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NO. COA14-448
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Craven County
Nos. 12 CRS 324
12 CRS 50852

SAMUEL LEE GASKINS,
Defendant.

Appeal by defendant from judgments entered 22 August 2013 by Judge Phyllis Gorham in Craven County Superior Court. Heard in the Court of Appeals 20 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Charles G. Whitehead, for the State.

Glenn Gerding for defendant-appellant.

GEER, Judge.

Defendant Samuel Lee Gaskins appeals from judgments entered after he pled guilty to possession of a firearm by a felon and possession of a weapon of mass destruction and a jury found him guilty of robbery with a firearm and conspiracy to commit robbery with a firearm. Defendant contends the trial court committed plain error by admitting evidence of defendant's 2002 conviction for assault on a female and by failing to give an

alibi instruction. Even assuming, without deciding, that the 2002 conviction was inadmissible, given the overwhelming evidence of defendant's guilt, he cannot show that the error had a probable impact on the jury's verdicts. With respect to the jury instructions, the trial court did not err in failing to give an alibi instruction because defendant did not specifically request the instruction. We find no prejudicial error.

Facts

The State's evidence tended to show the following facts. On 13 March 2012, at around 2:00 p.m., two masked men in hoodies entered the Dollar General store in Bridgeton, North Carolina. One of the men walked up to the front register where the manager, Rosalind Gaskins, was working, and said "This is a robbery." Ms. Gaskins instantly recognized the man as defendant, who was a frequent customer in the store. Defendant's mask did not cover his eyes or mouth, and Ms. Gaskins was able to identify defendant by his "very pointy nose" which "poked out of the mask," his "creepy blue eyes," "really thin lips," and by the his grey hoodie which he had worn in the store several times.

Defendant pointed a silver revolver at Ms. Gaskins, and she gave him the money from two cash drawers. During the robbery, the second masked man paced by the door, while holding a sawed-

off shotgun, and did not speak to Ms. Gaskins. Defendant and the other man left the store at the same time, ran across the highway, and drove away in a burgundy Jeep Cherokee.

Craven County Sheriff's Deputy Christian Desmarais was dispatched to respond to the robbery. As he drove to the store, Deputy Desmarais saw two people running across the highway, one of whom he recognized and later identified as Andrew Elder. When he reached the Dollar General store, witnesses told Deputy Desmarais that the robbers ran across the highway and fled in a burgundy Jeep. He passed this information along to communications and then left to try to locate the suspects.

At the time of the robbery, David Langston worked for the Sheriff's Office monitoring offenders who were on house arrest. Mr. Elder was one of the offenders Mr. Langston monitored, and Mr. Langston knew Mr. Elder drove a red Jeep Cherokee. When Mr. Langston heard the robbery call and description, he tracked Mr. Elder and determined he had been in the area of the store at the time of the robbery. Mr. Langston contacted his supervisor, and they decided to take Mr. Elder into custody.

Law enforcement officers located the red Jeep outside of defendant's house later that day. They obtained a warrant to search his home and van where they found a sawed-off shotgun, a .22 caliber rifle, a revolver, and several boxes of ammunition.

Melissa Gladson, defendant's wife, discovered a trash bag in the shed behind defendant's house that had not been there the day before and handed it over to the police. The bag contained a mask, white Nike sneakers and a flannel jacket. Defendant and Mr. Elder were taken into custody.

Defendant was indicted for possession of a firearm by a felon, possession of a weapon of mass destruction, robbery with a firearm, and conspiracy to commit robbery with a firearm. On 19 August 2013, defendant entered a plea of guilty to possession of a firearm by a felon and possession of a weapon of mass destruction. The court continued judgment pending the conclusion of defendant's trial on the remaining charges.

At trial, Mr. Elder testified that he was defendant's nephew. Mr. Elder testified that defendant planned the robbery and that Mr. Elder was the lookout man. Defendant's girlfriend, Ciarra Lewis, was to be the driver. Mr. Elder carried defendant's shotgun during the robbery, and defendant carried a chrome revolver. During the robbery, defendant went to the cash register while Mr. Elder watched the door. After the robbery, defendant and Mr. Elder left their masks and gloves in defendant's van, and returned to defendant's house in Mr. Elder's Jeep. Mr. Elder further testified that while incarcerated, he and defendant shared clandestine jailhouse

letters or "kites." The kites discussed the story they were going to come up with about the robbery.

Ms. Lewis also testified that defendant parked his van across the highway from the store before the robbery, and Mr. Elder parked his Jeep near the van. Defendant and Mr. Elder robbed the store and left their money, guns, and masks in defendant's van, then fled in Mr. Elder's Jeep.

Defendant testified on his own behalf and denied that he participated in the robbery. Instead, defendant testified that he was sleeping in a recliner at his home at the time of the robbery. Defendant admitted that he wrote letters to Mr. Elder while they were in jail. He explained that the letters were his attempt to prevent Mr. Elder from accusing defendant of doing something that he did not do in order to get a better deal for himself and that he was "trying to convince him if he didn't want to tell the truth, he had other options."

The jury found defendant guilty of robbery with a firearm and conspiracy to commit robbery with a firearm. The trial court sentenced defendant to consecutive presumptive-range terms of 84 to 113 months for robbery with a firearm, 33 to 52 months for conspiracy to commit robbery with a firearm, 21 to 35 months for possession of a weapon of mass destruction, and 17 to 30

months for possession of a firearm by a felon. Defendant timely appealed the judgments to this Court.

Discussion

In his first argument on appeal, defendant contends the trial court committed plain error by permitting the State to cross-examine him about a 2002 conviction for assault on a female. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. . . . To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.'" *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "Moreover, because plain error is to be 'applied cautiously and only in the exceptional case,' . . . the error will often be one that 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]'" *Id.* (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).

Even assuming, without deciding, that the admission of the 2002 conviction was improper, defendant cannot show that the error had a probable impact on the jury's verdicts. The evidence of defendant's guilt was overwhelming. The manager of

the Dollar General store, who was familiar with defendant because he was a frequent customer of the store, immediately recognized defendant as the robber. Ms. Lewis and Mr. Elder, defendant's co-conspirators, outlined the events surrounding the robbery in detail. Officers found the sawed off shotgun and the silver revolver that were used in the robbery in defendant's home and van. In light of this evidence of defendant's guilt, defendant cannot show that the questions about a 2002 assault on a female conviction had a probable impact on the jury's verdicts.

In his remaining argument, defendant contends the trial court committed plain error by failing to give a jury instruction on alibi. Our Supreme Court has recognized that "[s]ince the decision in *State v. Hunt*, 283 N.C. 617, 197 S.E.2d 513 (1973), the trial judge is not required to instruct on alibi unless defendant specifically requests such instruction." *State v. Williams*, 355 N.C. 501, 582, 565 S.E.2d 609, 656 (2002) (quoting *State v. Waddell*, 289 N.C. 19, 33, 220 S.E.2d 293, 303 (1975), vacated in part on other grounds by *Waddell v. North Carolina*, 428 U.S. 904, 49 L. Ed. 2d 1210, 96 S. Ct. 3211 (1976)). Because defendant did not specifically request the instruction, the trial court did not err in failing to give it.

No prejudicial error.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).