NO. COA06-1373

NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2007

STATE OF NORTH CAROLINA

v. Rowan County
Nos. 05 CRS 4423, 50070

SAMUEL EMANUELL MILLER

Appeal by defendant from judgment entered 11 July 2006 by Judge Michael E. Beale in Rowan County Superior Court. Heard in the Court of Appeals 4 June 2007.

Attorney General Roy Cooper, by Associate Attorney General LaToya B. Powell, for the State.

Sue Genrich Berry for defendant-appellant.

MARTIN, Chief Judge.

Defendant was indicted for common law robbery, and for having attained the status of an habitual felon. He entered pleas of not guilty. He appeals from judgments entered upon jury verdicts finding him guilty of common law robbery and attaining the status of an habitual felon. We find no error in his trial.

The evidence presented at trial tends to show the following: On 3 January 2005, Patrick Wendell Murphy, Jr., went to the Country Cupboard Convenience Store ("Country Cupboard") in Spencer, North Carolina. The defendant, Samuel Emanuell Miller, was also at the

store and was "run off" for creating a disturbance. Murphy purchased some cigarettes and left the store. As Murphy turned right after going out the front door, defendant hit him on his hand, causing Murphy to drop his change. Defendant told Murphy to, "Give me your money." Murphy told him, "You can have it." Defendant took the money and left.

Shortly before 6 p.m. on the same day, Officer Wayne Comer of the Spencer Police Department was dispatched to investigate a disturbance at the Country Cupboard. Defendant was identified to Officer Comer as causing the disturbance and people inside the store directed Officer Comer to defendant's home. When Officer Comer found defendant at his home, defendant was intoxicated. Officer Comer frisked him and found a box cutter, a lighter, and U.S. currency. Officer Comer determined that defendant was "too intoxicated to be out in the public" and warned him he would be arrested if he went back outside. Defendant indicated that he understood the warning.

Officer Comer was then dispatched to the Bethany Center in Spencer to investigate a robbery. When he got there, he met with Murphy. Murphy appeared "very scared, very timid" and explained to Officer Comer what had happened at the Country Cupboard. Murphy then accompanied Officer Comer back to the Country Cupboard and gave him a written statement. Officer Comer and Murphy were sitting in Officer Comer's patrol car after finishing the statement when Murphy began to get excited. Murphy started yelling, "That's the man. That's the man [who] robbed me." Officer Comer then

observed defendant walk in front of the patrol car. Officer Comer got out of the patrol car and arrested defendant for being "intoxicated and disruptive." Defendant did not offer evidence.

Defendant first argues that the trial court committed plain error by failing to instruct the jury on voluntary intoxication. Defendant contends there is undisputed evidence that he was too intoxicated to form the specific intent to rob Murphy. Defendant cites Officer Comer's testimony that defendant was "very intoxicated, he could hardly stand," and that defendant was "too intoxicated to be out in the public." We find this argument unpersuasive.

"A plain error is one 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002)(quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied,* 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003). It is to be applied cautiously and only in the exceptional case where the error is so prejudicial, that justice cannot have been done. *State v. Baldwin*, 161 N.C. App. 382, 388, 588 S.E.2d 497, 503 (2003)(citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a

probable impact on the jury's finding of guilt." *Id.* (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79).

Defendant was charged with common law robbery, a specific intent crime. *See State v. Bailey*, 4 N.C. App. 407, 412, 167 S.E.2d 24, 27 (1969). This Court has stated that:

> Voluntary intoxication may negate the existence of specific intent as an essential element of a crime. . . . In order for intoxication to negate the existence of specific intent, the evidence must show that the defendant was "utterly incapable" of forming the requisite intent. *Evidence of mere intoxication is insufficient to meet this burden.*

State v. Howie, 116 N.C. App. 609, 613, 448 S.E.2d 867, 869-70 (1994)(citations omitted)(emphasis added).

Here, we conclude that the evidence of intoxication was insufficient to require an instruction on the defense. When Officer Comer went to defendant's residence, he found defendant to be so intoxicated "he could hardly stand." However, defendant was coherent enough to answer Officer Comer's questions. When asked, defendant admitted that he had been at the Country Cupboard. During the frisk, when asked how much money he had in his pocket, defendant responded that he had "fifteen dollars." Then, after Officer Comer left, defendant was able to walk unaccompanied back to the Country Cupboard. After his arrest, defendant was coherent enough to provide Officer Comer with his biographical data, including "name, date of birth, age, race, sex, place of birth, an address, occupation, employer's occupation, and next of kin." Defendant also gave Officer Comer his social security number. See

State v. Shoemaker, 334 N.C. 252, 272, 432 S.E.2d 314, 324 (1993)("Other evidence which indicates that defendant was not 'utterly incapable' of forming the necessary intent includes the fact that defendant engaged in a lengthy conversation with the above-mentioned detective and provided the detective with his full name, date of birth, driver's license number, address, telephone number, and information regarding his employer.") Therefore, while the evidence shows that defendant may have been intoxicated, it falls short of showing that he was so intoxicated as to be "utterly incapable" of forming the specific intent to commit the charged offense. *State v. Herring*, 338 N.C. 271, 276, 449 S.E.2d 183, 186 (1994). Moreover, the failure to instruct the jury on voluntary intoxication did not amount to a "miscarriage of justice." Accordingly, we decline to find plain error.

Defendant next argues that he received ineffective assistance of counsel because his attorney failed to request an instruction on voluntary intoxication. Defendant contends that there was ample evidence in the record to support the instruction, and but for counsel's error, there would have been a different result in the proceedings.

To obtain relief for ineffective assistance of counsel, the defendant must demonstrate that his "counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985)(citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984)). This requires a showing that: (1)

"counsel's performance was deficient;" and (2) "that the deficient performance prejudiced his defense." *Id.* at 562, 324 S.E.2d at 248. As discussed previously herein, we conclude that the trial court did not commit plain error by failing to instruct the jury on voluntary intoxication. "There being no 'plain error' in the jury instructions, defendant's assertion of ineffective assistance of counsel with respect thereto must also fail." *State v. Seagroves*, 78 N.C. App. 49, 54, 336 S.E.2d 684, 688 (1985), *disc. rev. denied*, 316 N.C. 384, 342 S.E.2d 905 (1986). Accordingly, we find no error.

No error.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).