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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-96

Filed: 3 November 2015

Mecklenburg County, Nos. 11 CRS 256439, 12 CRS 200894-899

STATE OF NORTH CAROLINA

v.

CUMAR CRAIG HOWARD, Defendant.

Appeal by defendant from judgments entered 25 March 2014 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Anne Goco Kirby, for the State.

Staples Hughes, Appellate Defender, by Assistant Appellate Defender Emily H. Davis, for defendant.

DIETZ, Judge.

On 19 December 2011, Defendant Cumar Craig Howard and another man drove up to five painters next to an apartment building in Charlotte. Howard and the other man got out of the car and robbed the five painters at gunpoint. As Howard exited the passenger side of the car, he told the five men “don’t move” and demanded their wallets. Howard then pointed his gun at three of the men and took their wallets

STATE V. HOWARD

Opinion of the Court

while the driver of the car pointed his gun at the other two victims and took their wallets.

Law enforcement ultimately arrested Howard and charged him with five counts of armed robbery. The jury found Howard guilty on all counts. On appeal, Howard argues that his armed robbery charges should have been dismissed because, “[w]hile acting in concert was defined . . . the trial court never instructed the jury it could convict Mr. Howard if it found he acted in concert with others in the commission of the elements of each armed robbery offense.” Howard also argues that it was plain error for the trial court not to instruct the jury that it must consider each of the five robbery counts separately.

We reject Howard’s arguments. With respect to acting in concert, the trial court gave an acting in concert instruction that informed the jury it could convict Howard if he joined another in a common purpose to commit armed robbery and was actually or constructively present during the commission of the crime. Howard’s appeal from the denial of his motion to dismiss is, in effect, simply a challenge to the language of that instruction. But Howard failed to object to that language at trial and thus any argument on that ground is waived on appeal.

With respect to the armed robbery instruction, Howard again failed to object at trial but asks this Court to review for plain error. In light of the overwhelming evidence of Howard’s guilt, we hold that the alleged error would not have had a

probable impact on the jury's finding of guilt. Accordingly, we reject this argument as well.

Facts and Procedural History

On 19 December 2011, five painters were standing outside an apartment complex in Charlotte where they had been working. Two men drove up to them in a car. Defendant Cumar Craig Howard was in the passenger seat; the driver was never identified.

Both Howard and the driver got out of the car armed with handguns. Howard told the five men "don't move" and demanded their wallets. Howard then pointed his gun at three of the men, in turn, and took their wallets. While Howard robbed these three men, the driver of the car pointed his gun at the other two victims and took their wallets.

Law enforcement later arrested Howard and the State charged him with five counts of armed robbery. The case proceeded to trial and, at the State's request, the trial court instructed the jury on acting in concert. The jury found Howard guilty of all five counts of armed robbery. Howard timely appealed.

Analysis

I. Acting in Concert Instruction

Howard first argues that his armed robbery convictions should have been dismissed because, "[w]hile acting in concert was defined . . . the trial court never

STATE V. HOWARD

Opinion of the Court

instructed the jury it could convict Mr. Howard if it found he acted in concert with others in the commission of the elements of each armed robbery offense.” In other words, Howard argues that the acting in concert theory was not presented to the jury and therefore the jury could convict Howard only if it found he personally committed each element of the underlying offense. *See State v. Wilson*, 345 N.C. 119, 128, 478 S.E.2d 507, 511-12 (1996).

The flaw in this argument is that the trial court *did* instruct the jury that it could convict Howard if he acted in concert with another. During the jury charge, the trial court instructed the jury that “[f]or a defendant to be guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute a crime. If two or more persons join in the common purpose to commit robbery with a dangerous weapon, each of them, if actually or constructively present, is guilty of the crime.” Thus, the trial court unquestionably instructed the jury that it could convict Howard if he acted in concert with another.

Howard’s argument, although framed as an appeal from the denial of his motion to dismiss, is perhaps more appropriately viewed as a challenge to the language of the instruction itself, which departed from the pattern jury instruction for acting in concert. But this argument is waived. Although Howard objected during the charge conference to *any* instruction on acting in concert, he did not object to the language of *this* instruction on the ground he raises now—that the instruction failed

to require the jury to find that he acted in concert with someone else who committed all the elements of the underlying offense.

The purpose of requiring a defendant to object to jury instructions before the jury retires to deliberate is to provide the opportunity for the trial court to correct any error in the instruction without the need for a new trial. *State v. Odom*, 307 N.C. 655, 662, 300 S.E.2d 375, 378 (1983). Here, even assuming the instruction is erroneous, Howard failed to preserve that objection by “stating distinctly that to which objection is made and the grounds of the objection.” N.C. R. App. P. 10(a)(2).

In sum, Howard’s appeal from the denial of his motion to dismiss fails because the trial court instructed the jury that it could convict Howard if he joined in a common purpose to commit armed robbery and was actually or constructively present during the commission of the crime. Howard’s argument, to the extent it is actually directed at the language of the acting in concert instruction, was not preserved below and is waived on appeal.

II. Armed Robbery Instruction

Howard next argues that the trial court committed plain error “by giving a single armed robbery instruction for five counts of armed robbery when the instruction failed to clarify the jury was required to give each armed robbery charge separate consideration.”

STATE V. HOWARD

Opinion of the Court

Howard concedes that he did not object to the trial court's instruction on this ground and asks the Court to review for plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* (internal quotation marks omitted). Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

Here, even if the instruction was erroneous, the error did not have a "probable impact" on the jury's verdict. There was overwhelming evidence that Howard committed five separate robberies, either personally or acting in concert with the driver of the vehicle. As discussed above, the five victims testified that they were standing outside an apartment complex in Charlotte when Howard and another man approached them in a car. Both Howard and the driver got out of the car armed with handguns. Howard told the five men "don't move" and demanded their wallets. Howard then pointed his gun at three of the men and took their wallets while the driver pointed his gun at the other two victims and took their wallets. Based on this evidence, we cannot say that the trial court's failure to clarify that the jury must

STATE V. HOWARD

Opinion of the Court

separately find each element of robbery satisfied for each of the five counts of robbery had a “probable” impact on the jury’s finding of guilt on all five robbery counts.

Conclusion

For the reasons discussed above, we find no error in part and no plain error in part.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).