NO. COA06-204

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

STATE OF NORTH CAROLINA

v. Hoke County
No. 03 CRS 52545

DONALD COLLINS

Appeal by Defendant from judgment entered 16 July 2004 by Judge B. Craig Ellis in Hoke County Superior Court. Heard in the Court of Appeals 19 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Hope Murphy White, for the State.

D. Tucker Charns for Defendant-Appellant.

STEPHENS, Judge.

On 12 January 2004, Defendant was indicted by a grand jury on one charge of first-degree burglary. He was tried on that charge in a jury trial held before the Honorable B. Craig Ellis in Hoke County Superior Court between 13 July and 16 July 2004.

At trial, the State presented evidence tending to show that on 3 October 2003, Rufus Hamilton ("Hamilton") was at his residence in Raeford, North Carolina. Sometime during that day, Angela Oxendine ("Oxendine") introduced Hamilton to Defendant, who is her cousin. Defendant was introduced to Hamilton as "Papa." At that time, Defendant possessed a shotgun and a rifle, both of which he sold to

Hamilton for thirty-seven dollars. After purchasing the guns from Defendant, Hamilton began repairing them in his front yard while Defendant sat with him. During this time, Defendant asked Hamilton for more money for the guns, but Hamilton refused. Defendant left Hamilton's residence later that day.

That night, Hamilton was in his bedroom painting the two guns when a masked man, carrying a hammer, walked through the front door of his home and entered Hamilton's bedroom. Hamilton described the mask as "little" and testified that it failed to prevent him from being able to identify the perpetrator. Upon entering the bedroom, the man grabbed the rifle, which was loaded, and held it to Hamilton's head. He used the hammer to break the lock to a strongbox in which Hamilton kept his wallet and the cash proceeds of his monthly social security check. The man then left the residence with the rifle, the wallet, and more than four hundred dollars in cash that he had taken from the strongbox. Once the perpetrator had left, Hamilton called the police.

Deputy Burly Locklear of the Hoke County Sheriff's Department was the first law enforcement officer to respond to the scene. He spoke to Hamilton, who said that "[Papa] came into the house and took [my] rifle and robbed [me]." After talking with Hamilton, Deputy Locklear turned the investigation over to Detective Michael Hallman, also of the Hoke County Sheriff's Department. Once Detective Hallman assumed responsibility of the scene inside the house, Deputy Locklear looked for evidence outside the residence. While Deputy Locklear was outside, a witness told him that he

recently saw "Papa" running quickly down the road. Detective Hallman also interviewed Hamilton, who said that a man named Papa came into the house, grabbed a rifle, broke the lock off the strongbox, took money, and fled the scene. While Hamilton did not know Papa's real name, he did identify him as Angela Oxendine's cousin. Given this information, Detective Hallman, along with other law enforcement officers, proceeded to Oxendine's residence. However, they were unable to speak with Oxendine or Defendant that evening.

At the time of the robbery, Defendant was staying with Oxendine and her boyfriend in a trailer close to Hamilton's residence. At some point during the night of 3 October, Defendant woke Oxendine and her boyfriend and gave them each twenty dollars for allowing him to stay in their home. Shortly thereafter, Defendant and Oxendine's boyfriend went outside behind a barn. Oxendine testified that Defendant was carrying a flashlight and "something long." She was told by the men that the long object was a shovel.

The following day, Oxendine was taken into custody on an unrelated warrant and Defendant voluntarily appeared before law enforcement officers. While in custody, Oxendine was questioned by Detective Hallman and signed a written statement that implicated Defendant in the burglary. At trial, this statement was admitted in evidence as "State's Exhibit No. 2." Defendant, however, denied any involvement. That same day, Detective Hallman again proceeded to Hamilton's residence and presented Hamilton with a photographic

lineup that contained a picture of Defendant. He asked Hamilton "to see if he could pick out the person who had committed the [burglary][.]" After studying each photograph "very carefully[,]" Hamilton identified Defendant as the perpetrator of the offense. Upon returning to the police station, Detective Hallman received an unsolicited verbal statement from Oxendine that once again implicated Defendant in the crime. This statement was not recorded or signed by Oxendine.

After the close of the State's case, Defendant offered evidence tending to show that, while he was staying with Oxendine, he was working for James Curtis McNair doing odd jobs for which he was given periodic cash payments. Mr. McNair testified that Defendant could not have spent the day of 3 October with Hamilton because that entire day, Defendant was working with him. Defendant testified that, on the night of 3 October, he watched a baseball game and went to bed. Defendant testified further that he was recovering from a gunshot wound, was taking pain medication, and therefore had limited mobility. He stated that he did not recall entering Oxendine's bedroom or paying anyone twenty dollars. However, he did recall going out to the barn during the night, but testified that he did so to put away tools that he had used that day.

At the close of all the evidence, the jury found Defendant guilty of first-degree burglary. Based on this verdict and Defendant's prior record level of IV, Judge Ellis sentenced Defendant to a minimum term of 117 months and a maximum term of 150

months imprisonment. On 11 July 2005, Defendant petitioned this Court to issue our writ of certiorari to review this case on appeal, having failed to enter notice of appeal from the 16 July 2004 judgment. By order filed 1 August 2005, Defendant's petition was allowed. For the reasons stated, we find Defendant received a fair trial, free of prejudicial error.

Defendant first argues that the trial court erred in permitting Detective Hallman to testify as to the substance of the verbal statement that Oxendine made to the police and in admitting in evidence the written statement that Oxendine made to Detective Hallman. We find Defendant's contentions without merit.

While Oxendine was in custody, she made a verbal statement to Detective Hallman, in the presence of another officer, regarding Defendant's participation in the burglary. At trial, after Oxendine had testified and over Defendant's objection, the State sought to introduce the substance of Oxendine's statement through the testimony of Detective Hallman. The trial court gave a limiting instruction that the jury was to use any such statement only "for the purpose of corroborating Ms. Oxendine's testimony." After this limiting instruction was given, Detective Hallman testified that Oxendine told him that when Defendant returned on the night of the alleged incident, "he got a shovel and a flashlight to go bury the wallet and the rifle and asked if

[Oxendine] would come help by holding the flashlight."[1] Because Oxendine did not testify to making such a statement, Hallman's testimony may have been inadmissible. However, since Defendant has failed to allege or demonstrate any prejudice suffered as a result of the admission of the testimony, we overrule this assignment of error.

In an appeal in a criminal case, the burden is on the defendant to demonstrate not only that the trial court erred, but also that the error had a prejudicial effect at trial. *State v. Hutchinson*, 139 N.C. App. 132, 532 S.E.2d 569 (2000). In order to meet this burden, a defendant has to show "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2003). In this case, even assuming *arguendo* that the trial court erred in permitting Detective Hallman to testify as to the substance of Oxendine's verbal statement, nevertheless Defendant does not assert that he suffered any prejudice by such alleged error and, therefore, he has failed to meet his burden. That is, in his brief to this Court, Defendant fails to argue or demonstrate how, absent this evidence, there is a reasonable possibility that a

---

[1] Defendant erroneously argues that this statement was contained in State's Exhibit No. 2, Oxendine's written statement. On the contrary, the evidence establishes that Oxendine made the challenged statement orally to Detective Hallman after her written statement had been completed. Although Detective Hallman noted this verbal statement in the police report he prepared, the statement was not reduced to writing or made part of Exhibit 2, nor was Hallman's police report offered in evidence as an exhibit.

different result would have been reached at his trial. Accordingly, this assignment of error is overruled.

Defendant next specifically challenges the trial court's admission of a portion of Oxendine's written statement.[2] Even though Defendant failed to object at trial, because he proceeds under a plain error argument on appeal, we consider this assignment of error.

In criminal cases, questions not preserved by objection at trial may still be made the basis of an assignment of error on appeal. N.C. R. App. P. 10(c)(4). For such assignments of error argued in a brief to this Court, a defendant proceeds under plain error review. *Id.* Under plain error analysis, it must first be determined whether the trial court's action constituted error. *State v. Duff*, 171 N.C. App. 662, 615 S.E.2d 373, *disc. review denied*, 359 N.C. 854, 619 S.E.2d 853 (2005). If it is determined that the trial court erred, it must then be determined if the error amounted to plain error. *Id.* Plain error results when the error is "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. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (citations omitted), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). "A reversal for plain error is only appropriate in the most exceptional cases."

---

[2] This statement was admitted as State's Exhibit No. 2 during redirect examination of Oxendine when she was recalled to the witness stand after Detective Hallman completed his testimony.

State v. Duke, 360 N.C. 110, 138, 623 S.E.2d 11, 29 (2005), *cert. denied*, ___ U.S. ___, 166 L. Ed. 2d 96 (2006).

During redirect examination, the following exchange occurred between the prosecutor and Oxendine:

> Q. . . . Final question, "Did he ever say where he got the sixty dollars?" And your answer to that on the 4th of October 2003, "No, but I do believe he did it 'cause I know him."
>
> Now, when you said that, you were talking about Donald Collins, weren't you?
>
> A. Yeah. At the time, I was.

On appeal, Defendant argues that the admission of this statement was improper under Rule 602 of the North Carolina Rules of Evidence because Oxendine did not have any personal knowledge of the circumstances surrounding the crime. In response, the State contends that this statement was admissible both as character evidence under Rule 405(b) and as lay witness opinion testimony under Rule 701.

While we are not persuaded by the State's argument, we need not reach the substantive elements of this assignment of error. That is, because of the ample evidence properly admitted against Defendant, even assuming *arguendo* that the trial court erred in admitting Oxendine's written statement, this alleged error does not rise to the level of plain error. *See, e.g., State v. Brigman*, ___ N.C. App. ___, 632 S.E.2d 498 (finding no plain error when the evidence against the defendant was overwhelming), *appeal dismissed and disc. review denied*, ___ N.C. ___, 636 S.E.2d 813 (2006). In the present case, there was evidence presented regarding Hamilton's knowledge of the perpetrator, his immediate identification of

Defendant to law enforcement officers as the perpetrator, and his subsequent identification of Defendant during a photographic lineup. Moreover, on cross-examination, Hamilton testified that he was "a hundred percent sure [Defendant is] the one[.]" Additionally, Oxendine testified that during the night of 3 October, she and her boyfriend were awakened by Defendant so that Defendant could give them each twenty dollars. During her testimony, Oxendine described how, after giving them this money, Defendant, accompanied by Oxendine's boyfriend, went behind the barn with a flashlight and "something long" in his hands. Based on this evidence, we cannot say that absent the statement made by Oxendine, the jury probably would have reached a different result. Therefore, this argument has no merit and is overruled.

Finally, Defendant argues that the trial court committed plain error by permitting the State to ask Defendant questions about a prior armed robbery conviction and Defendant's confession to that crime. We disagree.

"For the purposes of impeachment, a witness, including the defendant, may be cross-examined with respect to prior convictions." *State v. Gallagher*, 101 N.C. App. 208, 211, 398 S.E.2d 491, 492-93 (1990) (citing N.C. Gen. Stat. § 8C-1, Rule 609(a)). Such an inquiry is typically limited to the name of the crime, the time and place of the conviction, and the punishment levied. *State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993). However, "when a defendant in a criminal case offers evidence which

raises an inference favorable to his case, the State has the right to explore, explain or rebut the evidence." *State v. Brown*, 310 N.C. 563, 571, 313 S.E.2d 585, 590 (1984) (citation omitted). The State may introduce evidence which might otherwise be inadmissible, if used for the purpose of correcting inaccuracies or misleading omissions in a defendant's testimony. *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001).

In this case, during cross-examination, the State, as was its prerogative, asked Defendant if he had been convicted of any crimes in the last ten years. Defendant testified that he "caught a[n] [armed] robbery charge when [he] was a teenager" and that he was subsequently convicted of that crime. When given the opportunity to clarify this prior conviction, Defendant explained that he "was charged with it," but he "didn't never enter that store." This testimony thereby created the inference that, although Defendant had previously been convicted of armed robbery, he participated in that crime only in an indirect capacity and did not physically confront the victim.

After this testimony, the State used a three-page statement signed by Defendant to frame questions aimed at rebutting Defendant's contention that he never entered the store or physically confronted his previous armed robbery victim. Through questioning, the State elicited testimony from Defendant that after committing the previous armed robbery, he signed a statement admitting that he "walked in the store[,] . . . grabbed the clerk's

left arm[,] . . . pointed the gun at her[,] . . . [and told her to] 'open up the cash register.'" This testimony was intended to rebut Defendant's earlier testimony that he did not enter the store and was clearly appropriate under the law of our State. Therefore, we conclude that the trial court did not err in permitting this line of questioning. Accordingly, this assignment of error is overruled.

For the reasons stated, we find

NO PREJUDICIAL ERROR.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).