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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-141

Filed: 15 August 2017

Forsyth County, Nos. 15 CRS 56356; 16 CRS 467, 469

STATE OF NORTH CAROLINA

v.

KENNETH LEE BONHAM

Appeal from judgments entered 9 June 2016 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 7 August 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Francisco Benzoni, for the State.*

*Charlotte Gail Blake for defendant-appellant.*

TYSON, Judge.

Kenneth Lee Bonham ("Defendant") appeals from judgments entered upon his conviction for robbery with a dangerous weapon ("RWDW") and felonious fleeing to elude arrest. We hold Defendant received a fair trial, free from prejudicial errors he preserved and argued.

## I. Factual Background

Defendant entered and robbed the WilcoHess convenience store at 566 Old Hollow Road in Winston-Salem, North Carolina on the morning of 7 July 2015. Storm Powell, the store cashier, testified an individual entered the store at approximately 3:00 a.m. and yelled, "Give me all your money." Ms. Powell further testified Defendant had covered his hands with black socks and wore a white rain jacket with the hood pulled down over his face. After pressing the store's "panic button," Ms. Powell told Defendant the cash register was "shut down," and she would need time to "get it back up."

Defendant replied, "I know better," and threatened to "shoot" Ms. Powell, if she did not open the register within ten seconds. Afraid of being shot, Ms. Powell opened the register by pressing "no sale" on the touch-screen. Defendant grabbed some of the money from the drawer, but left the $10 bills. Defendant ran from the store and drove off in a dark-colored vehicle, which was parked at a church across the street. The police arrived at the store within minutes.

Regarding Defendant's use of a gun, Ms. Powell testified as follows:

> Q. Did you see a gun?
>
> A. I didn't see no weapon. But his right hand was bigger than the left hand. So I couldn't know what he had, but he said that he had a gun.
>
> Q. When you said his right hand was bigger than the other hand, can you describe for the members of the jury what you saw.

> A. I seen a black sock. And it was longer than his left hand was – because I could see the fingertips of his left hand, but I couldn't see the fingertips of his right hand.
>
> . . . .
>
> Q. What happened when you pushed "no sale"?
>
> A. The drawer come open, and I went for the ones. And his hand come over. And when his right hand hit the drawer, I heard metal on metal.

Winston-Salem Police Officer J.D. Caffey, who responded to the scene, testified Ms. Powell had reported seeing a "bulge" in the sock covering Defendant's right hand "as if something was inside of the right sock." Although Ms. Powell did not identify Defendant, subsequent evidence, including Defendant's testimony, confirmed his identity as the perpetrator.

Officer J.B. Keltner was also dispatched to the WilcoHess and was advised of the suspect driving a dark-colored Ford Taurus. He observed a vehicle matching the description heading south on Germanton Road away from the location of the WilcoHess. Officer Keltner pursued the Taurus down Germanton Road and was quickly joined by Officer A.T. Canipe in a second patrol car. Based on the report that the suspect was armed, the officers attempted to perform a "felony vehicle stop."

The Taurus refused to stop and instead turned onto Oak Summit Road and accelerated to a speed of 80 miles per hour while repeatedly crossing the double-yellow marked center line. After passing through the intersection of Oak Summit

and Old Rural Hall Road, the Taurus left the road and drove into a residential yard, struck a utility pole, a garbage can, and a mailbox before coming to a stop.

Officers Keltner and Canipe exited their patrol cars, drew their service weapons, and ordered Defendant to put his hands up. Defendant ignored their instructions and attempted to re-start the car. He then "climbed across the front seat of the vehicle and exited out the front passenger-side door." Defendant ran away from the officers, "carrying something white in his right hand."

The officers eventually caught up to Defendant and subdued him. Before being taken to the ground, Defendant threw the object in his right hand, a white jacket, at Officer Canipe. Officer Keltner noted Defendant was barefoot and "had some wadded-up U.S. currency in his right front pocket." Officer Canipe collected the currency, which consisted of "five $20 bills, seven $5 bills and [fourteen] $1 bills."

Inside the Taurus, the officers found a pair of black socks on the front passenger-side floorboard. Defendant's driver's license was in a wallet stored in the vehicle's glove compartment. After waiving his *Miranda* rights, Defendant confirmed to Officer Keltner that he had come from "the WilcoHess at 566 Old Hollow Road" but claimed he did not remember "what he did or what he said to the clerk while he was inside the store."

Defendant testified in his own defense, acknowledged taking the money from WilcoHess, and fleeing from police in his car on 7 July 2015. He attributed his actions

to a "dumb decision," which was brought about by stress, depression, and substance abuse. After a night of using alcohol and crack cocaine, Defendant "decided that [he] needed more drugs, and that's when [he] went to the Wilco to commit the robbery." He admitted he wore socks on his hands to avoid leaving fingerprints or revealing his "nationality."

Defendant offered conflicting testimony about whether he announced, "This is a robbery," or merely demanded money. Defendant further denied having a gun, threatening Ms. Powell, or concealing anything in the sock covering his right hand.

In addition to the indicted charge of RWDW, the trial court instructed the jury on the lesser included offenses of common law robbery and larceny from the person. The court likewise instructed the jury on the indicted charge of felonious fleeing to elude arrest and its lesser-included misdemeanor charge. The jury returned a verdict and found Defendant guilty of the greater offenses, as charged. After a separate proceeding, the jury found Defendant not guilty of being an habitual felon.

The trial court sentenced Defendant to consecutive prison terms of 124 to 161 months for RWDW and 20 to 33 months for felonious fleeing to elude arrest. Defendant gave notice of appeal in open court.

## II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444(a) (2015).

III. Evidence of Defendant's Prior Robberies

In his sole argument on appeal, Defendant asserts the trial court committed prejudicial error by overruling his objection and allowing the prosecutor to question him about his prior acts of robbery on cross-examination.

The record shows that, between August 1988 and December 1994, Defendant was convicted of ten counts of common law robbery in four North Carolina counties during six discrete court sessions. Defendant argues the admissibility of his criminal history was limited by Rule 609 and Rule 404(b) of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rules 404(b), 609(b) (2015).

Defendant asserts he was entitled to and did not receive written notice of the State's intention to use these convictions to impeach his trial testimony under Rule 609(b), because more than ten years had elapsed since his most recent conviction and release from incarceration. *See* N.C. Gen. Stat. § 8C-1, Rule 609(b). Defendant further contends Rule 404(b) bars admission of these prior acts, because their sole probative value was to establish his general "propensity to commit" robbery.

A. Standard of Review

Defendant raised only general objections to the prosecutor's questions. "[U]nless, on the face of the evidence, there is no purpose for which the evidence could have been admissible, a general objection is ineffective [to preserve the alleged error for appellate review.] "On appeal, [d]efendant must demonstrate that the evidence

would not be admissible for any purpose." *State v. McKoy*, 317 N.C. 519, 525, 347 S.E.2d 374, 377-78 (1986) (citations and footnote omitted).

Defendant purports to assign plain error to the prosecutor's eliciting of his criminal history, "[i]n the event that this Court finds that this issue was not properly preserved by [his] objection." Plain error is the appropriate standard of review. *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). To establish plain error, Defendant must show that a fundamental error occurred at trial. *Id*. "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*. (citation and internal quotation marks omitted).

B. Analysis

The State argues the limitations imposed by Rule 609(b) and Rule 404(b) do not apply here, because Defendant's testimony on direct examination "opened the door" to the prosecutor's subsequent line of questioning. *See, e.g.*, *State v. Warren*, 347 N.C. 309, 317, 492 S.E.2d 609, 613 (1997) ("The law 'wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself.'" (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)), *cert. denied*, 523 U.S. 1109, 140 L. Ed. 2d 818 (1998). The State asserts the evidence Defendant had previously committed robberies was necessary to dispel any unwarranted "favorable inference that may have been created . . . by Defendant's

potentially misleading testimony on direct examination." *See* N.C. Gen. Stat. § 8C-1, Rule 404(b).

Defendant offered the following account of the events leading up to his crimes on the morning of 7 July 2015:

> Q. So moving to July 6th . . ., tell us what happened.
>
> A. . . . [T]hat particular night, after using [cocaine], I didn't like who I was or who I became. . . . And it seemed like my world was coming down on me. So after I used, I was so caught up with guilt and shame and what I had done – and I said, "Well, what's my reason for living?" you know.
>
> . . . I was riding, trying to clear my head out. And I had family members that lived in that area. And I passed by that [WilcoHess] store, and I made a dumb decision to do what I did.
>
> Q. Okay. So let's talk about what you did. Tell us what you did. You're driving by the store. You see the store.
>
> What did you do?
>
> A. I was so caught up in obsessive and compulsive, *I had thoughts about some of those -- I call them stupid TV shows that I saw about how to commit a robbery*. And I was so – I was so hyped up – I was so confused in my mind that I did – it was raining that night. And so I had a white ski jacket on or summer jacket.
>
> . . . I was so excited – well, not excited. But I was so obsessed with compulsion and obsession that I even forgot to put my shoes on. And I took my socks, and I put them on my hands.

> Q. . . . Why did you put the socks on your hands?
>
> A. For fingerprints. And, also, I didn't – I thought maybe that by doing that, they wouldn't see my nationality . . . . Just trying to trick the person or whatever . . . .
>
> . . . .
>
> Q. When you got to the store, what happened?
>
> A. . . . I entered the store. And the lady was standing behind – she was standing behind the counter. And I said, "This is a robbery." I said, "Just give me all your money."

(emphasis supplied).

On cross-examination, the State returned to the topic of the "TV shows" Defendant had watched, which led to the objections at issue here:

> Q. . . . [Y]ou testified that that night, you had been drinking alcohol. Is that right?
>
> A. Some, yes.
>
> Q. And you had also been consuming crack cocaine?
>
> A. Yes, ma'am.
>
> Q. And at some point, you decided that you needed more drugs, and that's when you went to the Wilco to commit the robbery?
>
> A. Pretty much.
>
> . . . .
>
> Q. So you're driving around that evening without your shoes on, but your socks are in the car?

A. Yes.

Q. And then you park away from the Wilco, and you put your socks on your hands?

A. Yes.

. . . .

Q. *And you indicated to the members of the jury that you did that because you had watched a lot of TV shows on how to commit crime*?

A. *Yes*.

Q. That was your statement?

A. Yes.

Q. *But you're familiar with how to commit crime, are you not*?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

. . . .

Q. *You are familiar with how to commit crime, are you not*?

A. Crime such as?

Q. *Robbery*.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DEFENDANT]: *I have – I have committed robbery*.

But, no, I'm no expert at it. No.

(emphasis supplied).

We agree with Defendant that the trial court's decision to allow the prosecutor's questions about Defendant's "familiar[ity] with how to commit crime" and, specifically, "[r]obbery," was not supported by N.C. Gen. Stat. § 8C-1, Rule 609. Rule 609 authorizes the cross-examination of any witness about his prior convictions for the purpose of impeachment. *State v. Gallagher*, 101 N.C. App. 208, 211, 398 S.E.2d 491, 492-93 (1990).

The rule generally limits such cross-examination to prior convictions, which are less than ten years old. N.C. Gen. Stat. § 8C-1, Rule 609(b). Prior to admitting convictions older than ten years, the court must make "findings as to the specific facts and circumstances which demonstrate the probative value outweighs the prejudicial effect" of this evidence. *State v. Hensley*, 77 N.C. App. 192, 195, 334 S.E.2d 783, 785 (1985), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986).

Here, the prosecutor did not inquire into Defendant's prior *convictions*, as Rule 609 permits, but into his general knowledge of how to commit robbery. Moreover, the court made no findings to support the admission of evidence about Defendant's robbery convictions, which were more than ten years old.

The mere fact Defendant had previously committed common law robbery was likewise not admissible under Rule 404(b), which provides as follows:

> 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*. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (emphasis supplied).

Although Rule 404(b) allows evidence of prior offenses to prove a defendant's "knowledge," "motive" or "absence of mistake," the State made no attempt to demonstrate any knowledge of or absence of mistake by Defendant that was relevant to the case. Nor did the robbery of WilcoHess on 7 July 2015 demonstrate the type of specialized knowledge that might be imputed to Defendant based on similar prior acts. Moreover, the State made no proffer of "similarity and temporal proximity" between Defendant's prior robberies and the charged offense, as required by Rule 404(b). *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002).

We are also not persuaded by the State's suggestion Defendant opened the door to its cross-examination about his familiarity with "how to commit a robbery." It is true "[t]he law 'wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself.'" *Warren*, 347 N.C. at 317, 492 S.E.2d at 613 (quoting *Albert*, 303 N.C. at 177, 277 S.E.2d at 441). However, Defendant's testimony about "the stupid TV shows that [he] saw about how to commit a robbery" cannot be fairly construed to imply he was otherwise unacquainted with the mechanics of the crime.

We further see no exculpatory value to the implication posited by the State that Defendant learned "how to commit a robbery" by watching television, rather than through past personal experiences. Rather, Defendant's testimony on direct examination detailed his self-diagnosed and allegedly "compulsion and obsession" state of mind, which irrevocably led him to commit the act.

C. Prejudice

Presuming, *arguendo*, the trial court erred by allowing the State's cross-examination of Defendant, Defendant has not shown prejudice under N.C. Gen. Stat. § 15A-1443(a), and certainly not plain error. *See* N.C. Gen. Stat. § 15A-1443(a) (2015) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."); *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Defendant did not dispute his identity as the perpetrator of the robbery, and expressly admitted to five of the six elements of common law robbery. He does not challenge the sufficiency of the State's evidence to support his conviction. At trial, he only challenged the element that he accomplished the theft "by violence or by putting [Ms. Powell] in fear." The primary issue before the jury was whether Defendant was armed when he confronted Ms. Powell. Nothing in the prosecutor's cross examination

of Defendant, or his responses, suggested his previous use of a gun to commit robbery.

Furthermore, the jury received similar evidence of Defendant's prior acts of robbery during Officer Keltner's testimony:

> Q. Corporal Keltner, let's back up a little to when you were questioning the defendant.
>
> What did you ask him, and what did he tell you?
>
> . . . .
>
> [OFFICER KELTNER]: I asked him why he ran from me. At that point he informed me that he ran because he was embarrassed. *And the statement that he made to me was that he was a three-time, four-time loser.*
>
> *I asked him, "For what?"*
>
> *And he said, "For common-law robbery*."
>
> [DEFENSE COUNSEL]: Objection, your Honor.
>
> THE COURT: Overruled.
>
> Members of the jury, evidence of other acts is not admissible to prove the character of a person in order to show that he acted . . . in conformity therewith. . . .

(emphasis added). A recording of this portion of Officer Keltner's interview of Defendant was also published to the jury for purposes of corroboration. Defendant has not challenged the trial court's admission of Officer Keltner's testimony on appeal.

There is no reasonable possibility the jury would have reached a different

verdict, absent the prosecutor's cross-examination of Defendant. *See State v. Badgett*, 361 N.C. 234, 247-48, 644 S.E.2d 206, 214-15 (holding admission of Defendant's prior conviction for manslaughter was not prejudicial at his trial for murder, when the "defendant has failed to demonstrate any reasonable possibility that the jury would have reached a different result had the evidence been excluded"), *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007); *McKoy*, 317 N.C. at 529, 347 S.E.2d at 380.

## IV. Conclusion

Presuming the trial court erred by allowing the State's cross-examination of Defendant regarding his prior convictions, Defendant has failed to show prejudice or plain error. Defendant received a fair trial, free from prejudicial errors he preserved and argued. *It is so ordered*.

NO PREJUDICAL OR PLAIN ERROR.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).