NO. COA06-727

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA

v.

JONATHAN MILLER,
Defendant.

Mecklenburg County
Nos. 04 CRS 217502
04 CRS 217503
04 CRS 217504
04 CRS 52168

Appeal by defendant from judgments entered 2 December 2005 by Judge David S. Cayer in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 April 2007.

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

Sue Genrich Berry for defendant-appellant.

GEER, Judge.

Defendant Jonathan Miller appeals from his convictions on three counts of robbery with a dangerous weapon and one count of possession of a firearm by a felon. We find each of his arguments unpersuasive and, accordingly, hold that he received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. At about 1:00 a.m. on 5 March 2004, Derek Hinton, Sideric Jackson, and Jeffrey Lightfoot walked out of a billiards hall in Charlotte, North Carolina and headed to Hinton's Cadillac Escalade. A white

four-door sedan, similar to a Chrysler or a Dodge, was parked next to the Escalade, with four men "laying low" inside the sedan. As Hinton placed the key in the ignition of his car, one of the men, later identified as defendant, opened the driver-side door, placed a handgun resembling a Ruger in Hinton's ribs, and said: "Don't make me burn you." Hinton noticed an odor of marijuana emanating from the white sedan and from defendant himself. Defendant took Hinton's wallet, cash, a gold necklace, and a vintage jersey and hat. Two of the other men in the white sedan pointed guns at Jackson and Lightfoot and took their wallets as well.

Lightfoot escaped and ran to a nearby convenience store to call the police. Meanwhile, defendant took Hinton's keys, got in the Escalade, and drove away. The remaining robbers returned to the white sedan and fled the scene. Several minutes after the robbery, at approximately 1:08 a.m., police officers located Hinton's Escalade, abandoned and locked, approximately one mile away.

About 23 hours later, at 11:53 p.m. on 5 March 2004, Officer Piotr Ignacznak of the Charlotte-Mecklenburg Police Department responded to a call to assist other officers. Upon arrival, he saw a four-door white Dodge Stratus occupied by three men, one in the front passenger seat and two in the rear. Defendant was in the custody of two other police officers. Officer Ignacznak found a fully-loaded Ruger pistol under the driver's seat of the vehicle and a box of hollow-point ammunition in the center console. He also smelled the odor of freshly burnt marijuana in the vehicle.

Gilda LouAllen, the mother of defendant's child, testified that at approximately 11:00 p.m. on 5 March 2004, she saw defendant sitting in the driver's seat of a white automobile with three or four other people in the car. She later saw police officers remove defendant from the vehicle.

Subsequently, the police prepared a six-photo lineup containing a photograph of defendant, and Hinton positively identified defendant from the lineup as the person who robbed him. On 18 May 2004, defendant was interviewed by a detective and admitted that he was present at the robbery scene outside the billiard hall, but claimed he had nothing to do with the robbery.

On 23 August 2004, defendant was indicted on three counts of robbery with a dangerous weapon and one count of possession of a firearm by a felon. Following a jury trial, defendant was convicted of each count. The trial court imposed three consecutive terms of 103 to 133 months imprisonment for the robbery convictions and an additional consecutive term of 16 to 20 months for the possession of a firearm by a felon conviction. Defendant timely appealed to this Court.

Discussion

In his first argument, defendant contends that the trial court committed plain error by allowing the State to introduce evidence of the Ruger handgun and ammunition and of the officer's observation that the Dodge Stratus emitted an odor of marijuana when stopped by the police on 5 March 2004. Defendant argues this evidence constituted inadmissible character evidence under Rule

404(a) of the N.C. Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 404(a) (2005) ("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 . . . .")

Defendant concedes that he did not object to admission of this evidence in the trial court and that, therefore, we may only review for plain error. *See* N.C.R. App. P. 10(c)(4). Under the plain error standard, the burden is upon defendant to show "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

It is well established that Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Rule 404(b) specifically provides that evidence otherwise within the scope of Rule 404(a) is admissible to prove identity. *See also State v. Anderson*, 350 N.C. 152, 174, 513 S.E.2d 296, 310 (upholding admission of evidence to prove defendant's identity was permissible purpose under Rule 404(b)), *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326, 120 S. Ct. 417 (1999).

In this case, Hinton had identified defendant as using a gun

that appeared to be a Ruger and as having exited from a white Dodge-like sedan that emitted a smell of marijuana. Evidence that, later the same day, officers found a Ruger handgun under the driver's seat of a white Dodge Stratus that defendant had been driving and that the car smelled of marijuana was consistent with the identifying details provided by Hinton. Such evidence has a tendency to identify defendant as the perpetrator of the robbery outside the billiard hall and is thus admissible. *See State v. Burton*, 119 N.C. App. 625, 633, 460 S.E.2d 181, 188 (1995) ("Evidence that defendant was firing the gun in question shortly before the events at the mobile home park was admissible to prove defendant's identity as the person who fired the stray 9mm bullet that killed Brittany."). The trial court, therefore, did not err in admitting the challenged evidence.

Defendant next contends that he was denied effective assistance of counsel when counsel failed to object to the admission of the purported "character" evidence discussed above. To establish a claim of ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient, and (2) his defense was prejudiced by counsel's deficient performance. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). Our determination that the evidence was admissible under Rule 404(b) establishes that defendant was not provided with ineffective assistance of counsel.

Finally, with respect to his conviction of possession of a firearm by a felon, defendant contends that the trial court's

instructions to the jury failed to safeguard his right to have the jury render a unanimous verdict. Defendant argues that the evidence tended to show defendant's possession of a firearm at two separate times on the day of the incident: at 1:00 a.m. and at 11:35 p.m. According to defendant, because the trial court failed to specify a particular time for possession of the firearm, there was no certainty that all twelve jurors reached the same conclusion as to the time of possession.

The right to a unanimous jury verdict in a criminal proceeding is guaranteed by the North Carolina Constitution and by the North Carolina General Statutes. N.C. Const. art. I, § 24 ("No person shall be convicted of any crime but by the unanimous verdict of a jury in open court."); N.C. Gen. Stat. § 15A-1237(b) (2005) ("The verdict must be unanimous, and must be returned by the jury in open court."). The issue whether a court's instructions permitted a jury to render a less than unanimous verdict may be fully reviewed on appeal notwithstanding the absence of objection to the instructions in the court below. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). Upon review, the appellate court examines the criminal statute forming the basis for the charge, the verdict, the court's instructions to the jury, and the evidence "to determine whether any ambiguity as to unanimity has been removed." *State v. Petty*, 132 N.C. App. 453, 461-62, 512 S.E.2d 428, 434, *appeal dismissed and disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999).

We can find no basis for concluding that this case presented

a risk of a non-unanimous verdict. On the date of the offense, N.C. Gen. Stat. § 14-415.1(a) (2003) provided:

> (a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c).[1]

There is no basis for any finding that defendant committed multiple violations of N.C. Gen. Stat. § 14-415.1(a). The State's theory in this case and the evidence presented indicated that on a single day, defendant possessed a single gun. As a result, there was no risk of non-unanimity. Because we are not confronted with the potential for "two or more discrete and separate wrongs," *Petty*, 132 N.C. App. at 461, 512 S.E.2d at 434, we have no unanimity problem. This assignment of error is, therefore, overruled.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).

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[1]Effective for offenses committed on or after 1 December 2004, N.C. Gen. Stat. § 14-415.1(a) (2005) was amended to make it unlawful for a felon to possess any firearm regardless of size. 2004 N.C. Sess. Laws ch. 186, sec. 14.1.