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NO. COA06-1542

NORTH CAROLINA COURT OF APPEALS

Filed: 04 September 2007

STATE OF NORTH CAROLINA

v.

From New Hanover County
No. 02 CRS 25658
03 CRS 674

DEMOND ANTONIO WELLS

Appeal by defendant from judgment entered 31 May 2006 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 7 June 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General L. Michael Dodd for the State. Parish & Cooke, by James R. Parish, for defendant-appellant.

STEELMAN, Judge.

The trial court erred in allowing the admission of certain evidence at trial, but the admission of that evidence did not rise to the level of plain error. The State's evidence was sufficient to survive defendant's motion to dismiss the charge of carrying a concealed weapon. The trial court did not err in instructing the jury concerning defendant's decision not to testify, even though defendant requested the instruction not be given. We find no error sufficient to warrant a new trial.

Demond Antonio Wells ("defendant") worked as a recording engineer. Charles Echols ("Echols"), owned Heavy Rotation, a

recording studio where defendant conducted most of his work. On 17 December 2002, while defendant and Echols were in Heavy Rotation, defendant argued with Roncin Sanders ("victim") over the phone concerning a dispute over an agreement between defendant and the victim for defendant to record and mix tracks for the victim's music group. Shortly thereafter, the victim and his friend LaDiamond Jones ("Jones"), arrived at the studio. Further argument ensued inside the studio, which consisted of angry conversation and threatening body language. Matters escalated when the confrontation moved outside the studio, and defendant and victim began fighting on the front steps. Jones joined in the fight as well, "stomping" on defendant twice. Echols, who had seen the fight start from inside the studio, opened the door and shouted for the men to stop. Shortly thereafter, defendant produced a 40 caliber Glock Handgun, though no one saw from where defendant produced the handgun, and began firing it. Defendant shot victim in the hand and chest, then continued to fire at the fleeing victim and Jones. The victim died shortly after being shot, and defendant turned himself in to the police several hours later.

Defendant was indicted for first-degree murder and carrying a concealed weapon. He went to trial at the 15 May 2006 Criminal Session of Superior Court in New Hanover County before the Honorable Charles H. Henry. On 31 May 2006, a jury found defendant guilty of second-degree murder and carrying a concealed weapon. Finding defendant to be record level II, the trial court

consolidated the charges for purposes of sentencing and sentenced defendant to 180-225 months imprisonment. Defendant appeals.

In defendant's first argument, he contends the trial court committed plain error by not intervening *ex mero motu* to exclude testimony, not otherwise admissible under the Rules of Evidence, concerning defendant's bad character and propensity for violence. We disagree.

Because defendant did not object to the testimony at trial, he argues the trial court's inaction amounts to plain error. N.C.R. App. P. 10(c)(4). "Plain error is error '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.' 'To satisfy the requirements of the plain error rule, the Court must find error, and that if not for the error, the jury would likely have reached a different result.'" *State v. Ramirez*, 156 N.C. App. 249, 256, 576 S.E.2d 714, 720 (2003), *rev. denied*, 357 N.C. 255, 583 S.E.2d 286, *cert. denied*, 540 U.S. 991, 157 L. Ed. 2d 388 (2003).

"The plain error rule . . . is always to be applied cautiously and only in 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'"

State v. Holbrook, 137 N.C. App. 766, 767-68, 529 S.E.2d 510, 511 (2000), (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Each contested admission of evidence or instruction will be evaluated individually for plain error, not cumulatively. *Holbrook*, 137 N.C. App. at 768-69, 529 S.E.2d at 511-12.

Defendant specifically objects to the State's examination of Echols, the owner of Heavy Rotation. Upon questioning by defendant's attorney, Echols testified that he had known defendant for ten years, and knew him to be a peaceful person. The State then asked Echols if he was aware defendant had been arrested "for an incident involving going armed to the terror of the people involving a 40-caliber Glock gun", and further asked if Echols knew that defendant had been previously convicted of carrying a concealed weapon. Echols responded that he had not been aware of these things, but that he did believe defendant to be a peaceful person.

N.C. Gen. Stat. § 8C-1, Rule 404 concerns the admissibility of evidence of character. Rule 404(a)(1) states: "(a) Character evidence generally. -- Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) Character of accused. -- Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same[.]" Because defendant introduced his character into evidence, Rule 404(a)(1) permitted the State to rebut evidence of defendant's good character. N.C. Gen. Stat. § 8C-1, Rule 405(a) defines the

parameters of the State's examination of defendant's character witnesses: "Reputation or opinion. -- In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct."

However, it is not permissible for the State to reference the fact that defendant has previously been arrested or charged with a crime, as "[t]he fact that the defendant had been charged with a crime does not show he is guilty of the crime." *State v. Martin*, 322 N.C. 229, 238, 367 S.E.2d 618, 623 (1988); see also *State v. Jones*, 329 N.C. 254, 259, 404 S.E.2d 835, 837 (1991); but see *State v. Roseboro*, 351 N.C. 536, 554, 528 S.E.2d 1, 13 (2000). It was improper for the State to ask the witness if he knew defendant had been arrested on suspicion of another crime.

We do not, however, find that this error rises to the level of plain error. State's evidence tended to show that defendant had a heated phone conversation with the victim shortly before the victim and Jones arrived at Heavy Rotation. Immediately after the conversation, Lamont Smith, who was in the studio at the time, teased defendant about his demeanor during the conversation. Defendant responded by saying: "Them n----s don't know me, I'm from Jervay." Echols explained that Jervay is a housing project known to be dangerous. Immediately following the altercation between defendant, Jones and the victim, defendant used his 40 caliber Glock handgun to shoot at Jones and the victim, hitting the victim

twice, killing him. There were multiple witnesses to the shooting, and their testimony tends to show that defendant emptied his full ten round clip shooting at the two men. Most of those shots were fired as Jones and the victim were attempting to flee. Defendant fired several rounds, paused for some seconds, then began firing again, calmly walking in the direction of the fleeing victim. Witnesses testified that defendant was not injured, and seemed methodical and composed. Defendant calmly walked to his van and drove off in a normal manner after he had emptied his handgun.

Defendant admitted that he killed the victim, and the only issues at trial were whether defendant acted in self-defense and, if not, of what degree of homicide he was guilty. Defendant argues that the improper testimony served to convince the jury that he acted with malice, and thus resulted in a conviction of second-degree murder rather than a lesser offence. We hold that there was plenary evidence to support a jury finding of malice, and that defendant has failed to meet his burden of proving that, absent the improper testimony, the jury would likely have reached a different result. *Ramirez*, 156 N.C. App. at 256, 576 S.E.2d at 720.

Defendant next argues that the trial court committed plain error by failing to intervene *ex mero motu* to prevent the prosecutor from asking Echols if he was aware that defendant had a prior conviction for carrying a concealed weapon. This argument has not been preserved for appeal by any assignment of error in the record, and is thus not properly before this Court. N.C. R. App. P.

10(a); *State v. Smith*, 160 N.C. App. 107, 122, 584 S.E.2d 830, 840 (2003). This argument is without merit.

In defendant's second argument, he contends the trial court erred in admitting a photograph of the victim and his daughter because it was irrelevant and inflammatory. We disagree.

Defendant objected to the admission of the photograph, which depicted the victim and his daughter on her first day of school. The photograph was authenticated by the victim's mother, and she stated that it would help her illustrate her testimony about her son. It was admitted into evidence for illustrative purposes only.

"It is well settled that photographs are admissible into evidence to illustrate the testimony of a witness." *State v. Ruof*, 296 N.C. 623, 629, 252 S.E.2d 720, 724 (1979). "Photographs are usually competent to be used by a witness to explain or illustrate anything that it is competent for [her] to describe in words." *State v. Bethea*, 167 N.C. App. 215, 223, 605 S.E.2d 173, 179 (2004) (citations and internal quotation marks omitted). "Whether the evidence should be excluded is a decision within the trial court's discretion. Hence, the trial court's decision will not be disturbed, unless it is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Burgess*, 134 N.C. App. 632, 635, 518 S.E.2d 209, 211-12 (1999) (citation and internal quotation marks omitted).

"Whether the use of photographic evidence is more probative than prejudicial ... likewise lies within the discretion of the trial court." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527

(1988) (citing *State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979)).

We hold that the admission of this photograph did not constitute an abuse of discretion, nor was it arbitrary and wholly unsupported by reason. Assuming *arguendo* that the admission of the photograph did constitute error, in light of the plenary evidence supporting the jury's verdict, we hold the admission of the photograph did not prejudice defendant to any extent requiring a new trial. This argument is without merit.

In defendant's third argument, he contends that the trial court committed plain error in allowing the State to introduce irrelevant and inflammatory evidence of the victim's good character and the impact his death had on his family, friends, and the community. We disagree.

The victim's mother was the first witness called by the State. During her testimony, the State elicited responses from this witness indicating she and the victim were very close, the victim was well respected, peaceful, a leader, a caring father, generous, and church-going. She further testified that the victim's death had been very hard on her and his family. Defendant did not object to this testimony at trial.

We agree with defendant that this testimony was improperly elicited by the State. Rule 404(a)(2) of the North Carolina Rules of Evidence permits the State to elicit testimony concerning the victim's character in certain instances, but only to rebut evidence initially introduced by the defense. *State v. Quick*, 329 N.C. 1,

26, 405 S.E.2d 179, 194 (1991). In the instant case, the victim's mother was the first witness to testify at trial, and the defendant had not put on any evidence or elicited testimony concerning the character of the victim. This testimony was improper and should have been excluded. *Id.*

Because defendant did not object at trial, the plain error rule applies. In light of the plenary evidence of defendant's guilt, as discussed above, we hold that defendant has failed in his burden of proving that this error likely resulted in a different result at trial. *Ramirez*, 156 N.C. App. at 256, 576 S.E.2d at 720. This argument is without merit.

In defendant's fourth argument, he contends the trial court erred in denying his motion to dismiss the charge of carrying a concealed weapon. We disagree.

N.C. Gen. Stat. § 14-269 states in relevant part: "(a1) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun" This statute then lists exceptions to this provision, none of which defendant argues in his brief. "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

In reviewing challenges to the sufficiency of evidence, we must view the evidence in the

light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then "'it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.'"

Id. at 596, 573 S.E.2d at 869.

Defendant does not contest that he was in possession of a handgun, rather, he argues that there was insufficient evidence that the weapon was ever concealed, and therefore his motion to dismiss should have been granted. During his interview by detectives at the police station, defendant stated that he was carrying the gun in his belt that day, but said "I made my weapon present", presumably meaning it was not concealed.

However, Jones testified that he was with the victim and defendant throughout the entire argument and physical altercation, and he never saw a gun. He testified that if he had seen a gun, he would never have stayed and participated in the confrontation, and that he would have told the victim to leave as well. Echols testified that he and defendant were at his store before the victim and Jones arrived, and that he was there throughout the altercation

and shooting. Echols testified that he knew defendant owned a black Glock handgun, which he sometimes carried, but that he did not see it on defendant that day.

From inside Heavy Rotation, Echols saw defendant and the victim fighting on the front steps of the Studio. He went to the door to tell them to stop once he saw Jones joining in. After telling them to stop, he turned for a few seconds, looking back into his store, and then he heard shots fired. This short span of time, between when Echols turned away from the fighting men and when he heard the shots, suggests defendant did not have time to run and retrieve the gun from his van, or anywhere else.

Though no witnesses observed defendant drawing the handgun from some place concealed on his person, there is substantial circumstantial evidence from which the jury could make a reasonable inference that defendant was carrying the weapon, and that it had been wilfully concealed. This argument is without merit.

In defendant's fifth argument, he contends the trial court erred in giving an instruction on his decision not to testify at trial, after he had requested that the instruction not be given. We disagree.

Defendant acknowledges that prior decisions of the appellate courts of this state have found no error when this jury instruction has been given against the request of the defendant. Defendant asks, however, that we "reexamine" these holdings and come to a different result. Even if we were so inclined, this we are without authority to do. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d

30, 37 (1989). "However, since defendant requested no such instruction, we are constrained to repeat once more that, in the absence of a request, it is better for the judge to make no reference to defendant's failure to testify." *State v. Cawthorne*, 290 N.C. 639, 649, 227 S.E.2d 528, 534 (1976). This argument is without merit.

Arguments included in defendant's assignments of error, but not argued on appeal, are abandoned. N.C. R. App. P. 28(b)(6) (2007).

NO PREJUDICIAL ERROR.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).