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NO. COA09-323

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v.

Guilford County

Nos. 07 CRS 024395

DOMINIQUE JEVON PERRY

07 CRS 085592

Appeal by Defendant from judgments entered 27 August 2008 by Judge Stanford G. Bullock in Superior Court, Guilford County. Heard in the Court of Appeals 15 September 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Gary R. Govert, for the State

Michael J. Reece, for Defendant-Appellant.

WYNN, Judge.

Jury instructions on the issue of flight are proper when some evidence in the record reasonably supports the theory that the defendant fled after the commission of the crime charged.¹ Here, Defendant argues that the trial court's instruction to the jury on flight was not supported by the evidence. Because the record shows

¹*State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997) (citations omitted).

evidence that Defendant took steps to avoid police apprehension, we find no error.

The evidence presented at trial establishing that Defendant Dominique Jevon Perry murdered Frank Moore was substantial if not overwhelming. Defendant acknowledged this in his brief by stating, "The only issue in this case was whether the Defendant would be guilty of first degree or second degree murder."

The State's evidence at trial tended to show that Greensboro Police discovered Moore's body at his home on 18 April 2007. An autopsy revealed that Moore died from multiple gunshot wounds. The evidence established that the Defendant shot Moore after breaking into Moore's home. When police officers arrested Defendant in a hotel room the next day, they recovered various items including: a revolver, .32 caliber ammunition, a cell phone activated in Frank Moore's name and cash. After waiving his *Miranda* rights, Defendant stated that he broke into Moore's house but found that Moore was not there; he decided to wait, during which time he watched television, made phone calls, and used Moore's computer. When Moore arrived home from work, Defendant forced Moore to the ground with a gun; took Moore's ATM card; spoke to Moore for about fifteen minutes; and shot Moore twice. Later, Defendant called a friend to help him get a hotel room.

On 21 May 2007, Defendant was indicted for first-degree murder

and robbery with a dangerous weapon. From convictions on the charged crimes, Defendant appeals alleging that the trial court committed plain error by (I) instructing the jury on flight; and (II) failing to bring the jury back into the courtroom during deliberation after it requested to review evidence.

I.

Defendant first argues that the trial court's instruction to the jury on flight was not supported by the evidence and should have been omitted from the jury instructions.

Trial courts are given latitude when deciding whether to instruct jurors on the issue of flight. "[J]ury instructions relating to the issue of flight are proper as long as there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997) (quotations and citations omitted). However, a defendant's mere departure from the scene of the crime does not warrant an instruction on flight; instead, the evidence must show that the defendant attempted to avoid apprehension. *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429,434 (1990).

Defendant in this case concedes that he failed to object to the trial court's instructions to the jury and therefore asks this Court to review this issue for plain error. "The plain error rule

applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to 'plain error', the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citation omitted).

Here, the record confirms that the trial court did not err by instructing the jury on the issue of flight. In his statement to police officers, Defendant described how he saw the police officers arrive while he was still inside Moore's home; explained how he wanted to "start off new" when he left Moore's home; stated that he withdrew large sums of money using Moore's ATM cards and had a friend rent a hotel room for him. This evidence is sufficient to establish that Defendant took steps to avoid police apprehension.

We are satisfied that the record supports the trial court's decision to instruct on flight; accordingly, we hold that the trial court did not commit error, much less plain error, by instructing the jury on flight.

II.

Defendant next argues that the trial court erred by failing to bring the jury back into the courtroom during deliberations after the jury requested an opportunity to review a copy of Defendant's statement. We need not address this issue because the record shows that Defendant consented to the trial court having copies of

Defendant's statement passed out to the jurors instead of bringing the jury back into the courtroom. Indeed, Defendant acknowledges in his brief that, "Defendant's counsel arguably consented to the procedure used."

N.C. Gen. Stat. § 15A-1233 (2007) requires that: "If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom." However, if the defendant consents to the court's communication, the defendant waives his right to an appeal. *State v. Pointer*, 181 N.C. App. 93, 99, 638 S.E.2d 909, 913 (2007) (citation omitted).

Here, before the trial court had copies of Defendant's statement passed to the jury, Defendant's counsel was given the opportunity to object. Instead, Defendant's counsel consented to the court's decision to provide the jury with copies of the statement without first bringing the jury into the courtroom. Because Defendant's counsel consented to the actions of the court, Defendant's argument is without merit.

Conclusion

In sum, we hold that the trial court did not err by instructing the jury on flight, and failing to bring the jury back into the courtroom after jurors requested to review Defendant's statement. Moreover, we summarily reject Defendant's arguments

that the trial court's use of short form indictments was unconstitutional and that the punishment imposed was cruel and unusual. Both issues are well settled by our caselaw. *See State v. King*, 311 N.C. 603, 608, 320 S.E.2d 1, 5 (1984) (upholding use of short form indictments for a first degree murder conviction); *see State v. Taylor*, 178 N.C. App. 395, 416, 632 S.E.2d 218, 232 (2006) (upholding a life imprisonment sentence of a defendant that was 16-years-old at the time of the offense); *see also State v. Lee*, 148 N.C. App. 518, 525, 558 S.E.2d 883, 888 (upholding a life imprisonment sentence of a 14-year-old defendant), *cert. denied*, 537 U.S. 955, 154 L. Ed. 2d 305 (2002).

No Error.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).