NO. COA07-1379

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2008

STATE OF NORTH CAROLINA

v.

Wake County
No. 06 CRS 39839-40
06 CRS 43939-40

JOHN CHRISTOPHER GREEN,
ERIC ANDREW GAYTON,

Defendants.

Appeal by defendants from judgment entered 14 March 2006 by Judge Ripley E. Rand in Wake County Superior Court. Heard in the Court of Appeals 30 April 2008.

Attorney General Roy Cooper, by Assistant Attorneys General Kimberly A. D'Arruda and David N. Kirkman, for the State.

Duncan B. McCormick, for defendant Green.

Crumpler Freedman Parker & Witt, by Vincent F. Rabil, for defendant Gayton.

ELMORE, Judge.

John Christopher Green (defendant Green) and Eric Andrew Gayton (defendant Gayton) (together, defendants) were each convicted after a jury trial of common law robbery and first degree burglary. Defendants were represented by separate counsel. The trial court sentenced each defendant to 15 to 18 months' imprisonment on the robbery charge and 77 to 102 months' imprisonment for the burglary charge; the court also ordered joint and several restitution in the amount of $976.52. Defendants appealed, each filing his own brief.

On the night of 5 May 2006 or the morning of 6 May 2006, two young black males beat and robbed David Long in his home. The assailants took cash and an ATM card, among other things, and coerced Long into providing them with his PIN number. Within approximately one hour of the crime, the perpetrators took out $320 in two separate transactions at nearby ATM machines. Although the police were not able to definitively identify either defendant based on the ATM video, the video clearly showed that the man withdrawing money was wearing a distinctive Pirates jacket that appeared to be the same as the one that defendant Gayton was wearing that night.

Also within approximately one hour of the crime, defendants picked up their friend Julio Labrador. The trio went to a Circle K convenience store, where they purchased gas and cigarettes, again with the debit card. Defendant Gayton was recorded on video using the stolen debit card to purchase the cigarettes. Labrador testified that after the group left the Circle K, they went to a parking lot where they smoked marijuana in the car. During this time, Labrador testified that defendant Gayton asked defendant Green if he thought everything had gone ok. Defendant Green replied that he thought that it had. When defendant Gayton asked whether defendant Green thought that anything would happen, defendant Green stated that he did not, and told defendant Gayton not to worry about it. During this period of time, Labrador also testified that defendant Gayton told a story about having robbed a white guy—beating him up, and taking his wallet, keys, and cash, before taking money out of an ATM.

At trial, Labrador stated that he believed defendant Gayton to be a member of the Crips gang, that he did not think that defendant Green was a member of the gang, and that he suspected that the robbery was an attempt to draw defendant Green into the gang. He also made similar statements to a police detective who testified at the trial about the statements.

Both defendants argue that their motions to dismiss all charges should have been granted because there was not substantial evidence that they were the perpetrators. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007) (citations and quotations omitted).

> In ruling on a defendant's motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator. The evidence should be viewed in the light most favorable to the state, with all conflicts resolved in the state's favor. . . . If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt.

State v. Replogle, 181 N.C. App. 579, 580-81, 640 S.E.2d 757, 759 (2007) (quotations and citations omitted). "This is true even though the evidence may support reasonable inferences of the defendant's innocence." *State v. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244-45 (2007) (quotations and citation omitted).

In arguing insufficient evidence, defendant Green claims that there was no more than a suspicion that he was involved because the victim did not identify him, he did not use the stolen debit card, and he was never in possession of the card or any of the other items stolen from the victim's apartment. A motion to dismiss "should be allowed if the evidence merely raises a suspicion or conjecture regarding . . . the defendant's identity as the perpetrator, even where the suspicion is strong." *State v. Noffsinger*, 137 N.C. App. 418, 423, 528 S.E.2d 605, 609 (2000).

Defendant Gayton argues that there was insufficient evidence because the victim did not identify him. He also argues that the State was bound by his exculpatory statement that he was "not present during the burglary of the apartment, but simply present passed out in a car driven by [defendant Green], and later at a store trying to buy cigarettes," because there was insufficient evidence to contradict or rebut this statement.

Both defendants' arguments are without merit. The State relies on the doctrine of recent possession of stolen goods to show sufficient circumstantial evidence of both defendants as the perpetrators.

> The possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker, as the possession is nearer to or more distant from the time of the commission of the offense.

State v. Patterson, 78 N.C. 470, 472-73 (1878)(citations omitted). "While the fact of recent possession has been said to raise a 'presumption,' it is more accurately deemed to raise a permissible inference that the possessor is the thief." *State v. Joyner*, 301 N.C. 18, 28, 269 S.E.2d 125, 132 (1980) (citation omitted).

> The inference of fact which is derived from possession of recently stolen goods is considered by the jury as an evidentiary fact along with all the other evidence in a case, in its attempt to determine whether the State has met its burden of proving defendant's guilt beyond a reasonable doubt to the satisfaction of the jury.

State v. Gonzalez, 311 N.C. 80, 86-87, 316 S.E.2d 229, 233 (1984) (citations omitted). Although this inference does not shift the burden to the defendant and may not be enough alone to convince the jury of the defendant's guilt beyond a reasonable doubt, it is sufficient to withstand a motion to dismiss. *State v. Maines*, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981).

With respect to defendant Green's claim of insufficient evidence, it is irrelevant that he was never in actual possession of the stolen debit card or any of the other stolen items. Nor does it matter that the victim never identified defendant Green as one of his assailants.

> [T]he evidence must show the person accused of the theft had complete dominion, which might be shared with others, over the property or other evidence which sufficiently connects the accused person to the crime or *a joint possession of co-conspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all*.

Maines, 301 N.C. at 675, 273 S.E.2d at 294 (emphasis added).

Defendant Green is sufficiently connected to a joint possession of the stolen property, therefore, and the doctrine of recent possession of stolen goods applies. Accordingly, the trial court properly denied the motion to dismiss. Defendants were together at all relevant times, even if one believes defendant Gayton's claim of being "passed out" in defendant Green's car from excessive drinking while defendant Green robbed the victim. Defendants were also in the area of the robbery within minutes of the burglary and at least defendant Gayton knew the PIN because it was required to make the ATM withdrawal. Defendant Green was present while defendant Gayton used the stolen card twice, once for a cash withdrawal at the ATM located two blocks from the victim's apartment and again at the gas station close to that ATM; both uses occurred less than one hour after the burglary. Defendant Green also received gas paid for by the stolen debit card, a "fruit of the crime" not present in *State v. Lyles*, 298 N.C. 179, 187, 257 S.E.2d 410, 415 (1979), on which defendant Green erroneously relies in making his insufficient evidence argument.

Further, defendant Green had a conversation with defendant Gayton during which he told defendant Gayton that "everything went ok" and "don't even worry about it" when defendant Gayton asked if anything was going to happen. These facts clearly support a reasonable inference that defendant Green was a perpetrator of the crimes, requiring that the issue go to the jury. Defendant Green's motion to dismiss the charges was properly denied.

Likewise, the doctrine of recent possession of stolen goods is easily applied to defendant Gayton's claim of insufficient evidence. He was filmed using the stolen debit card in the gas station and at the ATM, as identified at both locations by his Pirates jacket. These two uses occurred within less than an hour after the card was stolen. This allows the reasonable inference that he was the thief, requiring that the matter go to the jury.

Defendant Gayton also argues that the State was bound by his exculpatory statement because there was insufficient evidence to contradict or rebut this statement. This is incorrect. The presence of contradictory evidence is of no consequence in considering the sufficiency of evidence because the State is entitled to have all conflicts resolved in its favor. "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citation omitted). Defendant Gayton confuses the issue by pointing out that "[e]very inference must stand upon some clear and direct evidence, and not upon some other inference or presumption . . . ." *State v. Parker*, 268 N.C. 258, 262, 150 S.E.2d 428, 431 (1966). However, this is not an inference-upon-inference situation but rather only one inference from one fact; defendant Gayton had possession of the debit card, which supports the inference that he was the one who stole it.

Furthermore, in this case there is evidence contradicting defendant Gayton's claim of being passed out in defendant Green's car until arriving at the gas station. The ATM photo showed someone wearing a Pirates jacket just like the one defendant Gayton was wearing that night, Labrador testified that defendants Gayton and Green came to his home, and defendant Gayton was filmed walking around unimpaired and making transactions in the gas station, acts that would be difficult for someone so drunk that he was passed out minutes before. With all conflicts resolved in the State's favor, there is sufficient evidence supporting an inference of defendant Gayton as the perpetrator of the crime. We find no error in the trial court's denial of defendant Gayton's motion to dismiss the charges.

Defendant Green next argues that the trial court committed plain error when it admitted Labrador's testimony that he believed that defendant Gayton was a member of the Crips and that defendant Gayton might have been trying to get defendant Green to join the Crips. Defendant Green claims that the gang evidence is irrelevant and that its probative value is outweighed by unfair prejudice. Defendant Green must resort to the claim of plain error on this issue because he made only a general objection at trial, and thus has not preserved it for appeal. "In order to preserve a question for appellate review, 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." N.C.R. App. P. 10(b)(1) (2007) (emphasis added).

Defendant Green admits that "counsel did not state the basis for the objection" to Labrador's statement about the gang involvement, nor did counsel "specifically object to the statement on the basis of the reference to the Crips." Instead, "*[d]efendant made only general objections to the witnesses'* testimony, and this Court has held 'a general objection, if overruled, is ordinarily not effective on appeal.'" *State v. Parker*, 140 N.C. App. 169, 183, 539 S.E.2d 656, 665 (2000) (quoting *State v. Hamilton*, 77 N.C. App. 506, 509, 335 S.E.2d 506, 508 (1985)). "Generally, a defendant must make a timely objection to proffered testimony in order to preserve the issue for appellate review, and when a defendant has failed to object this Court may only review the matter for plain error." *State v. McDougald*, 181 N.C. App. 41, 47, 638 S.E.2d 546, 551 (2007) (internal citations omitted).

Furthermore, defendant Green did not generally object every time the gang testimony was admitted, constituting a waiver of any earlier objections to Labrador's testimony. Defendant Green did not object when the police detective testified that Labrador stated that he feared defendant Gayton because of his possible gang membership.

> [W]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost. Thus, as defendant has failed to preserve his appeal on the above testimony by either failing to object initially, or by failing to object when the same testimony was elicited later, this assignment of error may be reviewed only for plain error.

McDougald, 181 N.C. App. at 47, 638 S.E.2d at 551 (internal quotations, citations, and alteration omitted). Thus, the admission of the gang testimony against defendant Green can only be reviewed under a plain error standard.

Under our plain error standard of review, "a defendant has the burden of showing: (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. Watkins*, 181 N.C. App. 502, 507, 640 S.E.2d 409, 413 (2007) (quotations and citation omitted). "[T]he test for 'plain error' places a much heavier burden upon the defendant than that imposed . . . upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

Defendant Green cannot establish plain error here because there is no indication that a different result was probable but for the gang evidence. He states that "[i]n the absence of the testimony linking the defendants to the Crips, Mr. Green would not have been convicted." This is simply untrue. As is clear from our analysis above, the evidence in this case supports a conviction, with or without the gang testimony. Admitting the gang testimony was not plain error.

Defendant Gayton also assigns error to the admission of the gang testimony. He claims that it constituted inadmissible general bad character evidence and propensity to act in conformity therewith and that it was unfairly prejudicial. Defendant Gayton's counsel never separately objected or joined defendant Green's counsel's objection to the initial gang testimony. Moreover, even if defendant Green's objection had been sufficient to preserve the issue for appeal, defendant Gayton would not be able to rely on defendant Green's objection because one defendant's objection does not preserve another defendant's appeal. *State v. Bell*, 359 N.C. 1, 27, 603 S.E.2d 93, 111 (2004). Defendant Gayton's failure to object to the initial testimony renders any other objections to the evidence ineffective for appeal. *McDougald*, 181 N.C. App. at 47, 638 S.E.2d at 551. Also, the objection that was made was not specific, nor were the specific grounds apparent from the context. *Parker*, 140 N.C. App. at 183, 539 S.E.2d at 665. We acknowledge that defendant Gayton's objection was sustained as to the form of the question, but once the prosecutor rephrased the question the testimony continued without further objection. We therefore evaluate defendant Gayton's argument under the plain error standard.

Defendant Gayton cannot establish plain error because there is no indication that a different result was probable but for the gang evidence. There was overwhelming evidence against him, including film of him using the stolen debit card in two locations very near the victim's apartment within minutes of the burglary. In one of those instances, he used the PIN, which strongly implies that he was one of the perpetrators who beat the PIN information out of the victim. He even admitted to being in defendant Green's car while defendant Green robbed the victim, although he maintains that he was "passed out." Given the evidence against him, it is certainly not probable that the jury would have found defendant Gayton not guilty if they had not heard this gang affiliation evidence. Therefore, admission of the gang affiliation evidence did not constitute plain error.

Defendant Gayton would have us review the gang affiliation evidence's admissibility on Rule 403 grounds. Such review would require defendant to show an abuse of discretion by the trial court, the test for which is "whether the trial court's ruling was manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. Chapman*, 359 N.C. 328, 348-49, 611 S.E.2d 794, 811 (2005) (citations and quotations omitted). However, this Court's review of "those matters to which defendant did not object at trial is limited to plain error." *Id.* at 349, 611 S.E.2d at 812. It is therefore inappropriate for this Court to address this issue further.

Moreover, even if we were to review this assignment of error under an abuse of discretion analysis, we would still find no prejudicial error. We acknowledge that allowing the gang testimony into evidence was likely an abuse of discretion. "However, defendant has the burden to show not only that it was error to admit this evidence, but also that the error was prejudicial: defendant must show that, but for the error, a different result would likely have been reached." *State v. Gayton*, ___ N.C. App. ___, ___, 648 S.E.2d 275, 278 (2007) (citation omitted).

In *Gayton*, this Court found the admission of far more detailed and graphic testimony of the defendant's gang activities, rituals, and violence was not prejudicial because of the overwhelming evidence of his guilt. The defendant in *Gayton* arrived with and was sitting in the car beside a person engaged in a cocaine transaction and observed the sale. The evidence in *Gayton* deemed "overwhelming" was far less implicating than the evidence against defendant Gayton, who was filmed personally using the stolen debit card. It is improbable that the very short and non-graphic gang affiliation testimony in the instant case would have changed the ultimate outcome of defendant Gayton's trial. We find no error.

Finally, we consider defendant Green's argument that the testimony admitted against him was inadmissible hearsay and that defendant Gayton's remarks were inadmissible statements by a non-testifying co-defendant under *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968). The specific testimony he objects to is Labrador's testimony and statements to the police concerning the conversation about how the robbery occurred and defendant Gayton's contention that he was asleep in defendant Green's car while defendant Green committed the crimes.[1]

As before, defendant Green never properly objected to Labrador's testimony or the testimony of the police detective about

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[1] We note that defendant Green also suggests that the State misled him into withdrawing his motion to sever the trial by telling him that such statements by a non-testifying co-defendant would not be introduced at the trial. However, this argument is not properly before this Court because the withdrawal of the motion to sever is outside of the appellate record.

what Labrador said. Nor were any *Bruton* issues or confrontation clause issues ever raised in an objection. Similarly, defendant Green never entered a proper objection to defendant Gayton's statements about being passed out in the car during the crimes. Accordingly, we limit our review to plain error.

Even if the admission of any of these pieces of evidence amounted to error, they would not meet the high standard of plain error. Defendant Gayton's inculpatory statements served to put defendants together at the time of the crime, a fact already established by other properly admitted evidence, including Labrador's testimony about defendants coming to his house and the surveillance film at the gas station. Labrador's testimony about the conversations he heard and participated in was admissible under recognized exceptions to the hearsay rule. *See State v. Workman*, 344 N.C. 482, 503, 476 S.E.2d 301, 312 (1996) (concluding that "testimony was properly admitted under recognized exceptions to the general prohibition against the admission of hearsay testimony, and thus, no violation of Bruton occurred").

Having conducted a thorough review of the briefs and the record on appeal, we find no error.

No error.

Judge MCGEE concurs.

Judge ARROWOOD concurs in result.

Report per Rule 30(e).