NO. COA10-310

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v. Watauga County
Nos. 08 CRS 002241, 050811

CHASE BRYANT WHITTINGTON

Appeal by defendant from judgments entered 1 October 2009 by Judge Mark E. Powell in Watauga County Superior Court. Heard in the Court of Appeals 25 October 2010.

Roy Cooper, Attorney General, by Roberta Ouellette, Assistant Attorney General, for the State.

Faith S. Bushnaq, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was convicted by a jury of one count of first-degree burglary and one count of robbery with a dangerous weapon. He appeals from judgments entered upon the verdicts sentencing him to two consecutive terms of 64 to 86 months active imprisonment.

The State's evidence tended to show that on 25 March 2008, at approximately 11:00 p.m., Kenneth Bell, his roommate, Chelsea Rose, and his girlfriend, Marie McMahon, were in Bell's apartment watching television. Bell was a student at Caldwell Community College and Rose and McMahon were students at Appalachian State University.

The three heard a knock on the door. The door was unlocked, but closed. Bell opened the door, and there were three men standing at the door. Two of the men were white and one was African-American. According to the record, defendant's race is African-American. Bell, Rose, and McMahon testified that the men had a shotgun and two baseball bats. Bell and Rose testified that the African-American male had the shotgun, while the two white men carried bats. At trial, Rose identified defendant as the African-American male who robbed her apartment. McMahon testified that two of the men were white, and that the third male had "darker" skin, but "lighter skin than maybe black." She testified that the darker individual had the gun. All of the men had bandanas covering their noses and mouths and were wearing dark sweatshirts or jackets. One of the white men was wearing a sweatshirt with a Gonzaga logo. Bell testified that he did not invite them in -- the men just entered as soon as he opened the door and he stepped back as soon as he noticed they were armed.

Bell testified that the two men with bats were not very aggressive, but that the man with the gun was being fairly aggressive. The man with the gun pointed the gun at Bell and at Rose. After the gun was pointed in Bell's face, Bell gave the men his wallet. Bell testified that he feared for his safety. Bell was not certain, but believed the wallet contained approximately $100.00. According to the victims, the men demanded other valuables, but did not take anything else. Rose testified that she

felt the men were looking for drugs. The men conducted a cursory search, and left shortly thereafter.

After the men left, McMahon called the police. At trial, Bell was asked whether he said, "hide the stuff, the cops are coming," but he did not recall making the statement. Bell followed the men out of his apartment, and identified the vehicle in which the men left. He was able to identify the make of car and its license plate number. He saw the same car two weeks later, and it appeared that the driver was the man who had worn the Gonzaga sweatshirt.

Detective David Osborne investigated the incident. When he responded to the call, Bell, Rose, and McMahon were in the apartment. Detective Osborne testified that Bell was cooperative and answered all of his questions, but that Rose and McMahon were more reluctant to respond. He claimed that Rose and McMahon appeared to be upset and in a state of shock. Detective Osborne observed what he believed to be a faint odor of marijuana in the apartment. He noticed that all three occupants' pupils were dilated, which indicated that they may have taken impairing substances. The detective did not conduct a thorough search of the apartment, but did look around the immediate area where the robbers had been.

Detective Osborne asked Bell, Rose, and McMahon to come to the police department to speak with him as part of the investigation. The detective testified that Bell immediately agreed, but that the two women did not want to go to the department that night. They explained that they had early morning classes or exams the

following morning. They also explained that they were upset by the situation and wanted to rest due to the stress they had endured. Detective Osborne later checked class schedules to confirm their stories. At trial, he did not recall specific details, but recalled that there were no 8:00 a.m. classes scheduled that morning.

Rose testified that she did not go to the police department that night because she was very upset and had a class the next morning. She was not certain, but believed that her class was around 10:00 a.m. She went to the police department a few days later and gave a statement to Detective Osborne. McMahon also testified that she "probably" told Detective Osborne that she could not give a statement on the night of the robbery because she had an early class, but she did not recall her class schedule. She gave a statement later that week.

Because Detective Osborne felt that Bell, Rose, and McMahon were withholding some information, he obtained a search warrant for Bell and Rose's apartment. When officers executed the warrant on 26 March 2008, Bell answered the door and the officers first asked for consent. Bell denied consent, and the officers executed the warrant. They seized three pipes containing marijuana or marijuana residue, a small amount of mushrooms, drug paraphernalia, and a small jar with a few grams of marijuana. At trial, Bell testified that the marijuana and pipe were his, and Rose testified that the mushrooms belonged to her.

At trial, Detective Osborne read from Bell's statement. According to Detective Osborne, the race of the suspect with the shotgun was not noted initially. Detective Osborne also testified that Bell's statement indicated that one of the white males had the shotgun and that the AfricanAmerican male was holding a baseball bat. On cross-examination, Bell was questioned about his statement to Detective Osborne. He testified that the statement was incorrect and must have been an error or misunderstanding. Bell testified: "No, I never said that to him. I did notice that in the statement that I just read a few minutes ago, but that was not what I told. As I recall the black male had the pistol grip shotgun. The white male had the baseball bat."

Two co-defendants also testified. Mickey Anderson testified that he drove the three robbers to the apartment, but stayed in the car while the three other men went into the apartment. He testified that there was "a semi large amount of marijuana involved" and that the men obtained approximately one ounce of marijuana. Anderson also testified that the men obtained a wallet with approximately $65.00 in it. Anderson claimed that he never saw any bats or shotguns. Anderson admitted that he was charged for his role in the events that occurred on 25 March 2008, but was not promised anything in exchange for his testimony. Later in his testimony, Anderson testified that he was trying to get a better deal from the district attorney's office.

Steven Voisey, a co-defendant charged with armed robbery and first-degree burglary, also testified. Voisey testified that he

was not expecting any sort of deal in exchange for his testimony. Voisey testified that he, defendant, and Tyler LaFrance were hanging out 25 March 2008. Defendant asked how they felt about "making some easy money as long as nobody got hurt." Defendant went into a friend's house and came back a few minutes later with a gun and two bats and indicated that they were going to rob a house or an apartment. The men went to LaFrance's house for a while, and Anderson was there. Voisey testified that defendant brought the gun in and was showing it off. They told Anderson that they were going to rob a house, and the four men left in Voisey's car, with Anderson driving.

The four men drove to the apartment, and Anderson waited in the car, while the other three men went inside. Voisey testified that defendant had the gun and that he and LaFrance carried the bats. Voisey testified that a man opened the door, and they went inside, pushing past him. Defendant pointed the gun at the occupants and said, "give us the money and weed." According to Voisey, the male victim eventually gave defendant his wallet and the victims also gave them a mason jar full of marijuana.

Defendant raises one argument on appeal. He contends the trial court committed reversible error by misstating the law in an attempt to clarify a pattern jury instruction on prior inconsistent statements. The trial court gave the jury the following instruction on prior inconsistent statements, which tracks N.C.P.I. - Crim 105.20:

> When evidence has been received tending to show that at an earlier time a witness made a

> statement which may be consistent, or may conflict with her [sic] or her testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time, because it was not made under oath at this trial. If you believe such earlier statement was made and that it is consistent, or does conflict[] with the testimony of the witness at this trial, you may consider this together with all other facts and circumstances bearing upon the witnesses' truthfulness in deciding whether you will believe or disbelieve the witnesses' testimony at this trial.

Immediately following the instruction, the trial court attempted to clarify the instruction by stating:

> That is a very difficult instruction. I am going to reword that just a little bit. Some evidence has been presented that certain witnesses made statements before court, outside of court before trial. It is up to you to decide whether the state has proven – or the State has proven beyond a reasonable doubt that such statements were actually made. But you are to use those statements, not to prove the truth of what the State needs to prove, but you are to use those statements to help evaluate the witness's [credibility] here at trial. That is what I think that instruction means. I hope I was a little bit more clear than the instruction.

As defendant failed to object to the instruction at trial, he did not preserve it for review, and this Court's review is limited to whether the trial court's instruction amounted to plain error. *See* N.C.R. App. P. 10(a)(4). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). In the

absence of such impact, relief is unavailable to a defendant who has not objected. *Id.*

Plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). Our Supreme Court has explained:

> [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.

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (alterations in original) (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Under plain error analysis, the burden is on the defendant to show that "absent the error the jury probably would have reached a different verdict." *State v. Hartman*, 90 N.C. App. 379, 383, 368 S.E.2d 396, 399 (1988).

Defendant first argues that, in the trial court's attempt to clarify the instruction, the court misstated the law by "impos[ing]

a reasonable doubt standard as to assessing prior statements when none exists." Defendant contends the pattern instruction simply requires the juror to assess whether he or she "believes" the out-of-court statement was made. Defendant asserts that, by framing the issue as one which the State has to prove, the trial court essentially directed the jury not to consider prior statements that question the credibility of the State's witnesses. Defendant further claims that, on the other hand, the trial court correctly instructed the jury to consider prior statements for corroborative purposes. Therefore, the court's misstatement prevented the jury from using the witnesses' prior inconsistent statements for impeachment purposes, while at the same time encouraging prior statements which corroborate the State's witnesses.

Next, defendant claims that, had the trial court correctly instructed the jury, a different result would have been reached at trial. Defendant points out allegedly inconsistent statements by Bell, Rose, and McMahon as to whether drugs were in the apartment and/or taken by the robbers. Next, he points out Bell's prior inconsistent statement regarding the race of the suspect with a gun. Finally, defendant claims that Rose and McMahon gave inconsistent statements as to why they were reluctant to speak to the detective on the night of the robbery. Defendant claims that if the jury had been given the correct instruction, it would have discredited Bell, Rose, and McMahon and instead believed Anderson's account of the events, i.e., that the robbers were not armed.

Defendant is correct in pointing out that the trial court's attempt to clarify the instruction deviated from the pattern instruction. We have acknowledged that "N.C.P.I. - Crim. 105.20 is a correct statement of the law regarding prior inconsistent statements." *State v. Hall*, 187 N.C. App. 308, 320, 653 S.E.2d 200, 209 (2007), *disc. review denied and appeal dismissed*, 362 N.C. 366, 663 S.E.2d 431 (2008). The pattern jury instruction states in pertinent part: "If you believe that such earlier statement was made. . . ." It does not require the State to prove that the earlier statement was made beyond a reasonable doubt.

However, even assuming, *arguendo,* that the trial court misstatement constituted error, we do not believe such error was so fundamental as to amount to a miscarriage of justice. After reviewing the record, we do not believe the jury would have reached a different verdict had the judge not misstated the instruction. First, the trial court read the jury the full, correct pattern instruction before attempting to clarify it and only misstated a small portion of the instruction. Therefore, the jury had been read a proper statement of the law before it began deliberating. After deliberating, the jury had three requests for further instruction or clarification, none of which pertained to the law on prior inconsistent statements. Thus, it appears that the jury was not reluctant to seek clarification.

Second, and more importantly, we do not believe that, even if the jury had questioned the credibility of Bell, Rose, and McMahon, it would have reached a different result. Defendant argues that,

if the trial court had not misstated the law, the jury would have discredited the victims' account of the events and instead concluded that the robbers were not armed. We disagree. Even if the jury had questioned the credibility of the victims, all five witnesses to the incident (i.e., the three victims plus the two co-defendants) testified that three men came into the apartment and took Bell's wallet. The two co-defendants testified that defendant was one of the three robbers, and also Rose identified defendant at trial. Four of the five witnesses testified that the men were armed. Only Anderson claimed that the robbers were not armed, and he did not go into the apartment. The co-defendant who went into the apartment, Voisey, testified that the robbers were armed. Thus, the jury would likely have believed that the robbers were armed, even if the victims' credibility had been questioned.

Moreover, given the totality of the circumstances, it is likely that the jury may have questioned the victims' credibility even without fully considering prior inconsistent statements. Officer Osborne testified that all three victims appeared to be under the influence of impairing substances. A small amount of marijuana and a small quantity of mushrooms were found in the apartment. Anderson and Voisey testified that the robbers took marijuana from the apartment, while the occupants did not. From this evidence, the jury already had reason to question their credibility, but nonetheless chose not to believe Anderson's testimony that the robbers were unarmed.

Taken as a whole, the overwhelming evidence tends to show that three men, one of whom was defendant, entered Bell and Rose's apartment and took Bell's wallet through threatened violence with a shotgun. It is unlikely a different result would have been reached by the jury had the asserted error not occurred. Accordingly, we conclude that the trial court did not commit plain error.

No error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).