NO. COA08-142

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

STATE OF NORTH CAROLINA

v. Forsyth County
No. 98 CRS 41731-32

ROBERT LEE JORDAN

Appeal by defendant from judgment entered 25 May 1999 by Judge W. Douglas Albright in Forsyth County Superior Court. Heard in the Court of Appeals 20 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

BRYANT, Judge.

Defendant appeals from judgment and sentencing on the charges of assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon. We vacate defendant's sentence and remand for a new sentencing hearing.

On Monday, 14 September 1998, Officer Cook of the Winston-Salem Police Department responded to the scene of a "house break-in" at 2021 Harrison Avenue. Officer Cook was met by Edward Skinner, a neighbor who sometimes took care of Helen Foster, a ninety-two-year-old woman who resided alone at that address. Foster had dried blood from an injury on the back of her head,

fractures to the bones in her face, some bruising, and lacerations on her left hand.

Skinner later testified that he left town Friday morning and came back Sunday night. That Monday morning, he noticed Foster's back door was shut. It was usually open at that time. Skinner telephoned and Foster answered stating that she had been "robbed and beat up." When Skinner arrived, he noted that Foster's back screened door had been "jerked open" and the locks on the back door "kicked in." Skinner testified that Foster came to the door "all beat up, bloodied up all in the face . . . ."

Officer Cook testified that when she arrived she spoke with both Foster and Skinner. Foster informed Officer Cook that her assailant was a black male who lived in the brick house across the street. Foster had asked the man to take five dollars to dump her trash. When he returned, he entered, forced her back into the house, put a plastic bag over her head, and struck her. Foster later informed police that her assailant also had a knife which Foster grabbed during the struggle. Her assailant took two hundred dollars from the pocket of Foster's gown. Skinner testified that Foster normally kept her money in a dark colored wallet that snapped together "like most old ladies and stuff have."

Detective R.G. Cozart, assigned to the Investigative Services Bureau of the Criminal Investigations Division, along with other officers, processed the scene. Det. Cozart testified that the lock to Foster's kitchen door sustained damage consistent with someone kicking in the door. Det. Cozart also observed a pool of blood in

the bedroom and another in the living room, blood smears along the door frame leading into Foster's bedroom, and blood drops on the carpet.

While gathering evidence, Det. Cozart was approached by Julie Penn and Barbara Oakes, who resided with defendant across the street at 2021 Harrison Avenue. Penn and Oakes informed Det. Cozart, and later testified, that the previous Thursday night defendant left their residence dressed in all black, with garbage bags on his hands and feet, armed with a small silver kitchen knife. According to Oakes, defendant was gone for only a short period, and when he returned, he was "naked" and carried his clothes under his arm. Defendant immediately bathed then placed the clothes he was wearing in a garbage bag. He then walked south along Harrison Avenue and left the garbage bag on the curb. Oakes and Penn testified that later that evening defendant said, "every time I do something, I mess up. I left the damn knife in there. Now, I have to go back." Oakes and Penn also testified defendant gave each of them forty dollars which defendant pulled from a small black purse with silver clasps. Oakes testified that defendant was out of work during September 1998 and defendant rarely had any money.

On 17 September 1998, Det. Cozart interviewed defendant. Following are excerpts of that interview:

> [Detective]: [W]e've been talking here for awhile about an incident that occurred up there at 2021 Harrison Avenue, where the lady up there lived at that house got some money took from her.

And tell me – tell me about that.

[Defendant]: Well, like I told you, I – you know, I robbed the lady.

. . .

[Detective]: Now, how did you get into the house?

[Defendant]: Pulled the screen door open and kicked the back door and pushed the back door open.

[Detective]: And what was you wearing when you went into the house?

[Defendant]: Black pants, black shoes, black sweat shirt.

[Detective]: And did you have anything else?

[Defendant]: A knife.

[Detective]: What kind of knife? . . . What color was it?

[Defendant]: Silver[.]

. . .

[Detective]: So when you went into the house, what happened between you and – and the old lady?

[Defendant]: I grabbed her and, you know – and, 'uh, she grabbed the knife. She grabbed the knife, and I pulled the knife out of her hand.

[Detective]: Did she get cut? . . . Where did she get cut at?

[Defendant]: On her hands.

[Detective]: Did she fall down? . . . Did she hit her head?

[Defendant]: Yeap[.]

[Detective]: What did you take from her?

[Defendant]: 'Uh, well, about the money, it was about a hundred-some-dollars.

[Detective]: Where did she have that money?

[Defendant]: In her pocket.

. . .

[Detective]: [W]hat did you do with [your] clothes?

[Defendant]: Throw'em away.

[Detective]: Where did you throw them?

[Defendant]: I don't know. . . . It was dark. I throwed 'em somewhere.

. . .

[Defendant]: I'm sorry I did it.

Defendant was indicted on the charges of assault with a deadly weapon with intent to kill inflicting serious injury in violation of G.S. § 14-32(a) and robbery with a dangerous weapon in violation of G.S. § 14-87.

After a jury trial, defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon. Defendant appeals.

On appeal, defendant raises the following: that he is entitled to a new sentencing hearing on the grounds that (I) the trial court's finding that defendant had five prior criminal convictions is in violation of G.S. § 15A-1340.14; (II) the trial court's finding of the non-statutory aggravating sentencing factor of excessive planning was not supported by the evidence; and (III) the trial court erroneously failed to find "acknowledgment of wrongdoing" to be a statutory mitigating factor. Defendant also contends he is entitled to a new trial because of (IV) the trial court's admission of the State's irrelevant evidence about his poverty and unemployment; (V) the trial court's admission of the State's irrelevant evidence about defendant's prior incarceration; (VI) the prosecutor's improper cross-examination of defendant; (VII) the trial court's failure to submit the verdict of assault inflicting serious injury; and (VIII) of the trial court's failure to submit the verdict of common law robbery.

I

Defendant first argues that defendant is entitled to a new sentencing hearing on both convictions because the trial court's finding that defendant had five prior convictions is not supported by the evidence. We agree.

Under North Carolina General Statute section 15A-1340.14(a), "[t]he prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (1999). Under N.C. Gen. Stat. § 15A-1340.14(f),

> A prior conviction shall be proved by any of the following methods:
>
> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

N.C.G.S. § 15A-1340.14(f) (1999). Where the State submits no record of conviction, no record from the agencies listed under N.C.G.S. § 15A-1340.14(f)(3), and no evidence of a stipulation by the parties as to the prior record level, a prior record level of some positive number of points supported only by a prior record level worksheet is not sufficient to meet the catchall provision

found in N.C.G.S. § 15A-1430.14(f)(4). *See State v. Riley*, 159 N.C. App. 546, 557, 583 S.E.2d 379, 387 (2003).

Here, defendant testified that he had been convicted of robbery with a dangerous weapon but did not admit or stipulate to any other convictions. At sentencing, the State offered no record of prior convictions; however, the prior record level worksheet submitted to the trial court by the State indicated defendant had accrued six felony convictions and obtained a prior record Level V. Defendant was thereafter sentenced pursuant to prior record Level V. However, this sentence was not supported by sufficient evidence. Accordingly, we vacate defendant's sentence and remand for a new sentencing hearing.

We address defendant's issues (II) and (III) regarding sentencing as they will likely arise in defendant's new sentencing hearing.

II

Defendant next argues he is entitled to a new sentencing hearing because the trial court's finding of the non-statutory aggravating factor of excessive planning is not supported by the evidence.

Under North Carolina General Statute section 15A-1340.16(a), "[t]he court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate . . . . The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists . . . ." N.C. Gen. Stat. § 15A-1340.16(a) (1999). In *State*

v. Thompson, 328 N.C. 477, 402 S.E.2d 386 (1991), our Supreme Court held that there was no error in the trial court's finding as a nonstatutory aggravating factor that the crimes were planned where such findings were based on "extraordinary planning . . . [which] exceeded that which is ordinarily present or inherent in the crime[.]" *Id.* at 493, 402 S.E.2d at 395; *see also State v. Chatman*, 308 N.C. 169, 180, 301 S.E.2d 71, 77 (1983) ("We reject defendant's position that in order to find that the offense was planned it was necessary to show that defendant methodically surveyed . . . houses or carefully chose a particular night before entering.").

Here, the evidence is clear that defendant took extraordinary planning before committing the robbery. The victim lived across the street from defendant's girlfriend. When defendant left the house he was dressed in all black — black pants, black sweat shirt, black shoes. He had garbage bags on his hands and feet, and he carried a silver knife. Clearly, defendant's actions show his careful plan to commit an assault and robbery without being seen and without leaving finger or foot print evidence. Therefore, we hold that the trial court did not err in finding as a non-statutory aggravating factor that defendant engaged in excessive planning. Accordingly, defendant's assignment of error is overruled.

III

Defendant next argues that he is entitled to a new sentencing hearing because the trial court failed to find the "acknowledgment of wrongdoing" statutory mitigating factor. We disagree.

Under North Carolina General Statute section 15A-1340.16(e)(11), a statutory mitigating factor arises if "[p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledge[s] wrongdoing in connection with the offense to a law enforcement officer." N.C. Gen. Stat. § 15A-1340.16(e)(11) (1999). However, "if a defendant repudiates his inculpatory statement, he is not entitled to a finding of this mitigating circumstance." *State v. Thompson*, 149 N.C. App. 276, 288, 560 S.E.2d 568, 576 (2002) (citation and quotations omitted).

Here, defendant made an admission during an interview with a law enforcement officer. "Well, like I told you, I – you know, I robbed the lady." But, at trial, defendant testified he did not hit or rob Foster.

We hold defendant repudiated his earlier admission of guilt; therefore, the trial court's refusal to find a statutory mitigating factor for voluntarily acknowledging wrongdoing in connection with the offense was not error. Accordingly, defendant's assignment of error is overruled.

IV

Defendant argues he is entitled to a new trial because the trial court's admission of testimony regarding defendant's poverty and unemployment was irrelevant and plain error.

In *State v. Cummings*, 361 N.C. 438, 648 S.E.2d 788 (2007), our Supreme Court stated the following with regard to the plain error rule:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional

> case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Id. at 470, 648 S.E.2d at 807 (citation omitted).

Under North Carolina Rules of Evidence, Rule 401, "relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. Evid. 401 (1999). Relevant evidence is generally admissible. N.C. R. Evid. 402 (1999). But, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. R. Evid. 403 (1999).

Here, Jermaine Oakes testified that he lived at 2020 Harrison Avenue and that defendant had been dating Jermaine's mother, Barbara Oakes, for a couple of months as of September 1998. Jermaine testified that defendant did not work at all and "was living off us." Barbara Oakes testified that in September 1998 defendant was working "nowhere." Julie Penn, Jermaine Oakes's girlfriend, also testified for the State. According to Penn, on the evening on 10 September 1998, a Thursday, she was at 2020

Harrison Avenue and defendant gave her forty dollars. In response to the State's question, "Did you ever know this man to have any money?" Ms. Penn responded, "No; not really, no." Defendant did not object to the stated testimony and now asserts that the admission of such testimony amounts to plain error.

In September 1998, defendant did not have a job and was known to rarely have money. Yet, on the same evening Foster, defendant's neighbor, was robbed, defendant gave Penn forty dollars. We hold such evidence is relevant, and its probative value is not substantially outweighed by the danger of unfair prejudice. Furthermore, the admission of such evidence was not error, plain or otherwise. Accordingly, defendant's assignment of error is overruled.

V

Defendant next argues he is entitled to a new trial on the basis of plain error in the trial court's admission of evidence regarding his prior incarceration. We disagree.

As previously stated, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. R. Evid. 403 (1999). Further, "[e]vidence 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 . . . ." N.C. R. Evid. 404 (1999).

During the State's evidence, Detective R.G. Cozart testified to his interview of defendant after defendant's arrest. Det.

Cozart testified that while defendant spoke, "[h]e became somewhat depressed . . . and began talking about how he had been in prison and how he couldn't – couldn't get a job, couldn't buy a house or a car or have anything nice . . . ." Det. Cozart further testified to statements made to him by Foster. "She also indicated that she and this individual had had several conversations in the past where he had told her he had just gotten out of prison." Defendant failed to object to this evidence and now requests plain error review.

However, during defendant's presentation of evidence, defendant testified on direct examination that he had been in prison "probably about four, five, six times" and had been previously convicted as a habitual felon. Thus, even assuming arguendo that Det. Cozart's testimony regarding defendant's prior prison term offended Rules 403 and 404, we cannot say, in light of defendant's testimony, that such evidence was prejudicial. Defendant has failed to meet his burden to establish plain error. Accordingly, defendant's assignment of error is overruled.

VI

Defendant next argues he is entitled to a new trial because the State's cross-examination of him was improper and amounted to plain error. However, defendant is not entitled to plain error review of this claim.

"[P]lain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence. This Court has previously declined to extend plain error

review to other issues, and we decline to do so now." *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230-31 (2000) (citations omitted). Accordingly, we dismiss defendant's assignment of error.

VII & VIII

Defendant next argues he is entitled to a new trial because the trial court failed to submit the lesser included offenses of assault inflicting serious injury and common law robbery to the jury. We disagree.

The standard of review is again plain error. *State v. McCoy*, 174 N.C. App. 105, 111, 620 S.E.2d 863, 868 (2005) (citation omitted). "To obtain relief under [the plain error] rule, the defendant must show that the omission was error, and that, in light of the record as a whole, the error had a probable impact on the verdict." *Id.* at 112, 620 S.E.2d at 869.

> A defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. The trial court may refrain from submitting the lesser offense to the jury only where the evidence is clear and positive as to each element of the offense charged and no evidence supports a lesser-included offense.

State v. Tillery, ___ N.C. App. ____, ___, 651 S.E.2d 291, 294 (2007) (citations and quotations omitted).

In *Tillery*, this Court stated the primary distinction between assault with a deadly weapon inflicting serious injury and the lesser included offense of misdemeanor assault inflicting serious injury as follows: "felonious assault requires a showing that a

deadly weapon was used and serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that *either* a deadly weapon was used *or* serious injury resulted, the offense is punishable only as a misdemeanor." *Id.* at ___, 651 S.E.2d at 293 (original emphasis).

"Common law robbery is the taking and carrying away personal property of another from his person or presence without his consent by violence or by putting him in fear and with the intent to deprive him of its use permanently, the taker knowing that he was not entitled to take it." *State v. McCullough*, 79 N.C. App. 541, 544, 340 S.E.2d 132, 135 (1986) (citation omitted). Distinguishing common law robbery from robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87, is the use of a dangerous weapon, which may not be established by a defendant's hands or feet. *See State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007).

Here, defendant was indicted on the charges of assault with a deadly weapon with the intent to kill inflicting serious injury and robbery with a dangerous weapon. The evidence presented showed that defendant, who was in his thirties, entered the home of a ninety-two year old woman with a knife which was used to commit the robbery and which use resulted in injury to the woman. No evidence was presented that contradicted the fact that a knife was used in the robbery and assault and that serious injury resulted.

At the close of the evidence, the trial court instructed the jury on the charge of assault with a deadly weapon with intent to

kill inflicting serious injury and the lesser included offense of assault with a deadly weapon inflicting serious injury, which the trial court informed "does not require the State to prove defendant had the specific intent to kill the victim." The trial court further instructed the jury on the second charge of robbery with a dangerous weapon. The jury returned verdicts of guilty on the charge of assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a dangerous weapon.

Based on these facts the trial court did not commit plain error in not instructing the jury on misdemeanor assault inflicting serious injury and common law robbery. Accordingly, defendant's assignments of error are overruled.

No error at trial. Vacated and remanded for sentencing.

Judges JACKSON and ARROWOOD concur.

Report per Rule 30(e).