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NO. COA06-337

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

Guilford County
No. 05CRS068200

BILLY MICHAEL SUTTON

Appeal by defendant from judgment entered 2 September 2005 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 1 November 2006.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Joyce S. Rutledge, for the State.

Amos Granger Tyndall, P.A., by Amos Granger Tyndall, for defendant-appellant.

HUNTER, Judge.

Billy Michael Sutton ("defendant") appeals from a judgment entered 2 September 2005 consistent with a jury verdict finding him guilty of robbery with a dangerous weapon. For the reasons stated herein, we find no error.

The State's evidence tended to show that on 10 November 2004, Nick Gorham ("Gorham") placed a phone call at approximately 9:45 p.m. for a carry-out pizza from a Papa John's pizza restaurant ("Papa John's"). When ordering, Gorham gave his name as "Johnson." Gorham placed the call while defendant was riding in the car with

him. Gorham testified that defendant suggested they rob the Papa John's, but that Gorham refused.

Gorham and defendant arrived at Papa John's at approximately 10:45 p.m., after the restaurant had closed. Gorham left defendant waiting in the car, entered through the unlocked employee entrance, and asked for the pizza. The shift leader, Jared Pike ("Pike"), attempted unsuccessfully to run the debit card that Gorham offered as payment.

A man entered the store wearing a stocking mask and gloves and carrying a black semi-automatic handgun. Pike identified defendant at trial as resembling the masked gunman in terms of ethnicity, build, and facial hair, but could not positively identify him because of the mask. Gorham positively identified defendant as the masked man. The masked man demanded that everyone get down on the floor and asked who had the key to the safe. Pike retrieved the night's deposit from the rear of the store and handed it to the masked man. Gorham testified that he left the Papa John's without defendant and began to drive off, but defendant ran in front of his car, forcing Gorham to stop and let defendant into the vehicle. Gorham testified that defendant was carrying a clear bag containing checks and cash and was still wearing gloves. Gorham dropped defendant off at his home.

Pike identified Gorham from a photographic lineup and a warrant was issued for Gorham's arrest for armed robbery. Gorham pled guilty to a charge of accessory after the fact, and the armed robbery charge was dismissed pursuant to the plea bargain

agreement. Additional corroborating testimony was offered by Jason Norris ("Norris"), a friend of both defendant and Gorham. Norris testified that both men had confided details of the robbery to him on separate occasions. Norris also testified that defendant was keeping Norris's gun, a black, semi-automatic Glock 10mm, for him at the time of the robbery.

The jury convicted defendant of robbery with a dangerous weapon and the trial court sentenced defendant to seventy-two to ninety-six months in prison. Defendant appeals from this judgment.

I.

Defendant first contends that the trial court erred in admitting statements defendant made during a police interview asserting his right to silence. We disagree.

"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. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995); *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984).

Here, defendant objected to testimony by the investigating officer, Detective Matt Allred ("Detective Allred"), regarding a statement made by defendant that once he spoke with his attorney, he would tell Detective Allred what had happened. Defendant testified in his own defense. On cross-examination, defendant testified without objection that he told the officer he would get back with him later, but never "got around to it" and only spoke to his attorney regarding the matter. As the same evidence previously

objected to in Detective Allred's testimony was admitted without objection in defendant's testimony, defendant has failed to properly preserve this issue for appellate review. See N.C.R. App. P. 10(b). Although defendant alleges in his fourth assignment of error that the "trial court committed clear, plain, and reversible error" by admitting Detective Allred's statement, defendant does not provide "explanation, analysis or specific contention in his brief supporting the bare assertion that the claimed error is so fundamental that justice could not have been done." *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000). As stated by our Supreme Court in *Cummings*, a party must "provide argument supporting the contention that the trial court's instruction amounted to plain error, as required by subsections (a) and (b) (5) of Rule 28[,]" even when plain error has been alleged in the assignment of error, and the failure to do so waives appellate review. *Id.* As defendant failed to properly preserve the issue, the assignment of error is dismissed.

II.

Defendant next contends the trial court erred in excluding evidence related to the credibility of defendant's co-conspirator, Gorham. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 611(b) (2005), governing the scope of cross-examination, states "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." *Id.* "[S]pecific instances of a witness's conduct may be inquired into on cross-examination if probative of

the witness's 'character for truthfulness or untruthfulness,' and admission of the evidence is subject to the discretion of the trial court." *State v. Taylor*, 154 N.C. App. 366, 374, 572 S.E.2d 237, 243 (2002) (citing N.C. Gen. Stat. § 8C-1, Rule 608(b)). ""Among the types of conduct most widely accepted as falling into this category are 'use of false identity, making false statements on affidavits, applications or government forms (including tax forms), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.'"" *State v. Bishop*, 346 N.C. 365, 390, 488 S.E.2d 769, 782 (1997) (citations omitted). "[T]he scope of cross-examination is subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990); N.C. Gen. Stat. § 8C-1, Rule 611(a). ""[W]hile it is axiomatic that the cross-examiner should be allowed wide latitude, the trial judge has discretion to ban unduly repetitious and argumentative questions, as well as inquiry into matters of tenuous relevance.'" *State v. Hatcher*, 136 N.C. App. 524, 526, 524 S.E.2d 815, 816 (2000) (citation omitted). "The trial judge's rulings in controlling cross examination will not be disturbed unless it is shown that the verdict was improperly influenced." *Id.*

Here, defendant cross-examined Gorham as to his probation violations and established that Gorham had violated his probation for a prior drug conviction. Objections to additional questions regarding the specifics of Gorham's violations were sustained by the trial court, and a *voir dire* was conducted. The trial court

determined that additional evidence related to the probation violations, specifically the failure to report to his probation officer, complete his drug treatment, pay money as ordered by the trial court, and testing positive for drug use while on probation, were not appropriate grounds for impeachment of Gorham's credibility. We find no abuse of discretion as to the trial court's exclusion of this testimony. The assignment of error is overruled.

As defendant failed to preserve for review the issue of the admissibility of statements made to police, and as the trial court did not abuse its discretion in denying further cross-examination of a witness's credibility, we find no error in the judgment and conviction.

No error.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).