NO. COA06-393

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

STATE OF NORTH CAROLINA

v. Vance County
No. 05 CRS 50457-58

KENNETH LEROY TERRY,

Defendant.

Appeal by defendant from conviction entered 12 September 2005 by Judge Kenneth C. Titus in Vance County Superior Court. Heard in the Court of Appeals 1 November 2006.

Attorney General Roy Cooper, by Alvin W. Keller, Jr., for the State.

C. Scott Holmes, for defendant-appellant.

ELMORE, Judge.

On 12 September 2005, a jury found Kenneth Leroy Terry (defendant) guilty of second-degree kidnaping and common law robbery. The trial court then conducted a sentencing hearing and sentenced defendant in the presumptive range to consecutive sentences of 37 months minimum to 54 months maximum for second-degree kidnaping, followed by a sentence of 16 months minimum to 20 months maximum for common law robbery. It is from these convictions and sentences that defendant appeals.

Mrs. Gina Terry, defendant's wife, testified that she arrived at work on 9 February 2005, and defendant forced her into her car at knife point. He then threatened that she "was the last b---- that was going to leave him," and made her drive to a cemetery. Mrs. Terry plead for her life and for him to let her go. After 20-25 minutes in the cemetery, defendant told Mrs. Terry to drive him to Party Pickup. At Party Pickup, defendant exited the vehicle and took approximately $25.00 from a cup in the car.

Mrs. Terry testified to a number of abusive instances during her tumultuous marriage with defendant, which began in 2001. Over objection of defense counsel, she testified that defendant threatened her in 2002 that he would kill her if she left him. She testified that she took out a domestic violence protective order in 2002 as a result of these threats and because defendant cut the brake lines in her automobile. Mrs. Terry testified that defendant violated these protective orders by contacting her at work, at home, and by cell phone in various attempts to reconcile. Reconcile they did in 2004. After a few months, defendant again became violent and Mrs. Terry "left him for good" after defendant came at her and her daughter with a bat. She took out another restraining order, which defendant also violated.

Mrs. Terry and other witnesses testified to at least two prior incidents in which defendant threatened Mrs. Terry with a knife. Mrs. Terry stated that she believed that defendant might hurt her during the kidnaping "because he had pulled a knife out on [her] several times before."

Defendant testified that he and Mrs. Terry maintained a friendly relationship until 9 February 2005. He stated that Mrs. Terry often called him on the telephone, visited him at his home two or three times per week, went out to eat with him, exchanged Christmas gifts with him, and had sexual intercourse with him. He testified that on 9 February 2005, he met Mrs. Terry at Party Pickup so that she could repay $100.00 she had borrowed from him. He further testified that she arrived without the money, gave him $5.00 for cigarettes, and asked him for a kiss. He stated that he did not have a knife and did not force her to drive to the cemetery.

Defendant's sister, Mary Allen (Ms. Allen), testified that between September 2004 and 9 February 2005, Mrs. Terry visited defendant at his home two to three times per week and defendant often gave money to Mrs. Terry. Another of defendant's sisters, Queen Terry, testified that Mrs. Terry visited defendant daily and that they often went out together and exchanged Christmas gifts.

Although defendant does not specify a prayer for relief in his brief, we assume defendant requests that this Court reverse his conviction based on the following three arguments: (I) the trial court erroneously admitted details of a prior conviction beyond the name and date of the charge during the impeachment of the defendant; (II) the trial court erroneously allowed the State to impeach defendant with a conviction more than ten years old without making the necessary findings of fact; and (III) the trial court erroneously allowed the impeachment of defense witnesses with

specific incidents and prior convictions of defendant. In addition, defendant contends that this Court should reverse and remand this case for resentencing because (IV) the trial court erroneously used prior convictions to enhance his punishment. After careful review, we affirm the order of the trial court.

I.

Defendant first argues that the State exceeded the realm of permissible impeachment when it presented evidence of defendant's prior convictions. The prior conviction in question appears to be defendant's violation of the 2002 domestic violence protective order obtained by Mrs. Terry. After confirming that defendant was convicted of violating the order, the State inquired further into the manner in which that order was violated and the resulting punishment. The State presented evidence that defendant violated the protective order "by calling [Mrs. Terry] at her job, and threatening her safety, coming to her house four times, calling her house from 11:30 to 6:00 in the morning, threatening to burn [her] house and stealing her house keys." The State also presented evidence that defendant was ordered not to assault, harass, or threaten Mrs. Terry for a period of five years, and not to go upon any premises owned or operated by Mrs. Terry for a period of five years.

Admissibility of prior convictions to impeach the credibility of a witness is governed by Rule 609(a) of the North Carolina Rules of Evidence, which provides that "evidence that the witness has been convicted of a felony, or of a Class A1, Class 1 or Class 2

misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." N.C. Gen. Stat. § 8C-1, Rule 609(a) (2005). "Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. . . . Nevertheless, where a conviction has been established, a limited inquiry into the time and place of conviction and the punishment imposed is proper." *State v. Finch*, 293 N.C. 132, 141, 235 S.E.2d 819, 824 (1977). "Although *Finch* is a pre-Rules case, its limitations on inquiries concerning prior convictions are consistent with Rule 609(a)." *State v. Garner*, 330 N.C. 273, 288-89, 410 S.E.2d 861, 869-70 (1991). However, to the extent the prosecutor's questions went beyond these limited *Finch* inquiries, these additional inquiries were proper under Rules 404(a)(1) and 405(a) of the North Carolina Rules of Evidence. *See Garner*, 330 N.C. at 288, 410 S.E.2d at 870.

"Rule 404 is a limited codification of the long-established principle that once a defendant in a criminal case 'puts his character in evidence,' the prosecution may offer evidence of a defendant's bad character." *Garner*, 330 N.C. at 289, 410 S.E.2d at 870. Rule 404(a)(1), however, "limits the admission of character evidence to 'pertinent traits' of character." *Id.* Rule 404(a)(1) reads, in relevant part:

> (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

N.C. Gen. Stat. § 8C-1, Rule 404(a)(1) (2005).

"Rule 405, in contrast to the common law, specifically allows the prosecutor to cross-examine a witness concerning relevant, specific instances of conduct." *Garner*, 330 N.C. at 289, 410 S.E.2d at 870. Rule 405(a) reads, in relevant part:

> (a) *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.

N.C. Gen. Stat. § 8C-1, Rule 405(a) (2005); *Garner*, 330 N.C. at 289, 410 S.E.2d at 870. When a defendant puts "his character in evidence during direct examination by testifying in detail about himself and his relationship with the victim," specifically if he "painted a picture of himself as a level-headed, peaceful individual . . .", it is "proper for the prosecutor to cross-examine defendant concerning this pertinent trait of character." *Garner*, 330 N.C. at 289-90, 410 S.E.2d at 870 (internal quotations omitted).

In this case, defendant put his character into evidence by presenting himself as a peaceful individual who maintained such a positive relationship with Mrs. Terry between September 2004 and the events of 9 February 2005 that Mrs. Terry often called him on the telephone, visited him at his house, went out to eat with him, exchanged Christmas gifts, and engaged in sexual intercourse with

him. It was therefore proper for the State to cross-examine defendant concerning the pertinent trait of peacefulness by eliciting details of the conviction for violating the 2002 protective order to rebut defendant's direct testimony as to his peaceful nature.

The trial court therefore did not err in admitting the details of his prior convictions. Accordingly, defendant's first assignment of error is overruled.

II.

Defendant next argues the trial court erred by allowing the State to present a prior conviction that was more than ten years old, in violation of Rule 609(b) of the North Carolina Rules of Evidence. The conviction in question is a 1992 assault of an ex-girlfriend, elicited from the defendant in the following exchange:

> THE STATE: Mr. Terry, who is Crystal Boyd?
>
> DEFENDANT: She's a girl I used to go with?
>
> Q. And were you convicted in 1992 of assaulting her?
>
> A. Yes, ma'am.

Rule 609(b) limits the use of a prior conviction that is more than ten years old to impeach a witness "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." N.C. Gen. Stat. § 8C-1, Rule 609(b) (2005). However, "[f]ailure to object in apt time to incompetent testimony results in a waiver of objection so

that admission of the evidence will not be reviewed on appeal unless the evidence is forbidden by statute or results from questions asked by the trial judge or a juror." *State v. Blackwell*, 276 N.C. 714, 720, 174 S.E.2d 534, 538 (1970), *cert. denied*, 400 U.S. 946 (1970). Furthermore, Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires that "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" in order to preserve a question for appellate review. N.C.R. App. P. 10(b)(1). Defendant did not object to the introduction of this 1992 conviction and therefore did not preserve the question of its admissibility for appellate review.

Because defendant failed to object to the admission of this evidence and preserve for appellate review the question of its admissibility, defendant assigns and argues that the error is plain error. "In criminal cases, a question which was not preserved by objection noted at trial . . . may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4) (2005). 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." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 27 L. Ed.

2d 252 (1988) (citing *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)).

Upon review and consideration of the record, it cannot be said that the jury would have reached a different verdict but for admission of evidence of defendant's 1992 conviction for assault. The State presented ample evidence regarding defendant's guilt as to the kidnaping and robbery, and the prejudicial effect of the 1992 conviction, if any, was minimal given the weight of the prosecution's other evidence. Accordingly, we overrule defendant's second assignment of error.

III.

Defendant next contends the trial court erroneously allowed the impeachment of defense witnesses with specific incidents and prior convictions of the defendant, in violation of Rule 405 of the North Carolina Rules of Evidence. After defense witnesses Ms. Allen and Queen Terry testified about the acts of reconciliation between defendant and Mrs. Terry, the State inquired as to whether the witnesses knew of a variety of prior incidents and convictions. These included defendant's domestic violence orders; breaking into Mrs. Terry's car, waiting for her and attempting to stab her as she entered the vehicle; and convictions for two separate assaults on two ex-girlfriends.

As stated above, Rule 405 allows inquiry into relevant specific instances of conduct during cross-examination when the defendant places his character at issue. Defendant placed his character at issue by having his sisters testify and portray him as

a peaceful individual, a pertinent trait of his character that may be rebutted by inquiry into specific instances of misconduct. *See* N.C. Gen. Stat. § 8C-1, Rules 404(a)(1) and 405(a). Accordingly, the trial court committed no error by allowing the State to impeach the credibility of Ms. Allen and Queen Terry by inquiring into specific instances of misconduct by defendant, as well as prior convictions.

IV.

Finally, defendant argues the trial court erroneously used prior convictions to enhance defendant's punishment. He argues the trial court improperly used two prior convictions to establish a Prior Record Level for Felony Sentencing of Level IV rather than Level III. During sentencing, defendant refused to stipulate to convictions with case numbers 92 CR 4320 and 92 CR 1427 because he maintained that he was not the defendant in those two convictions.

When a defendant assigns error to the sentence imposed by the trial court, he "is entitled to appeal as a matter of right the issue of whether or not his . . . sentence is supported by evidence introduced at the trial . . . ." N.C. Gen. Stat. § 15A-1444 (2005). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." *Id.* at § 15A-1340.14(f). A defendant's prior convictions may be proven by any of the following methods:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.

> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

Id.

During sentencing, the parties stipulated to the validity of all of defendant's prior convictions listed on his prior record worksheet except case numbers 92 CR 1427 and 92 CR 4320. Case 92 CR 1427 is an assault on a female, Crystal Boyd. Case 92 CR 4320 is an assault on a female, Diane Boyd.

The State carried its burden of proving by a preponderance of the evidence that the defendant in each of these cases was the same person as defendant. First, defendant testified that he had been convicted of assaulting Crystal Boyd in 1992. Second, the defendant's birth date matched that of the arrest record for case number 92 CR 4320, and the trial judge stated that "[t]he Court has examined the signature of the alleged defendant on the waiver of counsel notice, compared the signature to that contained in the other files" and found them to be identical.

Therefore, we hold that the trial court properly included the two convictions with case numbers 92 CR 1427 and 92 CR 4320 in its calculation of defendant's sentencing level. Defendant was properly assigned a Level IV prior record level and properly sentenced within the guidelines of that prior record level.

No error.

Judges HUNTER and MCCULLOUGH concur.

Report per Rule 30(e).