

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1274

Filed: 20 August 2019

Durham County, No. 16 CRS 2673–74

STATE OF NORTH CAROLINA

v.

WILLIAM ALLAN MILES

Appeal by defendant from judgment entered 18 September 2017 by Judge James K. Roberson in Durham County Superior Court. Heard in the Court of Appeals 22 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Lewis W. Lamar, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant-appellant.

BRYANT, Judge.

Where the evidence, when taken in the light most favorable to the State, was substantial to show defendant committed the charged offenses, the trial court did not err in denying defendant's motion to dismiss for identity theft and conspiracy to commit robbery with a dangerous weapon. Where the testimony of a law enforcement officer was proper, the trial court did not err in admitting the testimony. Where the trial court properly informed the jury on the identity theft charge, the trial court did not err in giving the jury instruction.

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On 6 September 2016, defendant William Allan Miles was indicted for attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, assault with a deadly weapon with intent to kill, and identity theft. The matter was tried on 11 September 2017 before the Honorable James K. Roberson, Judge presiding.

The State's evidence tended to show that at approximately 4:00 a.m. on 29 July 2016, Jacob Badders was asleep in his home on Cole Mill Road when he noticed lights shining into his window and heard a car horn "honking" in his driveway. Badders went outside and encountered a woman who asked to use his phone saying that she had gotten into a fight with her father. Badders told her to leave, and he went inside to call the police. As he started looking for his cellphone, Badders's girlfriend told him they had left their phones in his car. Badders went outside to retrieve their phones, taking his gun with him. When he reached his car, a male approached him with a gun and said, "Don't f**kin' move." The two men exchanged gunfire, and the assailant ran away. Badders called the police who arrived at the scene minutes later.

Officer Lauren McFaul-Brow and Officer J.E. Harris, of the Durham County Police Department, arrived at Badders's house and interviewed Badders and his neighbor John Lobaldo. Badders informed Officer McFaul-Brow that he used "snake shot" as ammunition, which would leave a distinctive wound on his assailant. Later during her investigation, Officer McFaul-Brow received information that someone

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had come into Duke Regional Hospital—approximately 10 minutes from Badders’s house—with a distinctive wound matching the description of the snake shot described by Badders.

Officer Harris interviewed Lobaldo, who had surveillance cameras around his house, and reviewed the surveillance footage. Lobaldo stated that he noticed two cars enter a church parking lot near the intersection of Cole Mill Road. He saw three men get out of one of the cars and run across Cole Mill Road to the back of Badders’s house. One of the cars, driven by a white female, left the church parking lot and drove to Badders’s house. The car parked in Badders’s driveway and “honked” the horn three times until Badders came outside. Lobaldo heard the shooting and saw the assailant, along with two other men, get into one of the cars as they fled from Badders’s house. The assailant seen leaving Badders’s house was wearing a white t-shirt, jeans, tennis shoes, and a white toboggan or bandana on his head. Lobaldo stated he could tell the assailant was hurt by the way he was running.

The assailant—later identified as defendant—arrived at the hospital for treatment of his gunshot wounds. When defendant was asked for his name, he responded with a name, date of birth, and address other than his own. He gave the name “Jerel Antonio Thompson” and, as a result, he was provided a hospital tag with that name and corresponding date of birth. Defendant’s clothing—a white t-shirt and jeans—was taken into evidence. Defendant later revealed his correct name and

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other identifying information and told an investigating officer that he started using the identity of Jerel Thompson because “it kind of matched him.”

At trial, defendant moved to dismiss charges of attempted robbery with a dangerous weapon, felony conspiracy (to commit robbery with a dangerous weapon), assault with a deadly weapon with intent to kill, and identity theft. The trial court denied defendant’s motions to dismiss.

Defendant was found guilty by jury of conspiracy to commit robbery with a dangerous weapon and identity theft. After the trial court declared a mistrial on the remaining charges, the State dismissed those charges. Defendant was sentenced to 29 to 47 months of imprisonment for conspiracy to commit robbery with a dangerous weapon and a consecutive sentence of 12 to 24 months for identity theft. Defendant appealed.

On appeal, defendant argues the trial court erred by: I) failing to dismiss the charges of conspiracy to commit robbery with a dangerous weapon and identity theft, II) permitting improper opinion testimony from a lay witness, and III) instructing the jury on identity theft.

I

Defendant argues that the trial court erred by denying his motion to dismiss because the State did not present substantial evidence to support the charges against

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him—identity theft and conspiracy to commit robbery with a dangerous weapon. Specifically, defendant argues the State neither proved that he agreed to commit robbery or that he used identifying information of another person. We disagree.

The standard of review for this Court to review the trial court’s denial of a motion to dismiss is *de novo*. *State v. Woodard*, 210 N.C. App. 725, 730, 709 S.E.2d 430, 434 (2011). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

“Upon defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation and quotation marks omitted). “[T]he trial court should only be concerned that the evidence is sufficient to get the case to the jury,” as opposed to examining the weight of the evidence. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State

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the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

In the instant case, defendant challenges his convictions for identity theft and conspiracy to commit robbery with a dangerous weapon. We address each claim in order.

Identity Theft

Defendant argues the State did not present evidence of “identifying information” because he only provided another person’s name, date of birth, and address. Defendant concedes that he did not preserve this issue for appellate review due to his failure to raise the issue before the trial court.¹ *See* N.C.R. App. P. 10(a)(1) (2019) (“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling. . . [i]t is also necessary for the complaining party to obtain a ruling [from the trial court] upon the party’s request, objection, or motion.”).

Acknowledging his failure to preserve this issue, defendant asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to consider the merits of his argument. *See* N.C.R. App. P. 2 (2019) (Rule 2 provides, in pertinent part, that “[t]o prevent manifest injustice to a party, . . . either court of the appellate

¹ At trial, defendant argued that he did not *knowingly* use the name, date of birth, and address of Jerel Thompson because he was given pain medicine at the hospital. However, that argument was not presented on appeal.

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division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]”). However, this Court will invoke Rule 2 only in exceptional circumstances or to prevent manifest injustice, and defendant has not demonstrated such an exceptional circumstance exists to warrant invocation of the rule. Thus, we decline to exercise our discretion to invoke Rule 2 to address defendant’s argument regarding the identity theft charge.²

Conspiracy to Commit Robbery with a Dangerous Weapon

Defendant contends the State did not present substantial evidence to withstand a motion to dismiss for conspiracy to commit robbery with a dangerous weapon. We disagree.

The State’s successful assertion of a charge of criminal conspiracy requires proof of an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. The State need not prove an express agreement. Evidence tending to establish a mutual, implied understanding will suffice to withstand a defendant’s motion to dismiss.

State v. Boyd, 209 N.C. App. 418, 427, 705 S.E.2d 774, 781 (2011) (citation and quotation marks omitted).

² As an alternative argument, defendant contends his trial counsel provided ineffective assistance by failing to make a general motion to dismiss and preserve the identity theft claim. While defendant’s issue does not rise to the level that would require us to suspend the rules, as a practical matter, we analyze the identity theft statute in our review of his properly preserved argument in Issue III, regarding jury instructions. Thus, as noted *infra*, we see no prejudice from trial counsel’s actions and dismiss defendant’s IAC argument.

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“The proof of a conspiracy may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.” *State v. Lawrence*, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000) (citation and quotation marks omitted). Moreover, “[i]n order for a defendant to be found guilty of the substantive crime of conspiracy, the State must prove there was an agreement to perform every element of the underlying offense.” *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010).

Here, the evidence presented showed defendant was one of at least four people who occupied two cars that were present at the scene of the crime. Two cars drove into a parking lot of a church located in the victim’s neighborhood in the early morning. One car with three male occupants parked at the church parking lot. The other car had a female occupant who then drove into Badders’s driveway and initiated contact with Badders by honking her car horn. Badders instructed the female to leave his property, and soon thereafter, Badders was approached by a man—later identified as defendant—with a loaded weapon. After the two men exchanged gunfire, three men including defendant were seen running away from Badders’s house. Badders’s assailant was seen getting back into the car at the parking lot. When viewing all the evidence in the light most favorable to the State, a logical inference to be drawn is there was a meeting of minds to form an agreement to commit

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robbery. *See State v. Brewton*, 173 N.C. App. 323, 329–30, 618 S.E.2d 850, 855–56 (2005) (holding that an agreement may be established by circumstantial evidence).

Additionally, the State presented evidence satisfying the essential elements of the underlying offense: robbery with a dangerous weapon. *See State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (2003) (stating that a defendant is guilty of robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87 where the defendant commits: “(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, [and] (3) whereby the life of a person is endangered or threatened” (citation omitted)).

The evidence shows that defendant approached Badders from behind while Badders was retrieving his phone from his car in the driveway of his house. Defendant raised a loaded weapon towards Badders, threatening him by saying, “don’t f**kin’ move.” Badders reacted by drawing his weapon, and they exchanged gunfire. Defendant’s actions accompanied by his words were substantial evidence that defendant manifested the intent to rob Badders, and his arrival at Badders’ house with the weapon was an overt act to carry out his intentions. *See State v. Davis*, 340 N.C. 1, 13, 455 S.E.2d 627, 632 (1995) (holding that the defendant’s actions were substantial evidence of attempted armed robbery where he drew his pistol and stated

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to the victim, “Buddy, don’t even try it,” even without the demand for money or property).

Accordingly, as the State presented substantial evidence that defendant conspired with several others to commit robbery with a dangerous weapon, we overrule defendant’s argument.

II

Next, defendant argues the trial court allowed improper witness testimony from Officer Harris into evidence. Specifically, defendant argues that the testimony of Officer Harris, as to the modus operandi of the crime and similar incidents within the area, was inadmissible opinion testimony. Having not objected to the testimony at trial, defendant now urges that Harris’s testimony constituted plain error. We disagree.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4) (2019).

“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

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probable impact on the jury's finding that the defendant was guilty." *Id.* (citation and quotation marks omitted).

Rule 404(b) of the North Carolina Rules of Evidence governs the admissibility of relevant evidence of other crimes, wrongs, or acts.

This rule is subject to but one exception requiring exclusion [of the evidence] if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. Thus, although the evidence of the defendant's other crimes may tend to show his inclination to commit them, the evidence is admissible under Rule 404(b), as long as it is also relevant for some other proper purpose. *Such other purposes include establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.*

State v. Allred, 131 N.C. App. 11, 17–18, 505 S.E.2d 153, 157 (1998) (alterations in original) (emphasis added) (internal citations and quotation marks omitted).

Here, Officer Harris testified, without objection, during direct examination, to the following when asked specifically about the motive behind the sequence of events:

[THE STATE]: Tell me about [the motive of the crime or the MO]. What does an "MO" mean?

[OFFICER HARRIS]: Modus operandi, how a criminal operates.

[THE STATE]: And can you describe for the jury what that is?

[OFFICER HARRIS]: It's the way a person particularly commits a crime. With this particular one, it seemed that the suspects would use a female in a car by herself to lure out the victim and easy access into the home. Once the

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female would get access to the home, the other two suspects or however many suspects would use that opportunity to get entry to the home, take command of it and to commit an armed robbery.

[THE STATE]: Have you seen this particular MO before in that area?

[OFFICER HARRIS]: We have had a number of similar incidents within the area in the city in those -- in that particular time during the summer.

Officer Harris further testified that he became aware of similar incidents occurring in the area after reviewing the reports filed by other officers before his shift.

Defendant's contention that the aforementioned testimony is somehow improper opinion testimony because Officer Harris gave "his opinion [that] the suspects were guilty of conspiracy" is a mischaracterization of Officer Harris's testimony. Contrary to defendant's assertions in his brief, Officer Harris never testified it was his opinion that the suspects were guilty of conspiracy. Officer Harris testified to his understanding of what occurred on the night in question, after interviewing a witness on the scene and reviewing the surveillance video, and merely testified, without objection, to the *modus operandi* defendant used. Our rules of evidence allow a lay witness to testify about details "helpful to the fact-finder in presenting a clear understanding of [the] investigative process" as long as such details are rational to the lay witness's perception and experience. *State v. O'Hanlan*, 153 N.C. App. 546, 562–63, 570 S.E.2d 751, 761–62 (2002).

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Moreover, as defendant has not demonstrated it is probable that the jury would have reached a different result—given that the State presented substantial evidence supporting the charge of criminal conspiracy—we conclude the trial court did not commit plain error by admitting the testimony.

III

Finally, defendant argues the trial court erred by instructing the jury on the identity theft charge—specifically as to the element of “identifying information”—in which he contends the instruction was “contrary to existing laws.” After careful consideration, we disagree.

“[Arguments] challenging the trial court’s decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). “It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence.” *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). “Failure to instruct upon all substantive or material features of the crime charged is error.” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

Section 14-113.20 of our General Statutes, provides, in pertinent part, that identity theft exists when: “A person . . . knowingly obtains, possesses, or *uses* identifying information of another person . . . with the intent to fraudulently

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represent that the person is the other person . . . *for the purpose of avoiding legal consequences[.]*” N.C. Gen. Stat. § 14-113.20(a) (2017) (emphasis added).

The General Assembly enumerated fourteen examples of “identifying information”:

The term “identifying information” as used in this Article includes the following:

- (1) Social security or employer taxpayer identification numbers.
- (2) Driver’s license, State identification card, or passport numbers.
- (3) Checking account numbers.
- (4) Savings account numbers.
- (5) Credit card numbers.
- (6) Debit card numbers.
- (7) Personal Identification (PIN) Code as defined in G.S. 14-113.8(6).
- (8) Electronic identification numbers, electronic mail names or addresses, Internet account numbers, or Internet identification names.
- (9) Digital signatures.
- (10) Any other numbers or information that can be used to access a person’s financial resources.
- (11) Biometric data.
- (12) Fingerprints.

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(13) Passwords.

(14) Parent's legal surname prior to marriage.

Id. § 14-113.20(b).

On its face, unlike other statutes criminalizing fraudulent crimes involving identities, the statute in question specifically includes the word “use” in reference to making use of another’s information to derive a benefit or escape legal consequences. *Compare id., with* N.C. Gen. Stat. § 14-100.1 (stating that it is unlawful for any person to knowingly *possess, manufacture, or obtain* a false or fraudulent form of identification (emphasis added)), *and* N.C. Gen. Stat. § 14-113.20A (stating it is unlawful for any person to knowingly *sell, transfer, or purchase* identifying information of another person (emphasis added)). Additionally, the General Assembly amended section 14-113.20 to its current version to expand the conduct prohibited by statute and impose a greater punishment for violating this statute.³

Defendant contends that the General Assembly intended for this list to be “distinctive and exclusive” to the aforementioned examples. However, the statute itself disproves defendant’s contention of exclusivity by usage of the term “includes” before listing the fourteen examples. *See id.* § 14-113.20(b) (“The term ‘identifying

³ Section 14-113.20 was also amended to remove “financial” from the original enactment of the identity theft statute. *See* N.C. Sess. Law 2005-414, § 6 (Sept. 21, 2005); *see also* N.C. Gov. Mess., (Sept. 21, 2005) (referring to Sen. Daniel Clodfelter’s remarks as a sponsor of the Bill intended to create “comprehensive” legislation equipped with “tools to fight this crime” as “identity theft is one of the fastest-growing crimes in our state right now”).

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information’ as used in this Article *includes* the following [examples]” (emphasis added)). We consider the purpose behind enacting the identity theft statute was to protect against *using* misrepresentation to achieve a benefit. Where a person presents himself to be another person and then *uses* that identification to obtain a favorable result, such actions were intended to be covered under N.C. Gen. Stat. § 14-113.20 to support identity theft convictions. Thus, we reject the notion that a conviction for identity theft is restricted to just the fourteen examples and the General Assembly intended for the list of these examples to be exclusive.

Moreover, *assuming arguendo*, that we were to view the list as exclusive, defendant’s conduct would fall under subsection (10)—“[a]ny other numbers or information that can be used to access a person’s financial resources[.]” Another person’s name, date of birth, and address are possible forms of identifying information where a defendant, like defendant in the instant case, uses the information for the purposes of escaping arrest or other legal consequences and possibly to receive hospital services for his injuries.⁴

⁴ We also consider the federal identity theft statute as persuasive authority, which allows federal prosecution of a person who “knowingly transfers, possesses, or uses, without lawful authority, a *means of identification* of another person with the intent to commit . . . any unlawful activity[.]” See 18 U.S.C. § 1028(a)(7) (2017) (“Fraud and related activity in connection with identification documents, authentication features, and information”). By definition, “means of identification” includes a name and date of birth “alone or in conjunction with any other information, to identify a specific individual.” *Id.* § 1028(d)(7)(A).

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A warrant for defendant's arrest was issued under the name Jerel Thompson. Defendant's actual name and identifying information were not discovered and obtained until well after defendant was in custody. Defendant was indicted under the identity theft statute for using the name, date of birth, and address of Jerel Thompson while an investigation was underway regarding the events, including the shooting, that had taken place at Badders's residence. Therefore, such actions embody what the General Assembly intended for the identity theft statute to protect against.

At trial, the trial court used the North Carolina Pattern Jury Instructions for identity theft and instructed the jury as follows:

The defendant has been charged with identity theft.

For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.

First, that the defendant used personal identifying information of another person. A person's name, date of birth, and address would be personal identifying information.

And, second, that the defendant acted knowingly and with the intent to fraudulently – fraudulently represent that the defendant was that other person for the purpose of avoiding legal consequences.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant used personal identifying information of another person and that the defendant did so knowingly with the intent to fraudulently represent that the defendant was that other person for the purpose of avoiding legal consequences, it

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would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The Pattern Jury Instruction provides:

For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.

First, that the defendant [obtained] [possessed] [used] personal identifying information of another person. (Name type of identifying information, e.g., social security number) would be personal identifying information.

And Second, that the defendant acted knowingly and with the intent to fraudulently represent that the defendant was that other person for the purpose of [making [financial] [credit] transactions in the other person's name] [obtaining anything of [value] [benefit] [advantage]] [avoiding legal consequences].

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant [obtained] [possessed] [used] personal identifying information of another person and that the defendant did so knowingly, with the intent to fraudulently represent that the defendant was that other person for the purpose of [making [financial] [credit] transactions in that other person's name] [obtaining anything of [value] [benefit] [advantage]] [avoiding legal consequences], it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

N.C.P.I.—Crim. 219B.80 (2018).

Here, the trial court gave accurate jury instructions in accordance with the statute and nearly verbatim to the approved pattern jury instructions for identity

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theft. “Jury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law,” and this Court has recognized “that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions.” *State v. Ballard*, 193 N.C. App. 551, 555, 668 S.E.2d 78, 81 (2008) (citation and quotation marks omitted). Having already considered and determined that a person’s name, date of birth, and address constitutes identifying information under the statute, we reject defendant’s contention that the trial court gave a jury instruction as to identifying information that was “contrary to existing law.” Accordingly, we find no error in the trial court’s jury instruction on identity theft.

NO ERROR.

Judges TYSON and ZACHARY concur.