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NO. COA09-1439

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v.

Cleveland County
No. 07 CRS 55414

ALANDUS MONTRELL SMITH

By writ of *certiorari* from judgment entered 19 March 2008 by Judge David S. Cayer in Cleveland County Superior Court. Heard in the Court of Appeals 14 June 2010.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Charlotte Gail Blake for defendant-appellant.

STEELMAN, Judge.

Where the same evidence now complained of by defendant was later presented at trial, without objection, his appeal must be dismissed.

I. Factual and Procedural Background

On 19 August 2007, Marcus Littlejohn (Littlejohn) and Antrail Archie (Archie) were playing video games at Archie's apartment. Archie's sister, Ebony Roberts (Roberts), was also present. Littlejohn left Archie's apartment several times during the day to get food or run other errands. As he entered and exited the apartment, Littlejohn noticed Alandus Montrell Smith (defendant)

and William Hall (Hall) sitting outside the door. Littlejohn recognized Hall but did not know defendant.

Roberts had known defendant since childhood and had known Hall for a few months. At about 6:00 p.m., Roberts went outside to smoke and overheard a conversation between defendant and Hall. Defendant said, "I got us a lick, I got us a lick."

At about 7:45 p.m., Littlejohn left and saw that Hall and defendant were still sitting outside the apartment. Hall asked Littlejohn to give them a ride to another part of town. Littlejohn agreed, and Hall went inside his girlfriend's apartment and retrieved a balled-up shirt. Hall sat in the front passenger seat of Littlejohn's car, and defendant sat directly behind Hall. After less than ten minutes of driving, Hall told Littlejohn to stop the car. When Littlejohn stopped, Hall demanded he give him everything in his pockets. As Hall and defendant got out of the car, Littlejohn could see that defendant had a gun pointed at him. Littlejohn gave Hall \$2,500.00 in cash, which he testified was his remaining tax refund, and his bank card because he feared for his life. Hall then wiped the car door and dashboard with his shirt, and defendant and Hall fled the scene on foot.

Littlejohn returned to Archie's apartment and told him what had happened. Littlejohn knew Hall was one of the robbers, and Roberts was able to identify defendant by his nickname. Littlejohn, Archie, and Roberts then drove back to the area where Littlejohn was robbed to look for defendant and Hall. After failing to find them, Littlejohn went to the police. Littlejohn

described the details of the incident to police and was later able to identify defendant from a photo lineup.

Defendant was indicted for the felony of robbery with a dangerous weapon. On 19 March 2008, a jury found defendant guilty. The trial court sentenced defendant to a prison term of 77-102 months imprisonment. Defendant failed to give timely notice of appeal. This Court granted his petition for writ of *certiorari* on 9 April 2009.

II. Testimony of Ebony Roberts

In his sole argument, defendant contends that the trial court abused its discretion, or in the alternative, committed plain error by allowing Roberts to testify that the term "lick" meant to commit a robbery. We disagree.

Roberts testified at trial that she overheard defendant tell Hall, "I got us a lick, I got us a lick." Defendant objected. The prosecutor asked, "what does a lick mean?" Roberts testified, "A lick means, like, saying I see you got money, I've got us a lick in my headband. I want your money, I'm going to rob you." Defendant did not object until the prosecutor asked a follow-up question:

Q. So you hear the defendant say, "I've got us a lick". I know it's difficult to have a one-sided conversation but in your mind - -

MR. CRAIG: Objection, calls for speculation.

THE COURT: Finish the question.

Q. In your mind, you need to separate what Mr. Hall said and just tell the Court what the defendant said in that dialogue.

Roberts then testified that she heard defendant say, "Yeah, it's a lick, it's legit money, you know, what I'm saying. It's a lick, I got us lick we gonna get some money out of."

Defendant did not object to Roberts' prior testimony defining the term "lick," thus defendant's subsequent objection to similar testimony is deemed waived. "It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) (citations omitted).

Further, even assuming *arguendo* that defendant has not waived appellate review of this issue, we must apply the plain error standard to defendant's claim. "In order to preserve an issue 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(a)(1). When a defendant does not object to the admission of evidence at trial, he must show plain error to prevail on appeal. *See State v. Muhammad*, 186 N.C. App. 355, 359, 651 S.E.2d 569, 573 (2007), *appeal dismissed*, 362 N.C. 242, 660 S.E.2d 537 (2008); *see* N.C.R. App. P. 10(a)(4).

"The plain error rule applies only in truly exceptional cases," where "absent the error the jury probably would have reached a different verdict." *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 60-61 (2000) (citation and quotation omitted),

cert. denied, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). "Therefore, the test for 'plain error' places a much heavier burden upon the defendant than [that on] defendants who have preserved their rights by timely objection." *Id.* at 636, 536 S.E.2d at 61 (citation and quotation omitted).

Defendant cannot demonstrate plain error in light of the uncontroverted evidence of his guilt. Littlejohn and Roberts each observed defendant and Hall sitting together outside of Archie's apartment during the course of the day. Roberts had known defendant for most of her life, and Littlejohn was able to identify defendant from a photo lineup. Littlejohn testified that after he gave defendant and Hall a ride in his car, defendant pointed a gun at him while Hall demanded he give them what he had in his pockets. Littlejohn complied by giving them cash and a bank card because he feared for his life. Hall then wiped down the interior of the car, and the two men fled. Defendant has failed to demonstrate that a different result probably would have been reached but for the error, or that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial. *Id.* (citations and quotations omitted).

Defendant has failed to argue the remaining assignments of error in his brief, and they are deemed abandoned pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.

DISMISSED.

Judges HUNTER, ROBERT C. and BRYANT concur.

Reported per Rule 30(e).