

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1228

Filed: 7 April 2015

STATE OF NORTH CAROLINA

v.

New Hanover County

Nos. 13 CRS 3475-76

SHANNON JEROME MITCHELL

Appeal by defendant from judgment entered 16 May 2014 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 4 March 2015.

Roy Cooper, Attorney General, by Steven M. Arbogast, Special Deputy Attorney General, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

TYSON, Judge.

Shannon Jerome Mitchell (“Defendant”) appeals from judgment entered after a jury conviction of first-degree murder. We find no error in Defendant’s conviction or the judgment entered thereon.

I. Factual Background

A grand jury indicted Defendant on one count of first-degree murder and one count of possessing a firearm while being a convicted felon on 20 May 2013. A jury trial was held on 28 April 2014 in New Hanover County Superior Court. Defendant pled guilty to possession of a firearm by a felon outside the presence of the jury.

Judgment was continued on that charge until the conclusion of the trial. Defendant also stipulated to seven prior felony convictions within a twelve-year period, and prior conviction and record levels of III.

A. State's Evidence

Gilbert McClammy ("Gilbert") was renovating a house on Bladen Street in Wilmington, North Carolina for his stepson, Christopher James ("Christopher") and Christopher's girlfriend, Shiniqua Bunting ("Shiniqua"). Christopher and Shiniqua were expecting their first child together. Shiniqua is also the daughter of Defendant's girlfriend, Catrina Bunting ("Catrina").

On 27 April 2013, Gilbert offered to show Moise Tabon ("Moise"), his nephew, the house he was renovating. Moise and Gilbert stopped at Shiniqua's grandmother's house to pick up Shiniqua and Christopher and take them to the Bladen Street house.

Defendant and Catrina were also present at Shiniqua's grandmother's house. Defendant and Catrina asked Christopher to find out if Gilbert would give them a ride to a party. Gilbert agreed, so long as Defendant and Catrina contributed gas money. Shiniqua and Catrina rode in Gilbert's vehicle. Christopher and Defendant rode in Moise's vehicle. After stopping at a gas station, both vehicles were driven to a trailer park in Monkey Junction, North Carolina.

Christopher and Moise both testified as they pulled up to the trailer park, Defendant stated he "came to town on that day to shoot a guy so he could get the keys to his grandmother's vehicle."

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Gilbert parked his vehicle in the driveway in front of one of the trailers. Moise pulled in behind Gilbert's vehicle. Christopher, Shiniqua, Catrina, and Defendant exited the vehicles. Gilbert and Moise remained in the driver's seats of their respective vehicles.

Defendant and Catrina wanted to attend a party taking place in Sea Breeze, North Carolina. Shiniqua testified Defendant stated he was going to ask Gilbert whether he was going to drive Catrina and Defendant to the party. Defendant walked over to Gilbert's vehicle and "got in the car." When Defendant got into Gilbert's vehicle, his right leg and foot remained outside the vehicle.

Shiniqua and Christopher both testified they saw Gilbert lift his hands up to his face in a gesture indicating to them, "I can't do it" or "I don't know." Almost immediately, Shiniqua, Christopher, and Catrina heard three gunshots in rapid succession. After the third gunshot, Defendant was entirely outside of Gilbert's vehicle. He walked toward the location where Shiniqua, Gilbert, and Catrina were standing.

Catrina testified she observed Defendant exit Gilbert's vehicle with a gun in his hand. She saw Defendant place the gun in his waistband. Catrina testified Defendant approached her and asked, "What happened?" Gilbert's body fell out of his vehicle and onto the ground. Defendant asked Christopher to assist him in putting Gilbert's lifeless body back into the vehicle. Christopher refused and Defendant ran off.

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Shiniquea called the police. New Hanover County Sheriff's Deputy David Swan arrested Defendant near the scene of the shooting. Defendant was charged with murder and taken to the booking area of the New Hanover County jail. All telephone calls from this area are recorded. Both individuals placing a call and the person receiving the call are informed the calls are subject to monitoring and recording.

While in the booking area, Defendant placed a telephone call to his father. A segment of this recorded call was admitted into evidence over Defendant's objection. The jury heard a portion of the recorded call, which consisted of the following conversation between Defendant and his father:

Father: I told you. You wouldn't listen, Junior. You wouldn't listen. Now who you done shot now?

Defendant: Trina daughter baby daddy, daddy. Man, I was just trying to talk to him, man, but . . .

Father: That same gun, right?

Defendant: Yeah, man.

Father: See what I try to tell you. You don't do what God wants you to do. I told you from under up of safety. I told you, Junior.

Defendant: I know, man.

2. Defendant's Evidence

Dr. George Corvin ("Dr. Corvin"), a general and forensic psychiatrist at North Raleigh Psychiatry, testified on Defendant's behalf as an expert witness in forensic psychiatry. Dr. Corvin interviewed Defendant for over two hours on 25 October 2013,

reviewed discovery materials, and spoke with Defendant's family members. Dr. Corvin diagnosed Defendant with intermittent explosive disorder ("IED"). Dr. Corvin testified IED is an impulse control disorder characterized by recurrent behavioral outbursts representing a failure to control aggressive impulses. Dr. Corvin explained IED may lead to frequent verbal, threatening, destructive, or physically assaultive acts. Dr. Corvin also testified "the magnitude of the aggressiveness expressed during recurrent outbursts is grossly out of proportion to the provocation or to any precipitating psychosocial stressors."

Dr. Linda Graham ("Dr. Graham"), a psychiatrist at RHA Behavioral Health Services, also testified on Defendant's behalf as an expert witness in psychiatry. Dr. Graham evaluated Defendant as a walk-in patient in February 2013 for approximately one-half hour. Dr. Graham also diagnosed Defendant with IED.

On 16 May 2014, the jury returned a verdict finding Defendant guilty of first-degree murder. The jury found Defendant guilty both under the theory of premeditation and deliberation and under the theory of committing another felony during the murder.

The trial court consolidated the conviction of possession of a firearm by a felon with the first-degree murder conviction. The trial court sentenced Defendant to life imprisonment without the possibility of parole.

Defendant gave notice of appeal in open court.

II. Issues

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Defendant argues the trial court erred by (1) allowing witness testimony regarding Defendant's statements prior to the shooting; (2) admitting into evidence the recording of the jailhouse telephone call Defendant placed to his father; (3) failing to dismiss the charge of first-degree murder based upon premeditation and deliberation due to insufficient evidence; (4) failing to dismiss the charge of first-degree murder based upon committing another felony during the murder due to insufficient evidence; and (5) submitting to the jury the charge of first-degree murder on the theory of committing another felony during the murder as a permissible verdict. We address each issue in order.

III. Analysis

A. Defendant's Statements Prior to the Shooting

Defendant argues the trial court erred by allowing Moise and Christopher to testify Defendant made statements that "he had come to town that day to shoot someone about getting the keys to his grandmother's car." Defendant argues the statements were not relevant. Defendant also asserts the prejudicial impact of these statements greatly outweighed their probative value under Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2013). We disagree.

1. Standard of Review

"Whether evidence is relevant is a question of law, thus we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010) (citation omitted). However, whether to exclude evidence

under Rule 403 is a decision within the trial court's discretion. *State v. Peterson*, 361 N.C. 587, 602, 652 S.E.2d 216, 227 (2007) (citation omitted), *cert. denied*, 552 U.S. 1271, 170 L.Ed.2d 377 (2008). Thus, "a trial court's ruling will be reversed on appeal only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Kirby*, 206 N.C. App. at 457, 697 S.E.2d at 503 (citation and internal quotation marks omitted).

2. Analysis

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence may be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C. Gen. Stat. § 8C-1, Rules 401, 403 (2013).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). However, evidence of a defendant's prior actions or conduct is admissible if it is relevant to any fact or issue other than the defendant's character. *State v. Beckelheimer*, 366 N.C. 127, 130-31, 726 S.E.2d 156, 159 (2012).

Christopher and Moise both testified neither believed Defendant was referring to Gilbert when he stated he was going to "shoot a guy." Defendant filed a motion *in*

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limine to suppress statements he made to Moise. This motion was extended to the statements heard by Christopher. The trial court denied Defendant's motion after a *voir dire* evidentiary hearing.

Defendant argues the testimony of Moise and Christopher regarding the statements he made prior to shooting Gilbert were not relevant. He asserts both witnesses testified they did not believe Defendant was referring to shooting Gilbert. Defendant also asserts there was no probative value to outweigh the substantial prejudicial effect because this testimony was inadmissible "rank propensity evidence" barred by Rule 404(b). We disagree.

Rule 404(b) is a rule of inclusion, not exclusion. *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159. Our Supreme Court has stated Rule 404(b) is "subject to but one exception requiring the exclusion of evidence if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (citation and quotation marks omitted). Defendant's statements about his intent to shoot someone in order to retrieve the keys to his grandmother's car, made immediately prior to the shooting of Gilbert, is relevant and admissible evidence.

The statements made by Defendant illustrate his state of mind near the time of the shooting. *State v. Jacobs*, 363 N.C. 815, 823, 689 S.E.2d 859, 864 (2010) (citation omitted) (holding evidence of victim's prior bad acts, although impermissible character evidence if only relevant to show victim's behavior at time of shooting, was

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relevant, admissible evidence to show defendant's state of mind); *see Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (noting Rule 404(b) is a rule of inclusion).

Here, Defendant's state of mind just prior to the time of the shooting is relevant to the charge of first-degree murder under the theory of premeditation and deliberation. Premeditation and deliberation are generally proved by circumstantial evidence, not direct evidence. Premeditation and deliberation may be inferred through evidence of a defendant's mental processes at the time of the crime. *State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008), *cert. denied*, 588 U.S. 851, 175 L.E.2d 84 (2009). The State argues Defendant's "cavalier attitude and mindset towards shooting a person" is relevant circumstantial evidence to show premeditation and deliberation.

The trial court conducted a lengthy *voir dire* and made detailed findings of fact to support its decision to admit testimony of Defendant's statements just before he shot Gilbert. Defendant has failed to show the trial court abused its discretion in admitting this evidence. This argument is overruled.

B. Recorded Telephone Call Between Defendant and His Father

Defendant asserts the trial court erred by allowing the recorded telephone call to his father to be admitted into evidence and be heard by the jury. Defendant argues any minimal probative value of this evidence was substantially outweighed by the danger of unfair prejudice. We disagree.

1. Standard of Review

Whether to exclude otherwise relevant evidence under Rule 403 rests within the trial court's discretion. This Court reviews the decision of the trial court for an abuse of that discretion. *State v. Sims*, 161 N.C. App. 183, 190, 588 S.E.2d 55, 60 (2003). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

2. Analysis

Defendant does not dispute the telephone call was relevant. Defendant only argues the recorded call should not have been admitted at trial pursuant to Rule 403. He asserts its probative value was outweighed by its prejudicial effect.

Defendant objected to the admission of the recorded call into evidence because of his father's statements of: "Now who you done shot now?" and "That same gun, right?" Defendant argues these statements may have caused the jury to believe Defendant had previously shot another person with the same firearm he used at bar. Defendant's counsel had conceded in his opening statements Defendant had shot and killed Gilbert. Defendant contends the only effect of these statements was to "excite prejudice."

Concessions made in opening statements by counsel do not constitute evidence. *State v. Lewis*, 321 N.C. 42, 49, 361 S.E.2d 728, 733 (1987). The State was not relieved of its burden of proving Defendant had unlawfully shot and killed Gilbert beyond a

reasonable doubt. The State sought to introduce the recorded telephone call between Defendant and his father as direct evidence showing Defendant shot Gilbert. The telephone call also served as direct evidence that Defendant *knew* he had shot Gilbert. The telephone call was particularly probative in light of Defendant's defense that his actions were a result of his diagnosed IED and not premeditated and deliberate. The statements made by Defendant and his father immediately after Defendant's arrest put into context Defendant's responses in which he admitted shooting Gilbert.

Defendant failed to show the trial court abused its discretion in admitting the recorded telephone conversation into evidence. This argument is overruled.

C. Sufficiency of the Evidence: Premeditation and Deliberation

Defendant argues the trial court erred in denying his motion to dismiss the charge of first-degree murder due to insufficient evidence of premeditation and deliberation.

1. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime." *State v. Cody*, 135 N.C. App. 722, 727, 522 S.E.2d 777, 780 (1999) (citation and internal quotation marks omitted).

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Evidence does not have to be irrefutable or uncontroverted to be substantial. *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139-40 (2002). Substantial evidence “need only be such as would satisfy a reasonable mind as being adequate to support a conclusion.” *Id.* (citation and internal quotation marks omitted). Whether substantial evidence has been presented requires us to “examine[] the sufficiency of the evidence presented but not its weight.” *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (citation omitted). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted).

2. Analysis

Defendant argues the State presented insufficient evidence for a jury to convict him of first-degree murder based on premeditation and deliberation.

Premeditation has been defined by [our Supreme Court] as thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. An unlawful killing is committed with deliberation if it is done in a cool state of blood, without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose. The intent to kill must arise from a fixed determination previously formed after weighing the matter.

State v. Corn, 303 N.C. 293, 297, 278 S.E.2d 221, 223 (1981) (citations and internal quotation marks omitted).

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“Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence.” *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 822-23 (1985) (citation omitted), *cert. denied*, 476 U.S. 1165, 90 L.Ed.2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

Our Supreme Court delineated several factors from which premeditation and deliberation may be inferred. These circumstances include:

(1) *lack of provocation* on the part of the deceased, (2) the *conduct and statements* of the defendant *before and after* the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the *dealing of lethal blows after the* deceased has been *felled and rendered helpless*, (6) evidence that the *killing was done in a brutal manner*, and (7) the nature and number of the victim’s wounds.

State v. Keel, 337 N.C. 469, 489, 447 S.E.2d 748, 759 (1994) (citation and quotation marks omitted) (emphasis supplied), *cert. denied*, 513 U.S. 1198, 131 L.Ed.2d 147 (1995). Neither all nor any certain combination of factors is required. The presence of any one factor may be sufficient. *Id.*

Defendant contends “[a]n analysis of the facts in the instant case reveal insubstantial evidence of premeditation and deliberation.” We disagree.

All evidence shows a complete lack of provocation by Gilbert. Gilbert had no prior history of confrontation or disputes with Defendant. Several witnesses testified Gilbert was seen putting his hands up in a gesture they believed to mean “now is not

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the time,” “I can’t do it,” or “I don’t know” moments before he was shot repeatedly. No evidence shows Gilbert being argumentative or combative. Gilbert was unarmed and sitting inside his vehicle.

Just prior to the shooting, Defendant told Moise and Christopher he was going to shoot a man over a trivial matter. While both men testified they did not believe Defendant was referring to Gilbert, both also testified they were troubled by Defendant’s cavalier attitude toward firearms and violent behavior. Defendant also asked Christopher to assist him in placing the lifeless Gilbert back inside the vehicle after his body fell out.

The State also presented evidence that Gilbert had a minor dispute with Shiniqua, the daughter of Defendant’s girlfriend, Catrina. Defendant was aware of this incident. Evidence showed Defendant may have felt some need to intervene in the matter between Gilbert and Shiniqua. Defendant asked Shiniqua about the incident on the day of the shooting.

Defendant shot Gilbert three times. Two of the wounds were fatal. One of the gunshots entered Gilbert’s body from the back. The State argued such a wound allows for the inference that Gilbert may have been turning away from or otherwise trying to escape from Defendant.

The evidence presented by the State was sufficient to withstand Defendant’s motion to dismiss. The weight to be given the evidence admitted was for the jury to resolve. *Benson*, 331 N.C. at 552, 417 S.E.2d at 765 (citation omitted). The jury

returned a verdict finding Defendant guilty of first-degree murder on the theory of premeditation and deliberation. This argument is overruled.

D. Sufficiency of the Evidence: Felony Murder

Defendant argues the trial court erred by denying his motion to dismiss the charge of first-degree murder based upon his commission of another felony during the murder. Defendant contends the State failed to present sufficient evidence of the underlying felony of discharging a firearm into occupied property to survive his motion to dismiss.

1. Standard of Review

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted). “A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime.” *Cody*, 135 N.C. App. at 727, 522 S.E.2d at 780 (citation and internal quotation marks omitted).

Substantial evidence is such relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. In examining the evidence, the court must view any contradictions or discrepancies in the light most favorable to the State, allowing all reasonable inferences to be drawn therefrom. A motion to dismiss is properly denied where there is substantial evidence supporting a finding that the offense charged was committed.

State v. Alexander, 152 N.C. App. 701, 705, 568 S.E.2d 317, 319 (2002) (citations and internal quotation marks omitted).

2. Analysis

Pursuant to N.C. Gen. Stat. § 14-34.1, “[a]ny person who willfully or wantonly discharges or attempts to discharge any firearm . . . into any . . . vehicle . . . while it is occupied is guilty of a Class E felony” N.C. Gen. Stat. § 14-34.1(a) (2013). Our Supreme Court has held a firearm is discharged “into” occupied property “even if the firearm itself is inside the property, so long as the person discharging it is not inside the property.” *State v. Mancuso*, 321 N.C. 464, 468, 364 S.E.2d 359, 362 (1988).

Defendant argues the State’s evidence was insufficient to establish that he was outside of the vehicle when he shot Gilbert. We disagree.

Christopher and Shiniqua both testified to having observed Defendant fire the shots that killed Gilbert. Shiniqua testified Defendant’s right leg was located outside of the vehicle, with his right foot on the ground, when Defendant fired the third and final shot. She also testified the lower half of Defendant’s left leg and the lower half of his right arm were the only parts of Defendant inside the door frame. Additional testimony showed Defendant’s left leg was “almost out” of the vehicle.

Christopher also testified he heard the first two shots, and saw Defendant fire the third shot. He testified when Defendant fired the third shot, he also saw Defendant’s right leg located outside of the vehicle, and his right foot was on the ground. Part of Defendant’s left leg, slightly below the knee, was in the vehicle.

Christopher also testified Defendant's hips, chest, and head were all outside of the vehicle. Defendant's right arm, up to approximately the middle of his forearm, was extended into the vehicle.

The State presented substantial evidence from which a jury could find at least one of the three shots Defendant fired was "into" occupied property. Any discrepancies or contradictions in the evidence were for the jury to resolve. *Benson*, 331 N.C. at 544, 417 S.E.2d at 761 (citation omitted) (holding "contradictions and discrepancies do not warrant dismissal . . . [but] are for the jury to resolve"). We conclude substantial evidence shows Defendant was located outside the vehicle when he shot Gilbert. *Alexander*, 152 N.C. App. at 705-06, 568 S.E.2d at 320 (holding substantial evidence existed from which a jury could find defendant discharged a firearm into occupied property where defendant was "almost leaning inside the car . . . definitely standing outside and in the crease of the door" when he shot the victim).

The evidence supports the felony charge of discharging a firearm into occupied property. The jury could properly convict Defendant of first-degree murder based on committing another felony during the murder. Defendant's argument is overruled.

E. Jury Instruction of First-degree murder Based On Felony Murder

Defendant argues the trial court erred by submitting to the jury the charge of first-degree murder on the theory of felony murder as a permissible verdict, as the underlying felony was not supported by the law or the facts of the case.

1. Standard of Review

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This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] . . . Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citation and internal quotation marks omitted).

2. Analysis

Defendant argues no evidence presented at trial supports the felony charge of discharging a firearm into occupied property. This charge was the underlying felony upon which the trial court permitted the jury to convict Defendant of first-degree murder based on a theory of felony murder.

As discussed above, the State presented substantial evidence that Defendant discharged a firearm into occupied property. The trial court's jury instruction permitting the jury to convict Defendant of first-degree murder based on a theory of felony murder was supported by the law and the facts in evidence. The trial court properly submitted the instructions and charge to allow the jury to convict Defendant of first-degree murder based on a theory of felony murder. This argument is overruled.

IV. Conclusion

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Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or in the trial court's judgment entered thereon.

NO ERROR.

Judges STEPHENS and HUNTER, JR. concur.