NO. COA06-963

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

STATE OF NORTH CAROLINA

v. Alamance County
No. 05 CRS 51162

RODNEY ALSTON

Appeal by defendant from judgment entered 7 November 2005 by Judge J.B. Allen Jr. in Alamance County Superior Court. Heard in the Court of Appeals 20 February 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David J. Adinolfi, II, for the State.

Robert T. Newman, Sr., for defendant-appellant.

JACKSON, Judge.

On the night of 6 February 2005, Tele Richmond ("Richmond") went to the home of Tynisha Lee ("Lee"), and asked if she would drive for him and indicated that he would pay her. Lee's friend Crashonda Alston (Alston") also was present, and went with Richmond and Lee. The three got into Richmond's car, and joined Richmond's girlfriend, Rodney Alston ("defendant"), and another man, who already were in the car. After dropping off Richmond's girlfriend at her home, Lee took over driving, and per Richmond's direction drove to another house where Gary Lee Tate ("Tate") was picked up. Richmond then directed Lee to drive by a house on Rosenwald Street,

in Burlington, North Carolina later identified as the home of the Zepeda family. Richmond referred to the other males in the car as "team" and told them that this was the house. He then directed Lee to park several blocks from the house and that he would "chirp" her via the walkie-talkie feature on their cell phones when he needed her. Alston saw Richmond put a handgun in his coat pocket as he got out of the car. Within a few minutes Richmond contacted Lee, and she and Alston drove by the Zepeda home. At first they noticed the four males trying to get into the chainlink fence surrounding the home, and then saw them inside the fence on the home's front porch. Lee and Alston then returned to their original parking place.

During the early morning hours of 7 February 2005 Ismiel Zepeda ("Zepeda") was asleep in his home, along with his wife Maria, son Andy, and daughter Anna. Zepeda and his wife were awakened by the sound of their dog barking. As they started to get out of their bed they heard someone breaking through the front door. Maria Zepeda crawled over her husband and left the bedroom to check on the children. Upon leaving the bedroom she encountered two people coming towards her with one person pointing what she thought to be a pistol at her. She immediately backed into her bedroom and yelled to her husband that the intruders had a gun. The couple shut the bedroom door, and as they held it closed, her husband retrieved his gun from a bedside table and loaded it. The Zepedas eased their pressure on the door and allowed it to open.

Zepeda then reached his gun outside the door and fired, hitting someone.

As this intruder fell to the floor in the hall, Zepeda jumped over him and headed toward the front of the house and his son's bedroom. Other intruders went into his son's room and shut the door. The door was being held shut against Zepeda's attempts to enter, but the pressure then eased and Zepeda opened the door. He saw his son still in his bed and the lower half of an intruder going out the window of his son's bedroom. Zepeda fired a shot above the intruder and through the window.

Andy Zepeda had returned home about 11:30 p.m. on 6 February 2005. He locked the front gate of the chainlink fence surrounding their house with a chain and padlock. After entering the house he also locked the front door. He later went to sleep in his bedroom, which is located just to the left of the front door. During the early morning hours he was awakened by a loud bang at the front door. He then saw a tall man standing at the door of his bedroom. The man was dressed in black and aiming a gun at him. The man identified himself as "police" and told Andy not to move. As Andy remained in his bed, he heard someone trying to enter his parents' bedroom, and he heard one gunshot. The man standing in the doorway to Andy's bedroom then jumped across Andy's bed and started banging on the bedroom window with his gun. Two more men rushed into the room. As one man held the door closed the other two pushed the window open and jumped out. The man holding the door turned, yelled "wait for me," ran to the window, and dove through it head

first. Andy's father pushed open the door, looked first at him and then the window, and fired one shot.

Andy immediately called 911 and reported the break-in. Upon leaving his bedroom he saw a man crawling on his back toward the front door of the house. The man told Zepeda that there was no need to call the police. The man reached the front door, opened it and crawled onto the porch. The police arrived within minutes of the 911 call being placed, and found the intruder who had crawled out the front door in the Zepeda's front yard. Zepeda informed the police he had shot this intruder. The door of the Zepeda home showed evidence of having been forced open and a window in the first bedroom upon entering the house had a broken window with what appeared to be blood on the mini blinds. The intruder found in the front yard was transported to the hospital and later identified as Richmond.

Shortly after returning to their original parking spot, Lee and Alston were met at the car by defendant and Tate. Defendant had a severely cut finger. Tate stated that he had felt a bullet barely miss the top of his head, and Alston noticed a burn on the back of defendant's head. When asked about Richmond, Tate stated he heard Richmond say he had been hit.

The police recovered a cell phone from within the Zepeda home that showed a record of a direct connect call having been made from the phone to Lee at 1:33 a.m. on 7 February 2005. Swabs from the suspect's vehicle, mini blinds and plastic covering from the bedroom window of the Zepeda home, and the steps of defendant's

home gave chemical indications for the presence of blood. DNA testing of the blood from the mini blinds, plastic window covering, and the steps of the Zepeda home matched the DNA of defendant. Lee later identified the Zepeda residence for the police, and Tate subsequently was arrested.

On 7 March 2005, defendant was indicted for first degree burglary, first degree kidnapping, attempted robbery with a dangerous weapon, and assault by pointing a gun. At the conclusion of defendant's trial, the State dismissed the charges of first degree kidnapping and assault by pointing a gun. A jury found defendant guilty of first degree burglary, and not guilty of attempted robbery with a firearm. Defendant was sentenced to a term of imprisonment with the North Carolina Department of Correction, and now appeals from his conviction.

Defendant first contends the trial court erred in instructing the jury that it need not find that a gun was involved in order to convict defendant of first degree burglary. Defendant argues the trial court's instruction in response to a question from the jury was an improper statement of the law.

The standard of review for jury instructions is well-established, and we review jury instructions

> "contextually and in its entirety. The charge will be held to be sufficient if 'it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . .' The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. 'Under such a standard of review, it is not enough

> for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.'"

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (quoting *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002)).

In the instant case, the jury initially requested a "more defined definition of armed robbery." When requested to write down their specific question, the jury submitted the following question to the trial court: "Does a gun have to be involved for first degree burglary to convict?" Specifically, the jury had confusion over what "armed" meant in conjunction with the first degree burglary instructions. Defendant requested the trial court to re-instruct the jury that while a gun is not specifically required for the offense of first degree burglary, the intent to commit an armed robbery must be present. After much discussion with counsel over whether or not the jury was requesting clarification on the elements of attempted armed robbery or the sixth element of first degree burglary, the trial court instructed the jury as follows:

> Ms. Foreperson, members of the jury, your question was, does a gun have to be involved for first degree burglary to convict.
>
> The response of the Court is the answer is, no. Members of the jury, on the sixth element of first degree burglary the issue is whether or not the defendant, along with those for whom he was acting in concert with a common purpose, intended to commit a robbery; that is, to take and carry away the personal property from that person or his presence without his consent knowing that he, the defendant, or those with whom he was acting in

> concert, were not entitled to take it intending to deprive that person of its use, that means the property, permanently.
>
> It is not necessary that the defendant, along with those for whom he was acting in concert, actually use the weapon to complete the robbery.
>
> For this element of the offense to be proven it is only necessary that the State prove beyond a reasonable doubt that the defendant, or those with whom he was acting in concert, either by himself or along with others, intended to commit an armed robbery at the time of the breaking and entering. The actual use of the firearm is not required under this element of first degree burglary.

Defendant contends the jury's request for clarification went to the issue of whether or not the jury had to find that defendant had a gun during the alleged attempted robbery with a firearm, as this offense served as the underlying felony for the first degree burglary charge.

In view of the jury's specific request for a clarification on whether or not a gun had to be involved in order to find that defendant committed a burglary, we hold the trial court's re-instruction to the jury, in light of all of the trial court's instructions, did not mislead or misinform the jury. A weapon, specifically a gun, is not a required element of the offense of first degree burglary. *See State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996); *see also* N.C. Gen. Stat. § 14-51 (2005). As such, the trial court properly responded to the jury's specific question and instructed the jury in accord with the law, and defendant's assignment of error is overruled.

Finally, defendant contends the trial court erred in submitting the charge of first degree burglary to the jury, as there was an insufficiency of the evidence to prove the crime charged. At trial, the State dismissed defendant's charges of first degree kidnapping and assault by pointing a gun. Defendant then made a motion to dismiss only the charge of attempted robbery with a firearm. The trial court denied defendant's motion. At no time did defendant make a motion to dismiss the charge of first degree burglary.

Rule 10(b)(3) of our appellate rules provides that "[a] defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial." N.C. R. App. P. 10(b)(3) (2006). Our Supreme Court has held that "a defendant who fails to make a motion to dismiss at the close of all of the evidence may not attack on appeal the sufficiency of the evidence at trial." *State v. Spaugh*, 321 N.C. 550, 552, 364 S.E.2d 368, 370 (1988). Therefore, we decline to address this assignment of error, as defendant has failed to properly preserve the issue for appellate review.

No error.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).