NO. COA06-618

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

STATE OF NORTH CAROLINA

v. Northampton County
No. 05 CRS 50998

DERRICK DEMETRUIX EDWARDS

Appeal by Defendant from judgment dated 5 January 2006 by Judge Frank R. Brown in Superior Court, Northampton County. Heard in the Court of Appeals 10 January 2007.

*Attorney General Roy Cooper, by Special Deputy Attorney General Thomas R. Miller, for the State.*

*Geoffrey W. Hosford for Defendant-Appellant.*

McGEE, Judge.

Derrick Demetruix Edwards (Defendant) was charged with first-degree burglary and seven counts of robbery with a dangerous weapon. He was convicted of first-degree burglary and was acquitted of robbery with a dangerous weapon. The trial court sentenced Defendant to a term of 103 months to 133 months in prison.

At trial, Sonya Ray (Ms. Ray) testified that she was playing cards with six other people at her residence at Lot 118, Arrowhead Mobile Home Park (the mobile home), in Woodland, about midnight on 19 March 2005. Shortly after midnight, the door "flew open" and

three men wearing masks and armed with guns entered the mobile home. Ms. Ray and Cassandra Richardson, one of Ms. Ray's guests, ran to a bathroom, but one of the intruders, armed with a handgun, ordered Ms. Ray to go into a bedroom. He told Ms. Ray to give him her money and she gave him $200.00 in cash. The man then ordered her to return to the living room. As Ms. Ray approached the living room, another intruder, who was armed with a rifle, ordered her to stay in the kitchen and to "get down." Ms. Ray heard one of the men yell for the others to hurry. The men then ran from the mobile home.

Cassandra Richardson, Tolicia Mitchell, Josephine Joyner, Temekia Joyner, and Anthony Freeman testified that they were at Ms. Ray's home on 19 March 2005 when they heard a loud noise and saw the door "[fly] open." Men wearing masks and holding guns entered the mobile home and ordered everybody to "get down." One of the men collected money and jewelry from everyone and put the items in a black bag. One of the intruders stated they were taking too much time, and the men left the residence. Tolicia Mitchell then dialed 911 on her cell phone and handed the phone to Ms. Ray, who reported the robbery.

Gerald Bowser (Mr. Bowser) testified for the State that on the evening of 19 March 2005, he and four other men decided to rob Joseph "Wigg" Powell. Ms. Ray identified Joseph "Wigg" Powell as her former boyfriend and testified that he had resided with her on 19 March 2005 but that he was not present in the mobile home at the time of the burglary. Mr. Bowser identified the four other men as

Defendant, Earl Powell, Addaryll Powell, and Antoine Vaughan. The men collected guns, masks, and duffel bags, and then drove to the mobile home. Mr. Bowser wore a black ski mask over his face, Defendant wore an Army fatigue-colored mask that covered half of his face, Earl Powell wore a Halloween mask, and Antoine Vaughan wore a bandana. Mr. Bowser retrieved a handgun, Defendant grabbed a .12 gauge shotgun, Earl Powell took two handguns, and Antoine Vaughan took a black pump .12 gauge shotgun. Defendant kicked open the door of the mobile home and Antoine Vaughan entered, followed by Defendant, Earl Powell, and Mr. Bowser. Addaryll Powell remained at a back door. Defendant and Antoine Vaughan ordered Ms. Ray to go into a back room. Mr. Bowser carried a duffel bag and collected jewelry from the occupants. After Earl Powell declared that they were taking too much time, the intruders all ran from the mobile home.

On behalf of Defendant, Antoine Vaughan testified that he, Earl Powell, and Mr. Bowser committed the crimes at the mobile home. He further testified that Defendant was not present and was not a participant in the commission of the crimes.

I.

Defendant contends the trial court erred by denying his motion to dismiss the charge of first-degree burglary. Upon a motion to dismiss, the trial court determines whether there is substantial evidence to establish each element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). The trial court

considers the evidence in the light most favorable to the State, and gives the State the benefit of the reasonable inferences that may be drawn from the evidence. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

Defendant does not dispute the sufficiency of the evidence to establish all of the elements of the offense. However, he argues the evidence is insufficient to identify him as a perpetrator, given that none of the victims could identify him. He concedes that Mr. Bowser identified him as a perpetrator but he argues that Mr. Bowser's testimony was not credible due to inconsistencies and discrepancies between his testimony and that of the other witnesses.

Our Supreme Court has recognized that "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). In *State v. Jackson*, 161 N.C. App. 118, 588 S.E.2d 11 (2003), our Court rejected a similar argument in which the defendant challenged the sufficiency of the evidence to withstand a motion to dismiss by attacking the credibility of an accomplice who identified the defendant as a perpetrator. *Id.* at 121-22, 588 S.E.2d at 14-15. We noted that the credibility of witnesses, and the weight to be given their testimony, are issues for the jury, not the trial court, to decide. *Id.* at 122, 588 S.E.2d at 15.

In the present case, we conclude the trial court correctly left any discrepancies between Mr. Bowser's testimony and the

testimony of other witnesses for the jury to resolve. We overrule this assignment of error.

II.

Defendant's remaining argument is that the trial court committed plain error by entering judgment on the verdict convicting Defendant of first-degree burglary because it was inconsistent with the jury's verdict acquitting him of robbery with a dangerous weapon. By assigning plain error, Defendant has implicitly conceded he did not move to set aside the verdict or otherwise seek a ruling from the trial court on this issue. Our Supreme Court has declared that plain error review is applicable only to jury instructions and evidentiary matters. *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109-10 (1998), *cert. denied*, *Atkins v. North Carolina*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Our Supreme Court has also refused to apply plain error review to issues addressed to the trial court's discretion. *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, *Steen v. North Carolina*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). A motion to set aside the verdict is addressed to the discretion of the trial court. *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

Even assuming, *arguendo*, this issue could be reviewed by our Court in the absence of a request for corrective action in the trial court, we hold this assignment of error may not be sustained. First, "[i]t is well established in North Carolina that a jury is not required to be consistent and that incongruity alone will not

invalidate a verdict." *State v. Rosser*, 54 N.C. App. 660, 661, 284 S.E.2d 130, 131 (1981). Second, to convict Defendant of first-degree burglary, the jury only had to find that Defendant intended to commit a robbery at the time of the break-in, not that he actually committed a robbery. Therefore, the jury's verdict was not inconsistent. *See State v. Tippett*, 270 N.C. 588, 594, 155 S.E.2d 269, 274 (1967) (stating that the "actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary."). We dismiss this assignment of error.

No error.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).