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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-867

Filed: 15 December 2020

Wake County, No. 17 CRS 211984

STATE OF NORTH CAROLINA

v.

ABDUL HANEEF ABDULLAH, Defendant.

Appeal by Defendant from judgment entered 15 November 2018 by Judge Carl R. Fox in Superior Court, Wake County. Heard in the Court of Appeals 3 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State.

Anne Bleyman, for Defendant-Appellant.

McGEE, Chief Judge.

Abdul Haneef Abdullah (“Defendant”) appeals from judgment after conviction of robbery with a dangerous weapon. On appeal, Defendant argues the trial court erred by instructing the jury that a knife is a dangerous weapon as a matter of law, and Defendant’s conviction for robbery with a dangerous weapon must be vacated. We disagree.

I. Factual and Procedural History

Raleigh taxi driver Abdel Cadel Diane (“Mr. Diane”) received a text to pick up a fare off Calvary Drive in North Raleigh the afternoon of 17 March 2017. When he arrived at the address, which was an area containing several businesses behind an Aldi grocery store, no one was waiting. He called the fare’s phone number, which the dispatcher had provided him. The person who answered told him to wait, that they were nearby and would be there in a few minutes. Shortly thereafter, Mr. Diane saw two men approach Mr. Diane’s taxi. They told him they called for the taxi and they wanted to go to Western Boulevard. The men got in the back seat of the taxi and Mr. Diane drove them to Western Boulevard.

When they arrived at Western Boulevard, Mr. Diane asked where they wanted to be dropped off. The men told him to keep driving and they would let him know. When they arrived at the intersection of Avent Ferry Road and Western Boulevard, the men told him to pull into the parking lot of the University Inn. Once there, they directed him to park at the far end of the parking lot, away from the building.

As Mr. Diane stopped at the end of parking lot, the man seated directly behind him (later identified as Defendant) suddenly shoved a knife against the front of Mr. Diane’s throat and he could see part of the knife, including the edge. He saw that the knife was silver and had a long “V” shape. As Mr. Diane turned to look behind him, his hand was cut by a knife being punched towards him by the man in the passenger’s side of the back seat. Mr. Diane said the knife was medium sized and metallic in

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color. The man sitting behind Mr. Diane told Mr. Diane to give him all of his money or they would hurt him. Mr. Diane emptied his pockets and gave him the money. The man then told Mr. Diane to also give him his phone. Once Mr. Diane gave the man in the back seat the phone, the two men jumped from the taxi and started running. Seconds later, Mr. Diane also got out of the taxi. Bystanders, who had seen the two men running from the scene asked Mr. Diane what had happened. He told them he had been robbed and to be careful because the robbers had knives. One of the bystanders called 911.

As part of their investigation, law enforcement obtained a surveillance video from the Aldi store which showed the two men Mr. Diane had picked up coming around the back of the store. After viewing the video and tracing the phone number that Mr. Diane used to call the fare, police identified Tyrin Stubbs as one of the suspects. After his arrest, Stubbs told police that Defendant, was the other man with him in the taxi. Mr. Diane positively identified Defendant as the man who was seated behind him and held the knife to his throat and he identified Stubbs as the man on the passenger side.

At trial, Defendant presented no evidence. The jury found Defendant guilty of robbery with a dangerous weapon and the trial court imposed an active sentence of 66 to 92 months.

II. Analysis

In Defendant's only argument on appeal, he contends the trial court erred by instructing the jury, pursuant to the charge of robbery with a dangerous weapon, that a knife is a dangerous weapon as a matter of law. We first note that Defendant failed to properly object to the jury instruction. Pursuant to Rule 10(a)(2) of the North Carolina Rules of Appellate Procedure, "[a] party may not make any portion of the jury charge . . . the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection." N.C.R. App. P. 10(a)(2). Defendant made no such objection, and therefore waived regular appellate review of this issue.

During the charge conference, the prosecutor requested the trial court to instruct the jury, as an addition to the robbery with a dangerous weapon standard pattern jury instruction, that a knife is a dangerous weapon. When asked to respond, counsel for Defendant stated:

"Well, Judge, I can't speak to what exactly the case law might be on that at this point. I mean, obviously, the statute is that a firearm or other deadly weapon. And kind of anything can be a deadly weapon. And just because something's a knife or a butter knife doesn't necessarily mean it's a deadly weapon. Anything can be, it's just a question of the manner it's used."

The trial court then said: "Let me take a look at that over the recess." After the recess, both the trial court and the prosecutor stated their research indicated that a knife is

a dangerous or deadly weapon as a matter of law. Defendant did not object, again failing to preserve this issue for regular appellate review. N.C.R. App. P. 10(a)(2).

The trial court later presented counsel with printed copies of the instructions he planned to give to the jury. The prosecutor suggested corrections to some typos and asked that the order of some of the instructions be changed, and the trial court agreed. The trial court asked if there was anything else before they brought the jury back in, and defense counsel replied: “No, Your Honor.” Once the jury instructions were given and the jurors left the courtroom, the trial court asked whether there were any requests for corrections or additions to the instructions by Defendant. Defendant’s counsel again replied: “No, Your Honor, thank you.”

Once the trial court decided to instruct the jury that a knife is a dangerous weapon as a matter of law, Defendant had several opportunities to object and failed to do so. Because Defendant failed to object to the instruction and state the grounds for the objection, as required by Rule 10(a)(2), this issue was not properly preserved for appeal. N.C. R. App. P. 10(a)(2).

Nevertheless, Defendant requests that if this Court finds the issue was not properly preserved, that we review the instruction for plain error pursuant to Rule 10(a)(4), which states: “In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . 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); *see also State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (court may review unpreserved instructional and evidentiary errors in criminal cases for plain error when the defendant specifically argues plain error on appeal); *see also State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 60 (2000).

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Turner, 237 N.C. App. 388, 391, 765 S.E.2d 77, 81 (2014), (*quoting State v. Lawrence* at 516-17, 723 S.E.2d at 333), *disc. rev. denied*, 368 N.C. 245, 768 S.E.2d 563 (2015)). In addition, it is “[D]efendant [*who*] has the burden of showing . . . (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.” *Cummings*, 352 N.C. at 636, 536 S.E.2d at 61 (emphasis in original) (citation omitted). We do not find plain error under the facts of this case.

As this Court stated in *State v. Smallwood*, “the case law regarding knives as dangerous weapons gives rise to a certain amount of confusion.” *State v. Smallwood*,

78 N.C. App. 365, 368, 337 S.E.2d 143, 144 (1985). While there are cases holding that whether a knife is a dangerous weapon is a question of law to be decided by the trial court, there are also cases holding that whether a knife is a dangerous weapon is a question of fact for the jury. *See Smallwood*, 78 N.C. App. at 368-369, 337 S.E.2d at 144-145. The difference seems to be whether the knife in question was presented at trial, whether it was described in sufficient detail, how the alleged knife was used, and whether the victim suffered injury or death. *Id.* This Court also considers whether the evidence was “equivocal [] as to how the robbery was carried out.” *Id.* at 371, 337 S.E.2d at 146.

Assuming without deciding that the instruction that a knife is a dangerous weapon as a matter of law was erroneous in this case, Defendant cannot show a fundamental error, that “the [alleged] instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.” *Turner*, 237 N.C. App. at 391, 765 S.E.2d at 81. In this case, Mr. Diane testified he was positive that both men who robbed him had knives. He saw part of the knife Defendant held against his throat. He saw the edge and knew it was a knife. He testified it was silver and had a long “V” shape. The fact that the knife Mr. Diane described was held against his throat is particularly relevant as, generally, any real knife held against a person’s throat may be put to deadly purpose. Mr. Diane also described the knife held by Stubbs as being medium sized and metallic in color. Mr. Diane testified the robbers threatened to

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hurt him if he did not give them his money, and he was actually cut by Stubb's knife, proving its sharpness. Mr. Diane testified he was scared and he warned bystanders not to chase the robbers because the robbers were armed with knives.

“When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed.” *State v. Spellman*, 167 N.C. App. 374, 390, 605 S.E.2d 696, 706 (2004), (*quoting State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985), *appeal dismissed and disc. rev. denied*, 359 N.C. 325 (2005)) (emphasis in original). This presumption may be rebutted if the defendant brings forth evidence, or there is evidence presented by the State, that the victim's life was not endangered or threatened. *Id.*

Defendant did not present evidence at trial. The only evidence presented by the State which could conceivably rebut a presumption that the knives were dangerous weapons was testimony by Mr. Diane on cross-examination that he could not see or describe what type of knife Defendant held to his throat, but that it was “maybe a chicken or butter knife.” Viewing the evidence in its entirety, we hold that this testimony is insufficient for Defendant to meet his burden of proving any error

in instructing the jury “had a probable impact on the jury’s finding that the defendant was guilty.” *Turner*, 237 N.C. App. at 391, 765 S.E.2d at 81.

Further, even assuming, *arguendo*, we were to consider Mr. Diane’s testimonial evidence sufficient to rebut the presumption that Defendant’s knife was a deadly weapon, it would have no effect. There was no evidence presented to rebut the presumption that the knife used by Stubbs – which was described as a medium sized knife and which caused a small cut on Mr. Diane’s hand – was anything other than the dangerous weapon it appeared to be.

In this case, sufficient evidence supports the State’s theory that Defendant was guilty by acting in concert with Stubbs, and to justify the trial court’s instruction of the jury on acting in concert. Thus, Defendant would also be guilty of any crime committed by Stubbs. *See State v. Holloway*, 250 N.C. App. 674, 685, 793 S.E.2d 766, 774 (2016) (not necessary for defendant to do any particular act constituting part of a crime to be convicted under acting in concert if present at the scene of the crime and evidence shows he acted together with another who did the acts necessary to constitute the crime, pursuant to a common plan or purpose to commit the crime), *disc. rev. denied*, 369 N.C. 571, 798 S.E.2d 525 (2017).

Even beyond the testimony regarding the knife wielded by Defendant, the un rebutted evidence showed Mr. Diane was threatened and cut by Stubbs with what

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appeared to be a dangerous knife.¹ Under these facts and an the acting in concert theory, even if the trial court’s jury instruction that a knife is a dangerous weapon as a matter of law could be considered erroneous, Defendant cannot show a “miscarriage of justice” or a “probable impact on the jury’s finding that the defendant was guilty.” In light of the “heavy burden of plain error analysis” that a defendant is required to meet, *Cummings*, 352 N.C. at 616, 536 S.E.2d at 49, we hold that the evidence sufficiently supports the conclusion that Defendant acted in concert with Stubbs in committing the charged offense, and that Stubbs’ knife was a deadly weapon. Defendant has not met his burden of showing plain error. *Id.*

NO PLAIN ERROR.

Judges TYSON and YOUNG concur.

Report per Rule 30(e).

¹ We note that a copy of the police investigation report is included in the record on appeal. The report states Mr. Diane told investigators the knife held by Stubbs was a kitchen or steak knife, and the knife blade held by Defendant went all the way across Mr. Diane’s throat. The detective who prepared the report also testified to this at trial. Although a steak or kitchen knife is a dangerous weapon *per se*, see *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981), the investigation report was never introduced into evidence and the trial court instructed the jury they were to consider out-of-court statements made by witnesses for corroboration of trial testimony only, not for the truth. Therefore, we do not consider the report in our decision.