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NO. COA09-1707

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

STATE OF NORTH CAROLINA

v.

Forsyth County
Nos. 08 CRS 057492-94
08 CRS 028174

GREGORY ELLIS DAVIS

Appeal by defendant from judgments entered 23 July 2009 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 30 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Richard A. Graham, for the State.

Thomas R. Sallenger for defendant.

ELMORE, Judge.

A jury convicted Gregory Ellis Davis (defendant) of felonious breaking and entering (08 CRS 057492), felonious attempted larceny (08 CRS 057492), habitual misdemeanor assault (08 CRS 057494), interfering with emergency communication (08 CRS 057493), and assault on a female (08 CRS 057494). Following the jury verdict, defendant pled guilty to habitual felon (08 CRS 28174). The trial court sentenced defendant to 432 to 546 months' imprisonment. Defendant now appeals. After careful consideration, we hold that defendant received a trial free from error.

On 9 January 2008, the victims, Sylvia Wise and Ronald Williams, were driving on Gregory Street in Winston-Salem. Earlier that day, Ms. Wise had completed her final round of chemotherapy treatment for breast cancer. She had driven to the hospital to pick up her son, Mr. Williams, who had just been released following medical treatment for injuries he incurred after being run over by a van. These injuries included the loss of three inches of bone in his left leg and an elbow replacement. At the time of the incident, Mr. Williams primarily used a wheelchair, but could move minimally with a cane. At the hospital, he had been given a pain medication that made him nauseated. On the ride home, he asked his mother to pull over to the side of the road so that he could vomit. They were less than two blocks from Mr. Williams's house.

While Mr. Williams was vomiting next to the van, Ms. Wise saw defendant coming out of a building, Auto World, with a tire rim in his hand. She saw him lay the rim down and go back into the store. She testified that "[h]e turned the light off. He came back out. He closed the door. [She] thought nothing of it. Because of the light - turning the light on and off [- she] thought he was employed there." She heard her son call out to defendant by name, Greg, and the two men exchanged words. She testified, "My son said something to the guy again about it not being worth it to do this and the guy was screaming and cursing." She told her son to get back into the van, and when he did not, she exited the van and told him again to return to the van. Defendant "cursed even more" and told Ms. Wise and Mr. Williams "to tend to [their] own business."

At that point, Ms. Wise became "very frightened," and she "started across the street to the duplex apartments that were across the street to get someone to call for help" because she did not have her cell phone. Weak from her earlier chemotherapy treatment, she did not make it further than the sidewalk, where she sat down on a cinder block. Next to the cinder block were two more wheel rims.

Ms. Wise "was screaming for someone to call the police," and defendant approached her, picked up a wheel rim, and repeatedly beat her with it. She thought that defendant was going to kill her. At that point, Mr. Williams struck defendant across the back with his cane. Defendant then turned his attention to Mr. Williams and began beating Mr. Williams with the wheel rim. Ms. Wise saw defendant punch her son in the face, and, after her son fell to the ground, she saw defendant continue

hitting and punching and gouging his face and his head . . . over and over again. [Defendant] then kicked and stomped and beat [Mr. Williams's] chest . . . [and] he beat [her] son's head repeatedly and his face with his fists in a nonstop motion. Then he raised up and he started kicking and stomping . . . my son in the chest and in the right rib cage and in the head.

Mr. Williams corroborated his mother's testimony. He also testified that, during the beating, defendant grabbed Mr. Williams's cell phone and "slammed" it on the ground, "bursting it into pieces in the street." Mr. Williams testified that, when this occurred, he "was trying to get the phone just to get 911," but he "was unable to make a emergency call" because defendant broke the

phone into pieces. After a while, defendant walked away from the scene.

Another man was standing nearby and "watched the whole thing." After defendant left the scene, the man picked up the pieces of the cell phone and tried to reassemble the phone. The victims asked the man to call the police, but the man could not fix the phone. Mr. Williams drove the van to his house and called the police, leaving his mother with the man. When the police arrived a few minutes later, the man handed Ms. Wise the phone and said, "no can fix," and then disappeared.

Mr. Williams testified that, as a result of defendant's actions, his eye was completely swollen shut, he had "[q]uite a few knots on [his] head from being beat," he had "[a] lot of headaches," and he had bruises from being stomped and kicked. Ms. Wise's injuries were much more extensive, requiring hospitalization, surgeries, and therapy.

A grand jury indicted defendant for breaking and or entering, attempted felony larceny, interfering with emergency communication, assault on a female, aggravated assault on a handicapped person, habitual misdemeanor assault, and habitual felon.

Defendant now appeals the convictions for habitual misdemeanor assault, interfering with emergency communication, felonious breaking and/or entering, and attempted felony larceny. He argues that the trial court erred by denying his motion to dismiss these charges. However, defendant did not preserve all of these issues for appellate review because he did not make a motion to dismiss

all of the charges. Defense counsel, the prosecutor, and the trial court engaged in the following colloquy following the close of the State's evidence:

THE COURT: All right, you have a motion?

[DEFENSE COUNSEL]: Yes, I do, your Honor.

THE COURT: Yes, sir.

[DEFENSE COUNSEL]: The motion is at the end of the State's evidence and I don't care to be heard further on that.

THE COURT: All right. What was the evidence on the emergency communication?

[PROSECUTOR]: Your Honor, that would be the Defendant has his cell phone and was going - or not the Defendant - excuse me. Mr. Williams had his cell phone that's in evidence as State's Exhibit Number 9. He was reaching for his phone to call the police. At that time, the Defendant knocked his cell out of his hand and broke it. And we also heard testimony from Ms. Wise yesterday that was saying, call the police, call the police, trying to get someone to call the police while all this was going on. And that she eventually told the Defendant the police were on their way even though they were not. So under those circumstances it would have been clear to the Defendant why it was that Mr. Williams was reaching for his phone as he was being beaten, that that was an attempt to make an emergency communication, and that the Defendant broke his phone to prevent him from doing that.

* * *

THE COURT: All right, motion is denied. Is the Defense going to present any evidence?

[DEFENSE COUNSEL]: No, sir.

THE COURT: Are you ready to argue? Well, at the close of all the evidence do you want to renew your motion?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Do you care to be heard additionally?

[DEFENSE COUNSEL]: No, sir, I have to admit it's a factual issue as to whether or not the witness - to victims are believable as far as the jury is concerned, not a real issue that I can argue as far as the dismissal.

THE COURT: All right, then, motion is denied to dismiss the case for lack of insufficiency [*sic*] of the evidence.

It is evident that defense counsel never made a motion to dismiss all of the charges for insufficiency of the evidence. Although the trial court appeared to issue a bench ruling denying a motion to dismiss, no such motion appears in the record, and the burden is on the party, not the court, to make the motion required to preserve the question for appellate review. See N.C.R. App. P. 10(b)(1) (2009) ("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)(3) (2009) ("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."). Accordingly, we do not consider defendant's arguments on appeal. See *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195-96, 657 S.E.2d 361, 364 (2008) ("[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal.").

Nevertheless, out of an abundance of caution, we reviewed defendant's arguments and found that sufficient evidence supported each conviction challenged by defendant in his brief. We conclude that defendant received a trial free from error.

No error.

Judges JACKSON and THIGPEN concur.

Report per Rule 30(e).