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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-15

Filed: 17 November 2015

Mecklenburg County, No. 13 CRS025822, 218075-77

STATE OF NORTH CAROLINA

v.

JAMES TIMOTHY WATTS, JR.

Appeal by defendant from judgments entered on or about 25 April 2014 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 13 August 2015.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Josephine N. Tetteh, for the State.*

*Office of the Public Defender, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.*

STROUD, Judge.

James Timothy Watts, Jr. (“defendant”) appeals from judgments entered upon jury verdicts finding him guilty of attempted robbery with a firearm (“attempted robbery”), conspiracy to commit robbery with a firearm (“conspiracy”), assault with a deadly weapon with intent to kill (“AWDWIK”), and discharging a firearm into occupied property (“discharging a weapon”). We conclude that the trial court committed no error.

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### I. Background

On 4 May 2013, Kyle Doyle (“Doyle”) responded to a Facebook post by defendant offering to sell an iPhone. Doyle and defendant exchanged Facebook and text messages and agreed to meet at 2907 Lake Avenue in Charlotte, North Carolina in order to conduct the transaction. The agreed-upon address was a vacant home in defendant’s neighborhood.

Doyle parked and went to meet defendant, who was in the garage. After examining the phone, Doyle determined it was not the model that defendant had advertised. When he complained, defendant yelled into the house. Two masked men entered the garage from the house. One of the men was armed with a handgun. Defendant went into the house and returned with a gun of his own.

The armed masked man pointed his gun at Doyle and demanded his money. Doyle believed the gun was fake and refused to comply. After a brief physical altercation, defendant and at least one of the masked men fled into the house and Doyle returned to his car. When he entered his vehicle, Doyle saw defendant and one masked man pointing guns at him from an open window. As he drove away, Doyle heard two gunshots.

Approximately twenty minutes later, Doyle pulled into a gas station and examined his car. He had a flat tire and there was a bullet hole in his passenger side door. Doyle contacted law enforcement and reported the attempted robbery. Doyle

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posted on Facebook that defendant had attempted to rob him using a fake gun and warned others to avoid transacting with defendant. Someone responded from defendant's own account indicating that the gun was not fake.

Defendant was arrested and indicted for attempted robbery, conspiracy, AWDWIK, and discharging a weapon. Beginning 23 April 2014, defendant was tried by a jury in Superior Court, Mecklenburg County. At trial, defendant testified on his own behalf and denied having any prior knowledge that the two masked men would attempt to rob Doyle. During cross-examination, the State repeatedly asked defendant whether he was aware that a gun was recovered from his home at the time of his arrest, and defendant denied any knowledge of that fact.

After all the evidence had been presented, the trial court instructed the jury on the applicable law. This included an instruction on flight over defendant's objection. On 25 April 2014, the jury returned verdicts finding defendant guilty of all charges. The trial court sentenced defendant to a term of 73 to 100 months of imprisonment for the attempted robbery and discharging a weapon convictions. For the remaining convictions, the trial court imposed a consecutive sentence of 29 to 44 months of imprisonment, which was suspended and defendant was placed on 36 months of probation. Defendant appeals.

## II. Evidence of Recovered Firearm

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Defendant argues that the trial court erred by allowing the State to cross-examine him regarding a firearm that was recovered from his home at the time of his arrest. Specifically, defendant contends that the State's questions were repetitive, irrelevant, and assumed facts not in evidence. We disagree.

“The decision whether to allow repetitive questioning is within the trial court's discretion, and that decision will not be overturned on appeal absent a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hester*, 343 N.C. 266, 273, 470 S.E.2d 25, 29 (1996) (citation and quotation marks omitted). In this case, the State repeatedly questioned defendant during his cross-examination as to whether he was aware that a gun had been recovered from his home on the day he was arrested:

Q And you were aware that a gun was found at your house when they came to arrest you; is that right?

A No. I was not aware of that.

Q You weren't aware of that?

A No.

Q You have been given the discovery in this case; is that correct?

A Yes.

Q You have reviewed all of the evidence in this case; right?

A Are you talking about my discovery?

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Q Yes.

A Yes.

Q You sat through all the testimony in this case too; right?

A Yes.

Q Before telling this story?

A Yes.

Q And you are not aware that there was a gun found in your house on the day you were arrested?

[DEFENSE COUNSEL]: Objection; asked and answered.

THE COURT: Overruled.

THE WITNESS: Repeat the question.

BY [THE STATE]:

Q After reviewing all the discovery in this case, all the things that were given to you by the State, as we are required to do before trial, you are not aware that there was a handgun found in your house on the day that you were arrested?

A No. I am not. There wasn't any gun or anything like that in my discovery.

Q But there was a gun found in your house on that day; is that correct?

[DEFENSE COUNSEL]: Objection; asked and answered.

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THE COURT: Overruled.

THE WITNESS: I did not know that.

BY [THE STATE]:

Q You did not know there was a gun found in your house?

A No.

[THE STATE]: Approach the witness, Your Honor?

THE COURT: Yes, sir.

BY [THE STATE]:

Q Mr. Watts, I am handing you what has been previously marked as State's Exhibit 17 for identification purposes. That is the room in your house, isn't it?

A No.

Q Whose room is that?

A My step-brother's room.

Q He is pretty young; right? Younger than you?

A That is my step-brother, who is 24 years old.

Q This isn't your room?

A No.

Defendant contends that the trial court improperly allowed the State to continue to ask defendant the same question repeatedly after he had already answered that he was unaware that a gun had been recovered.

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However, we discern no abuse of discretion by the trial court. *See id.* In context, the State's repeated questions were not merely repetitive for their own sake. Rather, the purpose of this line of questioning was to remind defendant that he had, in fact, been informed through discovery that a gun had been recovered from his home and to see if defendant changed his answer in light of this reminder. Thus, the court did not err by overruling defendant's objections.

Defendant also contends that the State's questions were improper because they assumed facts not in evidence and were irrelevant. However, defendant acknowledges that he did not object to the questions on either basis at trial. Accordingly, we review this portion of defendant's argument for plain error. *See* N.C.R. App. P. 10(a)(4) (2014).

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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

Even assuming this argument can be reviewed for plain error and that the State's questions should have been excluded for either of the reasons advanced by

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defendant, defendant has failed to demonstrate that the trial court's alleged failure to exclude these questions rises to the level of plain error. *See id.* Doyle testified that he met with defendant after responding to defendant's Facebook posting. During the course of their transaction, defendant retrieved a gun and together with two masked men attempted to rob him. As Doyle returned to his car, he saw defendant and another robber point guns at his car and heard two shots fired as he drove away. In light of this evidence, defendant has failed to meet his burden of demonstrating that any alleged error would have "had a probable impact on the jury's finding that the defendant was guilty." *Id.*

### III. Flight Instruction

Defendant argues that the trial court erred by instructing the jury on flight.

We disagree.

An instruction on flight is appropriate where there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime. The relevant inquiry concerns whether there is evidence that defendant left the scene of the [crime] and took steps to avoid apprehension. If we find some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given.

*State v. Ethridge*, 168 N.C. App. 359, 362-63, 607 S.E.2d 325, 327-28 (2005) (citations, quotation marks, and brackets omitted), *aff'd per curiam*, 360 N.C. 359, 625 S.E.2d 777 (2006). When determining whether a flight instruction was appropriate, we view



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the evidence in the light most favorable to the State. *See State v. Grooms*, 353 N.C. 50, 80, 540 S.E.2d 713, 732 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

In this case, there was sufficient evidence, when taken in the light most favorable to the State, *see id.*, to support a flight instruction. Defendant testified that he fled from the crime scene, concealing himself by cutting through the backyards of neighbors before returning home. Although defendant testified that he did so for his own safety, “[t]he fact that there may be other reasonable explanations for defendant’s conduct does not render the instruction improper.” *Ethridge*, 168 N.C. App. at 363, 607 S.E.2d at 328. Moreover, the State introduced a 911 call in which the caller stated that, after she heard gunshots, she saw three individuals run “out the back, around to the front of the house, and across the street and down across the train tracks.” Based upon this evidence, the trial court properly instructed the jury on flight. *See id.* at 362-63, 607 S.E.2d at 327-28. Furthermore, defendant has failed to show that the trial court’s instruction on flight would be prejudicial error, since there is no reasonable probability that the instruction caused the jury to return a different verdict, based upon the evidence previously cited. *See State v. Holland*, 161 N.C. App. 326, 330, 588 S.E.2d 32, 36 (2003) (“[I]n light of the remaining evidence in this case, including the identification of defendant as the perpetrator of the crimes charged, the error in instructing the jury on flight was harmless.”).

#### IV. Conclusion

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The trial court did not err when it allowed the State to cross-examine defendant regarding a gun recovered from his home. There was sufficient evidence to support the court's flight instruction. Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges McCULLOUGH and INMAN concur.

Report per Rule 30(e).