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NO. COA06-798

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

STATE OF NORTH CAROLINA

v.

Rowan County  
Nos. 03 CRS 58253-54

PAUL ANTHONY EWING

Appeal by defendant from judgment entered 20 October 2005 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 26 March 2007.

*Attorney General Roy Cooper, by Assistant Attorney General Tina A. Krasner, for the State.*

*Miles & Montgomery, by Lisa Miles, for defendant appellant.*

McCULLOUGH, Judge.

#### FACTS

The State presented evidence tending to show that at approximately 8:00 to 9:00 p.m. on 18 October 2003, Paul Ewing ("defendant") came to the Saturday Night Lounge, a pool hall and bar, and showed the proprietor, Earl Burnett, some "party stuff." Burnett gave defendant \$150 to purchase some for him. Around the bar's closing time, defendant telephoned Burnett from outside the bar. Burnett agreed to take defendant to retrieve his truck. Upon arriving where defendant's truck was located, defendant got out of Burnett's vehicle. Instead of getting into his truck, defendant propped his foot up against a building. Burnett exited his truck,

approached defendant and said, "Paul, let's go[.]" Defendant lunged at Burnett and cut Burnett three times in the throat with a box cutter. Defendant then dragged Burnett behind the building and hit Burnett in the face with an object. Burnett lost consciousness. Upon regaining consciousness, Burnett managed to get back into his truck and drive back to the Saturday Night Lounge. From there he was transported by ambulance to a hospital. He told police officers that "Paul Ewing" assaulted him. He went from the emergency room to the hospital's intensive care unit. He underwent surgery to repair multiple facial fractures. The physicians also inserted a tube in his throat to permit him to breathe.

A police officer who responded to the call from the Saturday Night Lounge testified that when he arrived, Burnett's face and clothing were covered with blood. Based upon information provided by Burnett, police officers searched premises where the assault was believed to have occurred. Among other things, the officers found on the ground of the premises of Lambert's Alignment a Nextel cellular telephone, a pack of Winston cigarettes, a black cigarette lighter, a packet of headache powder, and a package of breath mints. Burnett identified all but the cellular telephone as items that were in his pockets. Law enforcement officers also searched defendant's residence and found a box cutter in a bedroom, and a knife or box cutter and black wallet on an awning. The wallet did not have any money in it. Burnett identified the black wallet as his. Burnett testified he had almost \$2,000 in cash in the wallet. The telephone number displayed on the cellular telephone matched

the number given to officers by defendant as his number. The cellular telephone showed an outgoing call to the number of the Saturday Night Lounge had been made at 1:57 a.m. on 19 October 2003.

Defendant's ex-girlfriend also found a check on the back porch of defendant's residence. Burnett identified the check as one he cashed for a customer that evening and placed in his wallet.

Defendant testified that Burnett asked him to obtain an ounce of cocaine for him. He quoted Burnett a price of \$2,000. Burnett consented to the price. Defendant went to his supplier and obtained the cocaine. He called Burnett to meet him at Lambert's Alignment to pick up the cocaine. About ten minutes later Burnett arrived in a burgundy pickup truck. Burnett walked over to defendant's truck and defendant handed Burnett the cocaine. Burnett took the cocaine and walked away without paying for it. Defendant got out of his truck and tried to get the bag of cocaine back. Burnett yanked the bag away from defendant, turned around and swung at defendant, who weighed more than twice as much as Burnett. Defendant retaliated and the two men fought. Defendant hit Burnett "ten times" and he also kicked Burnett in the ribs. He acknowledged that he knocked Burnett unconscious but he denied that he cut Burnett with a knife. After Burnett passed out and he saw another person approaching, he panicked and fled the scene. He returned later to look for the bag of cocaine. He found Burnett's wallet on the ground. He picked it up and took it home with him.

Defendant was found guilty of assault with a deadly weapon

inflicting serious injury and robbery with a dangerous weapon. Defendant appeals.

ANALYSIS

I.

Defendant contends the trial court committed plain error by allowing an officer to testify that he arrested defendant on outstanding warrants not related to the present charges. Alternatively, he argues he was denied effective assistance of counsel by counsel's failure to object to the evidence. We disagree.

By assigning plain error, defendant concedes that he did not object to admission of the evidence in the trial court. See *State v. Oliver*, 309 N.C. 326, 335, 307 S.E.2d 304, 312 (1983). The burden is therefore 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). To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance was seriously deficient; and (2) his defense was so prejudiced by counsel's deficient performance that it is reasonably probable that had the errors not been made, the outcome of the proceeding would have been different. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248-49 (1985).

In *State v. Riley*, 159 N.C. App. 546, 552, 583 S.E.2d 379, 384 (2003), the defendant contended the court committed plain error by

admitting evidence the defendant was arrested on outstanding warrants charging unrelated crimes. This Court stated that plain error did not exist because of overwhelming evidence establishing the defendant's guilt. *Id.* Likewise, the evidence of defendant's guilt in the case at bar is overwhelming. By his own admission, defendant beat up Burnett, who was more than twice defendant's age and weighed half as much as defendant, and abandoned Burnett in an unconscious state. Defendant failed to present any evidence to show that Burnett was armed with a weapon. Given this overwhelming evidence of guilt, we conclude it is improbable that a different outcome would have occurred had counsel objected and the evidence not been admitted. Therefore, we disagree with defendant's contention.

II.

Defendant contends the trial court erred by excluding defendant's testimony that Burnett was known to carry a gun and have a reputation for aggressive behavior. For the purpose of addressing this contention we assume the court erred.

Notwithstanding the error, a "defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983). "[T]he exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import, or when the evidence is thereafter admitted, or when the party offering the evidence has the full benefit of the fact sought to be established thereby by other evidence." *State v.*

*Ransome*, 342 N.C. 847, 853, 467 S.E.2d 404, 408 (1996).

Here, defendant testified without objection that he had seen Burnett in an intoxicated state and that he had seen Burnett behave aggressively as he did on the night of this incident. Therefore, we disagree with defendant's contention.

Defendant received a fair trial, free of prejudicial or plain error.

No error.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).