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NO. COA09-1225

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v.

Sampson County  
Nos. 07 CRS 52440;  
07 CRS 52443;  
07 CRS 52445;  
07 CRS 52558

DEANGELO DONNELL JACOBS

Appeal by defendant from judgment entered 6 May 2009 by Judge W. Allen Cobb, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 11 March 2010.

*Attorney General Roy A. Cooper, III, by Associate Counsel John R. Corne, for the State.*

*James W. Carter, for defendant-appellant.*

JACKSON, Judge.

Deangelo Donnell Jacobs ("defendant") appeals the 6 May 2009 judgment entered upon a jury's verdict finding him guilty of discharging a weapon into an occupied dwelling, possession of a firearm by a convicted felon, discharging a firearm in the city, and injury to real property. On appeal, defendant argues that the trial court erred by (1) denying his motion to dismiss the charge of discharging a firearm into an occupied dwelling for

insufficiency of the evidence, (2) denying him the opportunity to cross-examine Detective Sergeant Gloria Pietrolaj ("Detective Sergeant Pietrolaj") on the existence of an additional written statement of defendant's, and (3) allowing the admission of defendant's *Mirandized* statement given to law enforcement and excluding a separate handwritten statement defendant had made earlier. For the reasons set forth below, we hold no error.

At trial, the State's evidence tended to show the following facts. At approximately 12:30 a.m. on 29 July 2007, Officer Anthony Smith ("Officer Smith") of the Clinton Police Department responded to a call of "possible shots fired into a house" at 713 Sampson Homes in Clinton, North Carolina. Officer Smith spoke with resident Leroy Howard ("Howard") and later observed a "mark on brick where it appeared that a bullet hit and possibly ricocheted off of [the residence]." Subsequently, Detective Kenneth Oates ("Detective Oates") arrived at the residence to investigate the scene. Detective Oates discovered "a scratch or strike on the brick wall of [the residence] next to one of the partitions in the front of [the residence]" and a piercing in the vinyl above the wall. Detective Oates pulled back the vinyl and located a projectile lodged in the ceiling. Detective Oates was unable to determine the type and caliber of weapon that fired the projectile. No lab analysis was performed on the projectile. Joyce Sampson ("Sampson"), an employee for the Eastern Carolina Regional Housing Authority, testified that she was aware of damage to the residence

including a chipped brick and a small hole in the top of the porch area that occurred "on or about July 28 and 29 of 2007."

Howard testified that on the night and morning in question, he saw defendant in the street in front of the residence "with a couple of guys." Howard stated that the men approached, "ask[ed] [him] questions about something, and . . . pulled out some guns on [him]." After a "tussle" with defendant over the gun, Howard believed defendant and the other men ran away. As Howard was opening his door to go inside he heard a gunshot hit the wall of the residence. Howard also testified that his son was inside the residence at the time he heard the gunshot hit his home.

On or about 1 August 2007, Defendant was brought to the Clinton Police department, and Detective Sergeant Pietrolaj interviewed him. After Detective Sergeant Pietrolaj advised defendant of his rights, defendant agreed to answer questions. Detective Sergeant Pietrolaj took handwritten notes of the interview. These notes were read to the jury. During the interview, defendant stated that he had a .22 caliber gun and that Howard "came at [him]" and "showed [him] a gun that [Howard] had in his pocket." Following this statement, Detective Sergeant Pietrolaj told defendant to tell the truth, and defendant said "I had the .380 and I shot at [Howard]." Defendant also said that Howard told someone in the house to call the police. Defendant described the gun as a black Brico .380 with scratches on the grip, and he explained that he could put only one bullet at a time in the gun. He stated that the gun was in a black bag in his room at his

home. Following this interview, Detective Sergeant Pietrolaj and Detective Oates went to defendant's home, accompanied by defendant's mother, to look for the firearm. The officers did not locate the weapon.

During his cross-examination of Detective Sergeant Pietrolaj, defendant attempted to introduce an additional written statement he had made prior to Detective Sergeant Pietrolaj's questioning him. The State objected, and the court considered the issue after it excused the jury. Defendant's counsel identified the statement as a copy of a handwritten statement defendant had written approximately ten minutes before the interview. The State argued that defendant's handwritten statement would be hearsay unless and until defendant testified, and the trial court sustained the objection. Defendant never testified at trial, and the statement was not introduced into evidence.

Prior to the State's resting its case, the trial court accepted and read a stipulation to the jury, which was an admission of defendant's conviction of a felony prior to this incident. At the close of the State's evidence, defendant moved to dismiss for insufficiency of the evidence relating to the charge of discharging a weapon into an occupied dwelling. The trial court denied the motion. Defendant did not present evidence and subsequently renewed his motion, which the trial court denied.

A jury found defendant guilty of (1) possession of a firearm by a convicted felon, (2) discharging a weapon into an occupied dwelling, (3) discharging a firearm in the city, and (4) injury to

real property. The trial court entered an order sentencing defendant to seventy to ninety-three months imprisonment. Defendant appeals.

On appeal, defendant first argues that the trial court erred by denying his motion to dismiss the charge of discharging a firearm into an occupied dwelling at the close of the State's evidence and at the close of all the evidence because the evidence was insufficient as a matter of law to establish each element beyond a reasonable doubt. We disagree.

We review whether the State presented substantial evidence of each essential element of the offense charged and that defendant is the perpetrator of the offense. *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 686 (2002). We previously have explained that,

[i]n considering a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that may be drawn from the evidence. A motion to dismiss on the ground of insufficient evidence should be denied if there is substantial evidence of each element of the crime, and that defendant [is] the perpetrator. Evidence is substantial when a jury could find the fact to be proved beyond a reasonable doubt. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense.

*Id.* (internal citations and quotation marks omitted). Furthermore, if any contradictions or discrepancies arise from the evidence, they do not warrant dismissal, but rather are properly left for the jury to resolve. *State v. Watson*, 179 N.C. App. 228, 247, 634

S.E.2d 231, 243 (2006), *disc. rev. denied*, 361 N.C. 437, 642 S.E.2d 896 (2007).

The crime of discharging a weapon into occupied property requires that a defendant (1) willfully or wantonly discharge (2) a firearm (3) into property (4) while it is occupied. *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991); *see also* N.C. Gen. Stat. §14-34.1 (2007). Our Supreme Court has interpreted this offense to require that the defendant have had "reasonable grounds to believe that the building might be occupied by one or more persons.'" *State v. Everette*, 361 N.C. 646, 650, 652 S.E.2d 241, 244 (2007) (quoting *State v. James*, 342 N.C. 589, 596, 466 S.E.2d 710, 715 (1996)).

Defendant cites *State v. Hewitt*, 294 N.C. 316, 239 S.E.2d 833 (1978), to support his argument that the State did not offer substantial evidence to link the projectile taken from the residence to a firearm used by defendant. In *Hewitt*, even when the defendant's gun and projectile were linked, the Court held "that the [S]tate's evidence creates only a suspicion that defendant committed the crime with which he was charged[,]" and therefore the State's evidence was insufficient to send the question to the jury. *Id.* at 319, 239 S.E.2d 835. In this case, defendant points out that the State conducted no lab analysis of the projectile in the ceiling, did not find any firearm at defendant's home, and found no shell casing at the scene.

Nonetheless, the State's evidence still was sufficient to send the question to the jury in the case *sub judice* because it creates

more than a "suspicion that defendant committed the crime with which he was charged." *Id.* In contrast to *Hewitt*, in the case *sub judice*, the State provided defendant's own statement that he fired at Howard. In addition to defendant's testimony, Howard testified that moments after a "tussle" with defendant over a gun, he heard a gunshot and a ricochet off of his brick home. Furthermore, Sampson explained that she became aware of the damage to the home that occurred on or about July 28 and 29 2007.

Defendant also contends that the evidence fails to indicate that he had any knowledge that the dwelling was occupied. However, defendant's *Mirandized* statement, read by Detective Sergeant Pietrolaj at trial, indicates that defendant knew someone was inside the residence; because defendant stated that during the "tussle" over the gun Howard "told someone in the house to call the police[.]" Although Howard testified that he did not call to anybody in the home, "contradictions or discrepancies . . . are properly left for the jury to resolve and do not warrant dismissal." *Watson*, 179 N.C. App. at 247, 634 S.E.2d at 243 (quoting *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005)).

From this evidence, viewed "in the light most favorable to the State and giv[ing] the State the benefit of every reasonable inference that may be drawn from the evidence[,]" we hold that the State presented substantial evidence from which a jury could find beyond a reasonable doubt that defendant committed the crime of discharging a firearm into occupied property. *Holliman*, 155 N.C.

App. at 124, 573 S.E.2d at 686 (citation omitted). Accordingly, the trial court properly denied defendant's motion to dismiss.

Next, defendant argues that the trial court erred in denying him the opportunity to cross-examine Detective Sergeant Pietrolaj on the existence of an additional written statement made before defendant was *Mirandized*. However, this issue has not been preserved for appellate review.

Our Supreme Court has held that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Williams*, 355 N.C. 501, 528, 565 S.E.2d 609, 625 (2002) (quoting *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001)), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). The North Carolina Rules of Appellate Procedure allow a criminal defendant to assert plain error on appeal when a question was not preserved by an objection noted at trial. N.C. R. App. P. 10(c)(4) (2007). However, "where defendant includes plain error as an alternative in some of his assignments of error but does not specifically argue or give support in his brief as to why plain error is appropriate, we will not address this aspect of his assignment of error." *Williams*, 355 N.C. at 528, 565 S.E.2d at 625 (citing *State v. Grooms*, 353 N.C. 50, 66, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001)).

Defendant acknowledges that at trial he failed to object on constitutional grounds to the denial of his right to impeach Detective Sergeant Pietrolaj. As a result, he requests that we review this issue for plain error in his brief. However, defendant



failed to specifically and distinctly argue plain error in his original assignments of error. Although defendant amended the record on appeal and his assignments of error, defendant failed to amend his assignments of error to include plain error. Moreover, defendant offers no "support in his brief as to why plain error is appropriate[.]" *Id.* Therefore, "we will not address this aspect of his assignment of error," on appeal pursuant to the holding of our Supreme Court in *Williams*. *Id.*; see also N.C. R. App. P. 28(b)(6) (2007).

Next, defendant argues that the trial court erred in allowing his *Mirandized* statement to be admitted into evidence without also admitting his own handwritten statement during the cross-examination of Detective Sergeant Pietrolaj. Defendant argues that this error was an abuse of the trial court's discretion contrary to Rule 106 of the North Carolina Rules of Evidence and deprived defendant of his right to due process guaranteed by the state and federal constitutions. We disagree.

Rule 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." N.C. Gen. Stat. § 8C-1, Rule 106 (2007). Whether evidence should be excluded pursuant to the common law rule of completeness codified in Rule 106 is within the trial court's discretion. *State v. Thompson*, 332 N.C. 204, 219-20, 420 S.E.2d 395, 403 (1992). On appeal, we address whether

the trial court's decision was an abuse of discretion, which "results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citing *State v. Parker*, 315 N.C. 249, 259-60, 337 S.E.2d 497, 503 (1985)).

Our Court has held that defendant has the burden of showing that the excluded portions of his statement are "explanatory or relevant," and therefore, defendant must make an offer of proof of the statement. *State v. Hall*, 194 N.C. App. 42, 50, 669 S.E.2d 30, 36 (2008), *disc. rev. denied and appeal dismissed*, 363 N.C. 377, 679 S.E.2d 393 (2009) ("Under Rule 106, a defendant bears the burden of contemporaneously seeking to introduce the excluded parts of the statement and demonstrating that the excluded parts are either explanatory or relevant."). In *Hall*, the defendant wrote letters from jail to his girlfriend; the State photocopied portions of his letters and used them at trial as evidence against the defendant. *Id.* The defendant claimed that, pursuant to Rule 106, the letters should have been excluded because only portions of the letters were copied. *Id.* The defendant also claimed that "he could not make an offer of proof as to the contents of the excluded portions" although he made no showing that the letters had been destroyed or were otherwise unavailable. *Id.* at 51, 669 S.E.2d at 36-37. This Court rejected the defendant's argument, holding that

[g]iven that defendant wrote the letters at issue, he was in the best position to know whether the excluded parts of the letters would have been either explanatory or

relevant. To the extent that they would have aided in his defense, defendant had a duty to obtain those letters from Goins during discovery and contemporaneously seek to introduce the excluded portions at trial. Therefore, we hold that defendant has failed to show that the trial court abused its discretion under Rule 106 by allowing the State to introduce the photocopied portions of the letters that defendant wrote to Goins while he was awaiting trial.

*Id.* at 51, 669 S.E.2d at 37. Here, because defendant's handwritten statement obviously was available to defendant, as it was discussed during the trial and it appears that the trial court reviewed it. However, defendant did not make an offer of proof of the statement, and it is not included in our record, so defendant has not met his burden of demonstrating that his statement was "explanatory or relevant." *See id.* Because "we cannot say that the trial court's decision . . . was so arbitrary that it could not have been supported by reason[, t]his assignment of error is overruled." *State v. Gregory*, 340 N.C. 365, 387, 459 S.E.2d 638, 651 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Accordingly, we hold no error.

For the foregoing reasons, we hold no error.

No Error.

Judged ELMORE and STROUD concur.

Report per Rule 30(e).