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NO. COA05-332

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Pasquotank County
No. 00CRS340

WENDELL BENNETT

Appeal by defendant from judgment entered 13 July 2004 by Judge Dwight L. Cranford in Pasquotank County Superior Court. Heard in the Court of Appeals 3 November 2005.

Attorney General Roy Cooper, by Assistant Attorney General J. Douglas Hill, for the State.

Everett & Hite, L.L.P., by Stephen D. Kiess, for defendant.

LEVINSON, Judge.

Defendant Wendell Bennett appeals from judgment entered upon his conviction of first degree burglary. We find no error.

Defendant was tried in July 2004 on charges of first degree burglary, kidnaping, and robbery with a dangerous weapon. The State's trial evidence is briefly summarized as follows: Cheryl Hopson testified that in December 1999 she lived in the Hickory Village mobile home park, in Pasquotank County, North Carolina. On the night of 17 December 1999, Hopson was sleeping on her living room couch and was awakened by a knock at the door from a person

identifying himself as "Whop." Hopson opened her front door and an intruder, whom she identified as the defendant, shoved his way into her home. Once inside, the defendant pointed a gun at her and demanded money. Hopson got her purse from a bedroom, and defendant took \$400 cash from her wallet. Before defendant left, he took Hopson's cordless phone and threatened to kill her if she reported the incident to the police. On cross-examination, Hopson testified that in December 1999 she had been dating a man named Glen Mitchell for about six years; that she had recognized defendant from seeing him in local clubs; and that in December 1999 she did not know that defendant and Mitchell had grown up together in New York.

Testimony from two law enforcement officers corroborated Hopson's trial testimony. Mike Liebno testified that in December 1999 he was a patrol officer with the Elizabeth City Police Department. On the night of 17 December 1999 he was dispatched to Hopson's home. Hopson appeared nervous and shaken, and told Liebno that she had been robbed at gunpoint by an intruder. Liebno's recitation of his interview with Hopson generally corroborated Hopson's trial testimony. She also told Liebno that she thought "Whop's" last name might be Bennett. Sergeant John Young of the Elizabeth City Police Department testified that he investigated the robbery reported by Hopson, and that, in his interviews with her, she told him "pretty much the same thing" as her trial testimony. Hopson also told Young that she thought "Whop's" first name began with a 'W' and that his last name might be Bennett. Based on this information, Young assembled a photographic lineup that included

defendant's picture. Hopson immediately picked out defendant's photo as the person who robbed her; Young testified that "in sixteen (16) years of police work, this was the quickest selection that I have had."

The defendant testified that he was 34 years old, and that he had known Hopson's boyfriend, Glen Mitchell, since they were both children. On 17 December 1999 defendant called Mitchell and asked to buy "a large quantity of crack cocaine." Later that night, Hopson drove to defendant's location and gave him the cocaine. Defendant took the cocaine and went inside, promising to return shortly with money to pay for it. Instead, he left by a side door and never paid for the crack cocaine. Defendant denied owning a gun, and denied going to Hopson's house on 17 December 1999 or robbing her.

Following the presentation of evidence, the trial court dismissed the charge of kidnaping. The remaining charges were submitted to the jury, which acquitted defendant of armed robbery, and convicted him of first degree burglary. Upon this conviction, defendant was sentenced to an active prison term of seventy five (75) to ninety eight (98) months' imprisonment. From this judgment and conviction, defendant timely appealed.

Defendant argues first that the trial court erred by denying his motion to dismiss the charge of first degree burglary on the grounds that the evidence was insufficient as a matter of law to submit the case to the jury. We disagree.

Upon a defendant's motion to dismiss for insufficiency of the evidence, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied. The issue of whether the evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Bumgarner*, 147 N.C. App. 409, 412, 556 S.E.2d 324, 327 (2001) (quoting *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982)).

In the instant case, defendant challenges the sufficiency of the evidence of first degree burglary. "The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996) (citing N.C. Gen. Stat. § 14-51 [(2003)]) (other citation omitted).

Defendant concedes the sufficiency of the evidence of the first five elements; accordingly, we address only the sufficiency of the evidence that, when defendant entered Hopson's home, he intended to commit a felony. Hopson testified that as she started to answer her door, the defendant forced his way past her and immediately pointed a gun at her and demanded money. Clearly, this

is substantial evidence that at the time he entered Hopson's home, the defendant intended to commit a felony.

Defendant, however, contends that his acquittal of robbery with a dangerous weapon necessarily means, as a matter of law, that there was insufficient evidence that he intended to commit the offense. Defendant misstates the relationship between evidence of an intent to commit a felony, and evidence of commission of the offense:

Intent . . . must ordinarily be proved by circumstances from which it may be inferred. 'The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house. . . . However, the fact that a felony was actually committed after the house was entered is not necessarily proof of the intent requisite for the crime of burglary. . . . Conversely, actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary.'

State v. Bell, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (citing *State v. Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965), and *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963), and quoting *State v. Tippet*, 270 N.C. 588, 594, 155 S.E. 2d 269, 274 (1967)). Defendant cites no authority for the proposition that his acquittal of robbery with a deadly weapon negates proof of his earlier intent to commit the offense, and we find none. This assignment of error is overruled.

In a related argument, defendant contends that, because he was acquitted of armed robbery, the trial court committed reversible error by entering judgment on defendant's conviction of first

degree burglary. Defendant argues that his conviction of first degree burglary is "inconsistent" with his acquittal of armed robbery. As discussed above, the jury was free to believe that when defendant entered Hopson's home he intended to commit a felony, regardless of their verdict on his actual commission of the offense. See, e.g., *State v. Freeman*, 307 N.C. 445, 451, 298 S.E.2d 376, 380 (1983) (jury's acquittal of defendant on attempted rape charge held not inconsistent with guilty verdict on charge of first degree burglary). This assignment of error is overruled.

Defendant next argues that the trial court erred by excluding evidence of Glen Mitchell's "involvement in the sale of drugs." Defendant cites two occasions during trial when the trial court sustained the prosecutor's objection to defendant's attempted questioning of a witness. However, defendant failed to make an offer of proof to show what the excluded testimony or evidence would have been. "Therefore, defendant has failed to preserve this issue for appellate review under the standard set forth in N.C. Gen. Stat. § 8C-1, Rule 103(a)(2)." *State v. Williams*, 355 N.C. 501, 534, 565 S.E.2d 609, 629 (2002). This assignment of error is overruled.

Defendant argues next that the trial court erred by instructing the jury that the defendant was presumed innocent "until" the jury was convinced of his guilt, rather than "unless"

it was convinced. We conclude, however, that defendant failed to preserve this issue for review.

"[D]efendant did not object to the instructions as given at trial and, thus, must satisfy the plain error standard of review. To demonstrate plain error, a defendant 'must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict.'" *State v. Roache*, 358 N.C. 243, 305, 595 S.E.2d 381, 420-21 (2004) (quoting *State v. Barden*, 356 N.C. 316, 383, 572 S.E.2d 108, 150 (2002) (internal quotation marks omitted)). Defendant assigned plain error to the trial court's instructions in his assignment of error number five (5). However, he failed to present any argument on plain error in his appellate brief, and thus waived review of this issue:

Although defendant alleges plain error in the . . . [assignment of error] he provides no explanation, analysis or specific contention in his brief supporting the bare assertion that the claimed error is so fundamental that justice could not have been done. . . . Defendant's empty assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule. By simply relying on the use of the words 'plain error' as the extent of his argument in support of plain error, defendant has effectively failed to argue plain error and has thereby waived appellate review.

State v. Cummings, 352 N.C. 600, 636-37, 536 S.E.2d 36, 61 (2000).

This assignment of error is overruled.

Defendant also argues that the trial court erred by denying his request for an instruction limiting the jury's consideration of evidence of defendant's involvement with illegal drugs. Defendant testified that on 17 December 1999 he asked Mitchell to sell him a "large quantity of crack cocaine," and later that night took the cocaine without paying for it. Defendant offered this evidence as a possible motive for Hopson (Mitchell's girlfriend) to invent the charges against him. He asked for a limiting instruction informing the jury that evidence of his drug use and drug theft could not be considered as evidence of his guilt of the charged offenses, and argues on appeal that the trial court's denial of his request was reversible error.

At trial, defendant failed to raise any issue pertaining to the constitutionality of the court's ruling on his motion for a limiting instruction. However, he asserts on appeal that the trial court's ruling "deprived him of his constitutional right to a fair trial[.]" "Constitutional 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) (citation omitted). Thus, we do not address defendant's constitutional claim.

Under N.C. Gen. Stat. § 15A-1443(a) (2003), "[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. The burden of showing such prejudice under this subsection is upon the defendant." In the instant case, the defendant fails to argue on appeal that the trial court's denial of his request was prejudicial as defined by N.C. Gen. Stat. § 15A-1443. We conclude that, even assuming *arguendo* that the court's ruling was in error, the defendant failed to meet the burden of demonstrating prejudice. This assignment of error is overruled.

For the reasons discussed above, we conclude that the defendant had a fair trial, free of reversible error.

No error.

Judges McCULLOUGH and ELMORE concur.

Report per rule 30(e).