

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-379

Filed: 1 November 2016

Watauga County, Nos. 13 CRS 50623, 50625

STATE OF NORTH CAROLINA

v.

JOSHUA EDUARDO HOGG

Appeal by defendant from judgments entered 6 November 2015 by Judge W. David Lee in Watauga County Superior Court. Heard in the Court of Appeals 5 October 2016.

*Roy Cooper, Attorney General, by Matthew Tulchin, Assistant Attorney General, for the State.*

*Michael E. Casterline for defendant-appellant.*

DAVIS, Judge.

Joshua Eduardo Hogg (“Defendant”) appeals from his convictions for two counts of first degree burglary, two counts of common law robbery, one count of attempted common law robbery, and one count of assault inflicting serious bodily injury. On appeal, he contends that the State violated his right to due process by allowing false testimony to be introduced at trial. After careful review, we conclude

that Defendant failed to preserve this issue for appellate review. Consequently, we dismiss his appeal.

### **Factual Background**

The State presented evidence at trial tending to establish the following facts: Early in the day on 9 April 2013, Christopher Webster and D'Ray Hall visited the apartment of Christopher Smith and Zack Miller at the Cardinal Apartments complex in Boone, North Carolina, for the purpose of selling marijuana to one of them. Webster and Hall saw police cars parked in a nearby parking lot when they left the apartment, leading them to believe that Smith or Miller had alerted the police about the drug sale.

Later in the day, Webster and Hall picked up Defendant — who was a friend of theirs — and the three of them drank whiskey and smoked marijuana together at Webster's apartment. Webster suggested that they rob the occupants of two particular apartments, and Hall and Defendant agreed. One of the apartments targeted was Smith's and Miller's unit in the Cardinal Apartments. Webster later testified that they decided to target this apartment because he thought Smith or Miller had informed the police about their drug deal earlier in the day.

The other apartment was located in the Hill Street Apartments complex, which was also located in Boone. Webster later testified that he wanted to target a

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particular occupant of this apartment, Jason Hinshaw, because Hinshaw owed Webster and Hall \$1,200 for marijuana they had sold to him the prior week.

After deciding to commit the robberies, Webster, Hall, and Defendant drove in Webster's car to a gas station at around 8:00 p.m. to buy gas and cigarettes. The three men subsequently retrieved the keys to a Nissan Sentra owned by Hall's girlfriend. They then drove to a nearby Walmart where they purchased ski gloves and masks. Afterward, they went to Webster's apartment to change into dark clothes so that they would be less noticeable. Hall then picked up the Nissan Sentra. Webster dropped off his car at Defendant's apartment, and the three of them proceeded in the Nissan Sentra to Hinshaw's apartment.

Hinshaw and one of his roommates, Matthew Robinson, were in the living room of their apartment playing video games when they heard a knock on the door at about 9:15 p.m. When Robinson opened the door, Defendant and Webster forced their way into the apartment. Webster immediately began hitting Robinson while Defendant went over to Hinshaw and started punching him. Robinson was able to escape, and he asked neighbors to call the police. During the attack, Hinshaw noticed another man in a mask outside the apartment peering in through a window.

Hinshaw asked, "what in the eff, what in the eff [d]o you want[?]" Defendant or Webster screamed, "give me the effing money, give me the effing money[.]" According to Hinshaw's testimony at trial, while being hit from behind by the

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intruders he went into his bedroom and pulled out his dresser drawer to retrieve his wallet. He took out \$40 to \$50 and threw the bills at the intruders, one of whom picked them up. According to Webster's trial testimony, Hinshaw told Defendant where to find money in his bedroom, and Defendant went into the bedroom alone and retrieved \$450.

The three intruders then fled from the apartment. A neighbor was able to record the license plate of the Nissan Sentra. Hinshaw suffered bruises and abrasions from the attack, and Robinson suffered a fractured eye socket and permanent partial loss of vision.

After leaving Hinshaw's apartment, Webster, Hall, and Defendant briefly stopped at Defendant's apartment before proceeding to Smith's and Miller's apartment at the Cardinal Apartments. Smith and Miller were not there, but Clint Sorrell and Benjamin Brown — their roommates — were in the apartment getting ready to play video games. The unlocked front door burst open at approximately 9:25 p.m. Defendant and Webster ran inside while Hall waited in the car. Webster and Defendant pinned Sorrell and Brown down and punched them repeatedly. Webster asked, "where's the money and drugs at[?]" When Sorrell and Brown said they did not have any, Webster and Defendant grabbed a guitar and an Xbox video game console and left the apartment. They then went to Defendant's apartment to store

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the property they had taken. Sorrell suffered three fractures to his nose and two black eyes from the attack.

The police were able to trace the license plate number of the Nissan Sentra to Hall's girlfriend, and, after interviewing her, police officers arrested Webster and Hall the day after the robberies occurred. Based on information from Hall's girlfriend, an investigator interviewed Defendant on 12 April 2013. Defendant told the officer that he had last seen Webster and Hall at around 3:00 or 4:00 p.m. on the day of the robberies. However, video surveillance footage from the gas station on the night of the robberies showed Webster's car pulling up to a pump and Defendant making the gas and cigarette purchases at approximately 7:50 p.m. Video footage from the Walmart showed Defendant accompanying Webster and Hall as Webster bought the gloves and masks at about 8:15 p.m. Defendant was arrested on 17 April 2013.

On 30 September 2013, Defendant was indicted on two counts of first degree burglary, two counts of common law robbery, one count of attempted common law robbery, one count of assault inflicting serious bodily injury, and three counts of simple assault.<sup>1</sup> A jury trial was held before the Honorable W. David Lee in Watauga County Superior Court beginning on 2 November 2015.

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<sup>1</sup> The simple assault charges were subsequently dismissed by the State.

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At trial, Webster testified for the State and implicated Defendant in the crimes for which he was charged. During his testimony, Webster stated that he had sold marijuana to Hinshaw at Hinshaw's apartment approximately 20 times before the date of the robbery. Hinshaw, conversely, testified that he had only seen Webster a total of four times prior to the robbery and never had a "business relationship" with him.

Testifying on his own behalf, Defendant denied that he had taken part in the robberies. During his testimony, Defendant admitted that when questioned by police, he had falsely stated to an investigating officer that he had last seen Webster and Hall at approximately 2:00 or 3:00 p.m. on the day of the robberies because he "didn't want [the police officer] to think I was involved with anything."

Although he admitted that he had accompanied Hall and Webster to Walmart where Webster purchased the masks and gloves, Defendant claimed that he was dropped off at his apartment sometime between 8:15 and 8:30 p.m. that night. He testified that later in the evening he had a conversation with his neighbor, Corey Summers, and then played video games with another neighbor, Robert Deere, for thirty minutes to an hour around 10:00 pm. Summers did not testify at trial, but Deere testified that he had a conversation with Defendant in the hallway of their apartment complex sometime between 8:15 and 9:00 p.m. on 9 April 2013 and that

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Defendant went to Deere's apartment to play video games at approximately 10:15 or 10:30 p.m.

The jury found Defendant guilty of two counts of first degree burglary, two counts of common law robbery, one count of attempted common law robbery, and one count of assault inflicting serious bodily injury. The trial court sentenced Defendant to two consecutive sentences of 51 to 74 months.

**Analysis**

Defendant's sole argument on appeal is that his due process rights were violated because the State knowingly allowed false testimony to be given at trial. Specifically, Defendant argues that portions of Webster's and Hinshaw's testimony was contradictory in that (1) Webster stated that he had sold drugs to Hinshaw approximately 20 times before the night of the robberies and, in fact, had sold Hinshaw \$1,200 worth of marijuana the previous week, while Hinshaw testified that he had only seen Webster a total of four times before 9 April 2013 and never had a "business relationship" with him; and (2) Webster testified that, during the robbery, Hinshaw told Defendant where to find money in his bedroom at which point Defendant went into the bedroom alone and retrieved \$450, whereas Hinshaw testified that — while being hit from behind by the intruders — he went into his bedroom, took \$40 to \$50 out of his wallet from his dresser drawer, and threw the bills at the intruders, one of whom picked them up.

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The State argues that the constitutional issue Defendant seeks to raise on appeal should not be considered by this Court because Defendant failed to raise this argument in the trial court. We agree.

Our Supreme Court has held that “[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.” *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Indeed, we have previously applied this rule in the precise context presented here.

[D]efendant argues that his due process rights were violated when the State failed to correct false and misleading testimony from [one of its witnesses]. . . . Although defendant argues that his constitutional right to due process was violated . . . , defendant has not referenced any instance in the record where he made this constitutional argument before the trial court. Indeed, it appears that defendant failed to make this constitutional argument at any point at the trial level . . . . It is well-established that constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal. Accordingly, defendant has failed to preserve this issue for appeal.

*State v. Moore*, 185 N.C. App. 257, 264-65, 648 S.E.2d 288, 293-94 (2007) (citation, quotation marks, and brackets omitted), *disc. review denied*, 362 N.C. 368, 661 S.E.2d 891 (2008). Accordingly, we conclude that Defendant has not preserved this issue for appeal. As such, his appeal must be dismissed.



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Moreover, even assuming *arguendo* that Defendant had properly preserved this issue, Defendant has failed to show that his due process rights were violated.

Our Supreme Court has explained that

[w]hen the State obtains a conviction through the use of evidence that its representatives know to be false, the conviction violates the Due Process Clause of the Fourteenth Amendment. The violation also occurs if the State fails to correct material testimony it knows to be false. To establish materiality, a defendant must show a reasonable likelihood that the false testimony could have affected the judgment of the jury. Evidence that affects the jury's ability to assess a witness' credibility may be material.

*State v. Phillips*, 365 N.C. 103, 126, 711 S.E.2d 122, 140 (2011), *cert. denied*, \_\_\_ U.S. \_\_\_, 182 L. Ed. 2d 176 (2012) (internal citations, quotations marks, and brackets omitted). Accordingly, “when a defendant shows that testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction, he is entitled to a new trial.” *Id.* (citation, quotations marks, and brackets omitted).

Rather than demonstrating which witness's testimony was false, Defendant simply states that “it is impossible to tell which of these two men was lying” and that the State “must have known that either Webster or Hinshaw was lying.” Our Supreme Court, however, has “distinguished between the knowing presentation of false testimony and knowing that testimony conflicts in some manner.” *Id.* at 126, 711 S.E.2d at 140 (citation and quotation marks omitted). “Merely because inconsistent testimony is presented, it does not follow that such testimony is

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knowingly and demonstrably false.” *State v. Allen*, 360 N.C. 297, 305, 626 S.E.2d 271, 279, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). “It is for the jury to decide issues of fact when conflicting information is elicited by either party.” *Id.* Here, Defendant has failed to show that the discrepancies between Webster’s testimony and Hinshaw’s testimony constituted the knowing presentation of false evidence by the State.

**Conclusion**

For the reasons stated above, we dismiss Defendant’s appeal.

DISMISSED.

Judges INMAN and ENOCHS concur.

Report per Rule 30(e).