen ("Cauthen"), and defendants Tolliver, Brayboy, and Bryant. The boys discussed "jacking somebody up," and Black understood that phrase to mean they intended to rob someone. She testified that the group had been discussing such a robbery for about a week to a week and a half prior to that evening.

Black drove the group to Maxways ("Maxways"), a store, where she believed Bryant, Cauthen, Tolliver, and Brayboy purchased the

tape. Next, she drove them to Belview Park, where the group gathered around picnic tables. After a few minutes, the group observed a car entering the victim's driveway. Black heard Cauthen say, "There's the car," and the group, with the exception of Tolliver, walked toward the victim's house. Bryant and Cauthen picked up sticks and Brayboy indicated that he was carrying "protection." After approximately five minutes, Tolliver followed the group. Black, who remained in the park, testified that after several minutes of silence, she heard "banging noises," and heard voices she recognized as those of Bryant, Cauthen, and Banner. "You could hear them saying get the fuck down, give us the shit," Black testified. She reported hearing a voice she did not recognize say, "Stop, leave me alone."

After five or ten minutes, the boys returned. Black testified that some of the boys bragged about beating and robbing the victim and discussed how the money should be divided. She testified that she saw a wallet imprint in Cauthen's pocket, and that she had never known him to carry a wallet. Black stated that some of the boys wanted to change their clothes. She dropped them off and then returned to pick them up, drove them to a mall, and later to a bowling alley. A security officer on duty at the bowling alley testified that on the night of the murder, he observed Cauthen, Banner, Brayboy, and Tolliver in Black's vehicle. According to Black, the group later went back to the park, walked to the fence beside the victim's house, and stopped. She stated that police had

roped off the roads and she could see something covered in black cloth that she thought was a body.

Following an investigation, the Winston-Salem Police Department arrested Cauthen, Banner, Tolliver, Brayboy, and Bryant and charged them with the murder and robbery of the victim. Cauthen and Banner were jointly tried and convicted of first degree murder and robbery with a dangerous weapon on 19 August 2004. The trial court arrested judgment on their robbery convictions. They were both sentenced to life in prison without the possibility of parole. *State v. Banner*, 2006 N.C. App. LEXIS 1748 (2006).

After waiving probable cause hearings on 9 December 2002, defendants Tolliver, Brayboy, and Bryant were bound over from the Juvenile Court to Forsyth County Superior Court, where they were tried jointly. On 20 May 2005, the jury returned verdicts finding Tolliver, Brayboy, and Bryant guilty of second degree murder and common law robbery. The court then entered judgment on those verdicts, sentencing each defendant to a presumptive term of 157 months to 198 months in the North Carolina Department of Correction on the murder conviction, and 13 months to 16 months on the robbery conviction. From those judgments, defendants appeal.

I. Jermal Tolliver

Defendant Tolliver raises several assignments of error on appeal. He initially argues that his due process rights were violated when the trial court required him to be shackled prior to jury selection and throughout the trial. We determine that the defendant has not preserved this issue for appeal by objecting at

trial. Tolliver failed to object to the judge's order to shackle him, never objected under the federal or state constitution to such a decision, and never objected under N.C. Gen. Stat. § 15A-1031 (2005), which requires, *inter alia*, that the judge enter in the record his reasons for ordering a defendant shackled.

"In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1)(2006). "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003). "Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995). Because Tolliver's argument regarding his being shackled has not been properly preserved for appellate review, it is procedurally barred and we do not consider it here.

Tolliver's next argument is that the trial court abused its discretion by failing to instruct the jury *ex mero motu* that the inculpatory statement made by co-defendant Brayboy could not be considered against Tolliver. This statement was made four days after the murder and robbery, and was read into evidence by Sergeant Mark Smith of the Winston-Salem Police Department. The transcribed statement's references to co-defendants had been

redacted, but when Brayboy took the stand and testified, the district attorney filled in the names during cross-examination. Brayboy admitted that he had identified co-defendants Tolliver and Bryant, as well as Banner and Cauthen, as the other people who were involved in the crime. However, Brayboy disavowed the statement's accuracy, testifying that he made up the story because the police told him he could go home that night if he admitted to being the lookout.

This Court has held that "[w]hen, at a joint trial, evidence is admitted against one defendant which is not admissible against a co-defendant and the co-defendant makes a general objection to the evidence, the court is required to give a limiting instruction to the jury." *State v. Robinson*, 136 N.C. App. 520, 522, 524 S.E.2d 805, 807 (2000). As in the instant case, *Robinson* involved a defendant who took the stand and was impeached with a statement he previously gave to police that also implicated Robinson, his co-defendant. Robinson's attorney made a general objection, which was overruled, and made no request for a limiting instruction. *Id.*

Here, no limiting instruction was sought, but a general objection was initially raised by Tolliver's counsel. The initial exchange went as follows:

> PROSECUTOR: On tape with your mother present, you said you did do it, didn't you?
>
> BRAYBOY: Yes, ma'am.
>
> PROSECUTOR: You said you were there?
>
> BRAYBOY: Yes, ma'am.
>
> PROSECUTOR: That your buddy Jermal was there?

> BRAYBOY: Yes, ma'am.
>
> MR. FISCHER [Tolliver's counsel]: Objection.
>
> THE COURT: Overruled.

During oral arguments, Tolliver's counsel contended that in light of *Robinson*, it was error for the trial court to admit Brayboy's statement concerning Tolliver's involvement absent a limiting instruction. However, the State later asked Brayboy again about his statement to police inculpating Tolliver.

> PROSECUTOR: Now, the statement that Officer Smith read yesterday. . .
>
> BRAYBOY: Yes, ma'am.
>
> PROSECUTOR: . . . was your statement that was taken down on tape?
>
> BRAYBOY: Yes, ma'am.
>
> PROSECUTOR: But it left out the names of the other people involved, didn't it?
>
> BRAYBOY: Yes, ma'am.
>
> PROSECUTOR: And the other people involved, according to your statement on tape, were not only you, but Jermal Tolliver, Christopher Bryant, Rayshawn Banner, and Nathaniel Cauthen; is that right?
>
> BRAYBOY: Yes, ma'am.
>
> THE COURT: Record may reflect that he nodded his head affirmatively as to each of them.

This time no objection was made or limiting instruction sought. "Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984).

Assuming Tolliver was entitled to a limiting instruction after the first mention of his name as part of Brayboy's recorded statement, Tolliver lost the benefit of the objection by failing to object when the same evidence was again introduced later. Thus, even if the judge was required to give a limiting instruction as to the first mention of Tolliver's name, he was under no duty to so instruct on the second statement since no objection was made. Because the evidence introduced both times was identical, there is no prejudice resulting from the judge's failure to give a limiting instruction the first time the evidence was sought to be introduced.

Tolliver next argues that the trial court erred by denying his motion to dismiss the charges of murder and robbery. Our courts have established the following practice in reviewing a trial court's denial of a motion to dismiss:

> In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence. The court must determine whether substantial evidence supports each essential element of the offense and the defendant's perpetration of that offense. If so, the motion must be denied and the case submitted to the jury. "'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion."

State v. Hairston, 137 N.C. App. 352, 354, 528 S.E.2d 29, 30 (2000) (internal citations omitted). Here, the State was required to present substantial evidence of second degree murder and common law robbery. "[S]econd degree murder is the unlawful killing of a

human being with malice but without premeditation and deliberation." *State v. Allen*, 77 N.C. App. 142, 144, 334 S.E.2d 410, 411 (1985). "Common law robbery is the taking of personal property of another by violence or placing the person in fear." *State v. Muhammad*, 146 N.C. App. 292, 294, 552 S.E.2d 236, 237 (2001).

In the case *sub judice*, the State introduced abundant evidence to defeat Tolliver's motions to dismiss. There was evidence from Jessicah Black, who testified that the group of boys in her car, including Tolliver, discussed "jacking somebody up" and had been discussing such a thing for more than a week. Black testified that she drove the group, including Tolliver, to Maxways, where she believed the boys purchased tape, and then carried them to Belview Park. Once there, the boys saw the victim's car pull into his driveway and started toward his house. Black testified that Tolliver lagged behind, but ultimately joined the group, and several minutes later she heard a violent altercation, including threatening demands from her friends and a plea from the victim to leave him alone. In addition, a detective testified that on 19 November 2002 Tolliver accompanied him to an area around Hanes Mall and directed him to an entrance near a McDonald's restaurant where a wallet belonging to the victim might be found. No such wallet was ever found. Additionally, Brayboy testified on cross-examination that he had identified Tolliver as one of the individuals participating in the robbery and murder. From this, a reasonable juror could find Tolliver guilty of both second degree

murder and common law robbery. Accordingly, these assignments of error are overruled.

Lastly, Tolliver argues the trial court erred by overruling his objection and instructing the jury on the defendant's flight from the crime scene. Tolliver, in his assignment of error, alleges that the instruction was not supported by the evidence, which he contends violated the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 19, 23 and 27 of the North Carolina Constitution. We conclude the defendant's constitutional arguments were not properly preserved.

Tolliver's counsel, in objecting to the instruction, argued only that there was insufficient evidence to support the instruction. He raised no constitutional objection. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Further, the defendant's brief does not provide argumentation or case law supporting constitutional error, but only argues insufficiency of evidence for an instruction on flight. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28(b)(6)(2006). Thus, we will only consider whether there was sufficient evidence to support the trial court's instruction on flight.

"A flight instruction is proper 'so long as there is some evidence in the record reasonably supporting the theory that

defendant fled after commission of the crime charged. . . .'" *State v. Norwood*, 344 N.C. 511, 534, 476 S.E.2d 349, 359 (1996) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

Here, there was certainly evidence that Tolliver was present at the crime scene and that he left the scene. The issue is whether there was some evidence that Tolliver took some steps to avoid apprehension. The State argues that there was evidence tending to show that Tolliver, along with his cohorts, went home and changed clothes immediately after leaving the scene. This evidence comes from the testimony of Jessicah Black:

> PROSECUTOR: When you and the five others were in the car, where did you go?
>
> BLACK: After we left the park, I went and dropped them out.
>
> PROSECUTOR: Why did you drop them out?
>
> BLACK: Because they said they wanted to change clothes.
>
> PROSECUTOR: Who said they wanted to change clothes, if you remember?
>
> BLACK: Just in general they were talking about wanting to change clothes.

Black was asked, "Did all of them want to go home and change clothes?" She replied, "As far as I know of." T4 p. 234. Black then testified that she dropped Tolliver and Bryant off at Bryant's

house, then picked them back up and drove them to the mall. T4, p. 236. There was no testimony that Tolliver actually changed his clothes or altered his appearance. Black's testimony does nothing to establish that Tolliver personally intended to alter his appearance or that he in fact did alter his appearance. It offers no evidence that he took any steps to avoid apprehension other than leaving the scene of the crime, which we have determined is insufficient to support a flight instruction. However, we determine that the error in the jury instruction did not prejudice the defendant.

A defendant is prejudiced by errors relating to rights other than those arising under the United States Constitution when there is a reasonable possibility that, absent the error, there would have been a different result. N.C. Gen. Stat. § 15A-1443 (2005). The burden of showing prejudice falls on the defendant. *Id.*

Here, Jessicah Black's testimony placing Tolliver at the crime scene during the crime's commission, the testimony of the bowling alley security guard placing Tolliver with co-defendant Brayboy, as well as Banner and Cauthen, on the night of the murder, and the testimony of the police officer regarding Tolliver's cooperation in the search for the victim's wallet, all point strongly to Tolliver's involvement in the crime. As such, the jury's verdict would have been the same absent the erroneous flight instruction. This assignment of error is overruled.

II. Dorrell Brayboy

Defendant Brayboy on appeal brings forth two assignments of error. He argues that the trial court erred by denying his motion to suppress inculpatory statements he made to the police, and argues that the trial court violated his due process rights by requiring him to be shackled prior to jury selection and during the course of the trial. Since we have already addressed defendant's second argument in the context of co-defendant Tolliver, we need not readdress that argument here. Like Tolliver, defendant Brayboy failed to object to his shackling at trial. Because Brayboy's argument regarding his shackling at trial has not been properly preserved for appellate review, this assignment of error is overruled.

Brayboy's remaining assignment of error takes issue with the denial of his motion to suppress inculpatory statements made to the police on 19 November 2002. In its order denying Brayboy's motion to suppress, the trial court found, *inter alia*:

> 5. On November 19th 2002, at approximately 4:00 p.m., Detectives Poe and Nieves located defendant, and his mother, Lisa Brayboy, leaving the Medical Park Hospital. Defendant and Ms. Brayboy were told that the Winston-Salem Police Department was investigating an incident and needed to speak with defendant, and defendant was asked to accompany the Detectives to the Public [S]afety Center (hereinafter "PSC"). Both defendant, and his mother were told, in each other's presence, that he was not under arrest and he would be free to leave the interview if he wished; the defendant's mother consented to her son's going to the PSC;
>
> 6. Defendant agreed to go and was transported by the detectives to the PSC in an unmarked car. During the ride the doors remained unlocked or easily within the defendant's

reach to unlock;

7. Upon arrival, defendant accompanied Detective Poe and Detective Smith to a standard interview room;

8. Once in the interview room, defendant was again told by detectives that he was not under arrest and he was free to leave. Further, defendant was informed by Detective Smith that if he desired to leave a ride would be provided for him. Defendant was not handcuffed or restrained in any way and he was told by Detective Smith that the door to the interview room remained unlocked;

9. Shortly before 5:00 p.m., the interview began. For the first hour of the interview defendant appeared to be happy and coherent as he denied having any knowledge of [the victim's] death. While interviewing defendant a third detective, Detective Weavil entered the interview room and also spoke with defendant. During questioning, at approximately 6:10 p.m., defendant requested that his mother be present;

. . .

12. At about 7:00 p.m., Ms. Brayboy arrived and was taken to the interview room. Once in the interview room she urged the defendant to tell the truth;

13. The defendant contends that officers told him he could receive the death penalty. Despite any reference thereto he continued to deny any involvement until after his mother told him to tell the truth;

14. After speaking with his mother and the detectives, defendant requested that he be allowed to speak with Detective Smith alone. Defendant's wishes were accommodated and, at that point, Detective Poe and Ms. Brayboy left the interview room;

15. Shortly thereafter, defendant made statements which were largely consistent with those being made by others and, although he contended that his role was that of a lookout, he indicated that he participated in the

> beating and robbery of Mr. Jones and gave other details;
>
> . . .
>
> 22. Prior to these events defendant had been arrested approximately five times;

"Defendant has not assigned error to any specific finding of fact. Therefore, the findings of fact are not reviewable, and the only issue before us is whether the conclusions of law are supported by the findings, a question of law fully reviewable on appeal." *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005)(citations omitted), *cert. denied*, __U.S.__, 164 L.Ed. 2d 523 (2006).

Since the trial court's findings have not been assigned as error and are thus deemed conclusive, our review is limited to the court's conclusion of law that Brayboy's inculpatory statements were not the product of custodial interrogation and thus not violative of Brayboy's Fifth Amendment right against self-incrimination.

When a defendant is subjected to custodial interrogation, he must be advised of certain rights, including his right to remain silent and right to have an attorney present during questioning. *Miranda v. Arizona*, 384 U.S. 436 (1966). In denying Brayboy's motion to suppress, the trial court concluded that Brayboy was not in custody and thus no *Miranda* warning was required. The *Miranda* court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, 384 U.S. at 444. This definition has been further

refined by case law in recent years. It is a totality of the circumstances test, and the "definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997).

The fact that police picked Brayboy up, transported him to the Public Safety Center, and questioned him regarding the murder and robbery, does not itself establish that Brayboy was in custody. Although such a situation is inherently coercive, mere coercion does not equal custody.

> [A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of formal arrest or restraint of freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime.

Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

In *Gaines*, the North Carolina Supreme Court held that a juvenile defendant was not in custody when he made incriminating statements to police despite the fact that the defendant had been taken to a police station and questioned for several hours. The Court based its judgment on several factors, including the fact that the defendant was repeatedly advised that he was not under arrest and was free to leave at any time, and that he had prior experience in dealing with law enforcement officers. *Gaines*, 345 N.C. at 662-63, 483 S.E.2d at 405.

The facts in the case *sub judice* are similar to those in *Gaines*. Here, defendant Brayboy voluntarily went with the police to the station, was advised on several occasions that he was not under arrest and was free to leave at any time, and was not handcuffed or restrained by the officers. In its order denying Brayboy's motion to suppress, the trial court noted that it had:

> considered [Brayboy's] age, his experience with the law, his education, his level of intelligence, his lack of demonstrated fear or intimidation of the officers or their questions, the length of his questioning, the lack of any promises, deception or threats, and his being allowed to talk with his mother during the time he was at the PSC.

R. P. 37. The trial court's conclusion is supported by the line of cases represented by *Mathiason* and *Gaines*. Although Brayboy was interrogated prior to being advised of his *Miranda* rights and his statements were subsequently used against him, we cannot say that this interrogation occurred while Brayboy was in police custody. Because we have determined that Brayboy was not in custody, it follows that his rights under N.C. Gen. Stat. § 7B-2101 (2005) were not violated since that statute applies only to juveniles in custody. *State v. Smith*, 317 N.C. 100, 104, 343 S.E.2d 518, 520 (1986). Accordingly, this assignment of error is overruled.

Defendant Brayboy has failed to argue his remaining assignments of error on appeal and they are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6)(2006).

III. Christopher Bryant

Defendant Bryant raises several assignments of error on appeal. He initially argues the trial court erred by not

dismissing the second degree murder and common law robbery charges against him for insufficient evidence. We find this argument unavailing. As stated above, the State was required to present substantial evidence supporting each element of the charges. Here it did so.

Jessicah Black testified that the group of boys, including Bryant, had been discussing "jacking somebody up" for over a week; that on the night of the murder they discussed the victim and what time he might arrive home; that she transported the boys to Maxways, where she believed they purchased tape; that she then drove them to the park; that they waited for the victim and started toward his property after his car pulled into the driveway; that Bryant and Cauthen picked up sticks; that she then heard banging noises, followed by voices, including Bryant's, ordering the victim to the ground and demanding he surrender his property; that the boys, including Bryant then returned, bragging about the beating and robbery; that the boys argued over how to divide the money, with Bryant arguing he should get the most because he was bigger and stronger than the others. From this, a rational juror could have concluded beyond a reasonable doubt that Bryant participated in the killing and robbery of the victim. Accordingly, these assignments of error are overruled.

Bryant next argues that the trial court erred in allowing the jury to review requested documents during jury deliberations without instructing the jury that it must also consider the rest of the evidence. Bryant contends that this error violated his rights

under the United States Constitution and North Carolina Constitution, and also violated N.C. Gen. Stat. § 15A-1233 (2005). He also argues that the trial court erred by failing to give a complete precautionary instruction prior to the first overnight recess after the jury had begun deliberating.

We need not address these arguments, as they have not been preserved for appellate review. No objection was made to the trial court, and we are thus prevented from considering the matters on appeal. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion." N.C. R. App. P. 10(b)(1)(2006). Although Bryant asserts plain error in his assignments of error, defendant's brief does not advance any argument or present any case law supporting an assertion of plain error. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28(b)(6)(2006).

Bryant next argues that the trial court erred in overruling the defendant's objection and instructing the jury on the defendant's flight from the scene. As with Tolliver's identical argument, here no constitutional objection was raised at the trial court and, for the reasons stated in the Tolliver analysis, no constitutional argument will be considered here on appeal. So we need only to determine whether there was "some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged. . . .'" *Norwood*, 344 N.C. at 534,

476 S.E.2d at 359 (1996)(citation omitted). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *Thompson*, 328 N.C. at 489, 402 S.E.2d at 392 (1991).

As with defendant Tolliver, we determine that there was insufficient evidence to support the instruction on flight. Jessicah Black's testimony placed Bryant at the scene, and leaving the scene, but she presented no testimony specifically linking Bryant to any effort to conceal his identity or otherwise avoid apprehension. Black testified that the boys spoke of a desire to change clothes immediately following the robbery, and testified that they all shared this desire "as far as I know of." But no testimony was presented that Bryant specifically intended to or did change clothes or otherwise alter his appearance. However, as with Tolliver, we determine that there was no prejudice from this error, as the jury's verdict would have been the same absent the flight instruction. The jury had heard evidence placing Bryant immediately adjacent to the crime scene in Belview Park; placing him at the scene ordering the victim to the ground and demanding his property; placing him leaving the scene with his accomplices; and placing him in Black's car arguing that he should get the largest share of the robbery money because he was the biggest and strongest. Accordingly, this argument is without merit.

Bryant lastly argues that the trial court erred by instructing the jury on the theory that Bryant acted in concert in committing

common law robbery and second degree murder. Bryant contends the State did not prove that he acted together with another in pursuance of a common plan. Although Bryant in his assignment of error alleges plain error, he fails to argue plain error in his brief. Thus, we need not consider this argument on appeal pursuant to N.C. R. App. 28(a)(2006). *State v. Scercy*, 159 N.C. App. 344, 354, 583 S.E.2d 339, 345 (2003). He further raises constitutional objections, but these were not presented to the trial court and thus will not be considered on appeal pursuant to N.C. R. App. P. 10(b)(1)(2006).

Defendant Bryant has failed to argue his remaining assignments of error on appeal and they are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6)(2006).

No prejudicial error.

Judges HUNTER and HUDSON concur.

The Judges participated in this decision and submitted this opinion for filing prior to 1 January 2007.

Report per Rule 30(e).