NO. COA09-96

NORTH CAROLINA COURT OF APPEALS

Filed: 6 October 2009

STATE OF NORTH CAROLINA

v. New Hanover County
Nos. 07 CRS 9937-38,
KEVIN TREMELL GREEN 07 CRS 55957

Appeal by defendant from judgments entered 14 February 2008 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 19 August 2009.

Attorney General Roy Copper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Reita P. Pendry, for defendant-appellant.

STEELMAN, Judge.

Where the State presented substantial evidence to support every element of robbery with a dangerous weapon and possession of a firearm by a felon, the trial court properly denied defendant's motions to dismiss. Where defendant has failed to show that any remarks in the State's closing argument were improper, the trial court did not abuse its discretion by overruling defense counsel's objections. Where sufficient evidence was presented at trial tending to show that defendant was present at the scene of the crime and acted together with another pursuant to a common plan or

purpose to commit the crime, the trial court did not err by instructing the jury on the theory of acting in concert.

I. Factual and Procedural Background

At approximately 8:00 a.m. on 3 May 2007, Kenneth Lofton (Kenneth) and Timothy Brown (Timothy) began to clean out an abandoned apartment located on Maides Avenue in Wilmington, North Carolina on behalf of a real estate agent. Roger Lofton (Roger), Kenneth's disabled[1] brother, accompanied Kenneth to work that morning. At approximately 10:00 a.m., a group of individuals gathered across the street next to an apartment complex. The group consisted of three females and three males. One of the individuals was identified as Kevin Green (defendant).

While Kenneth and Timothy loaded up their truck with furniture and mattresses from inside the apartment, defendant positioned himself behind them and paced back and forth while he talked on a cell phone. Roger was raking leaves in an area approximately twenty-five feet away from the truck. At 11:00 a.m., Kenneth heard one of the females in the group yell, "Work it. Work it." As Kenneth was loading the last mattress onto the truck, defendant spun Kenneth around, raised a pistol to his forehead, and stated, "Big man, don't move." Kenneth grabbed defendant's collar and pulled the jewelry off of his neck. Defendant fired a shot near Kenneth's leg and the two fell to the ground. This struggle lasted

[1]The record does not identify Roger's disability, only that he has seizures.

around five minutes. At that same time, another unidentified male from the group attacked Roger. Kenneth heard Roger yell and heard another gunshot. Defendant jumped up, retrieved his jewelry, ran to where Roger was located, and pointed his pistol at him. Defendant then helped the unidentified male kick Roger and take $200.00 from his wallet. Defendant and the unidentified male fled the scene together in a gray Buick.

Wilmington police officers arrived shortly thereafter and collected the following evidence from the area: (1) the cell phone that Kenneth stated was used by defendant prior to the attack; (2) a .40 caliber shell casing lying on the sidewalk; and (3) a 9 millimeter shell casing located in the area where Roger had been working. Kenneth later identified defendant as his attacker in a police photo lineup.

Defendant was arrested and was indicted on 9 July 2007 for robbery with a dangerous weapon, attempted robbery with a dangerous weapon, possession of a firearm by a felon, and habitual felon status. The State later dismissed the charge of attempted robbery with a dangerous weapon. On 8 February 2008, the jury found defendant guilty of robbery with a dangerous weapon and possession of a firearm by a felon. Defendant pled guilty to habitual felon status. The trial court found defendant to be a prior record level III for felony sentencing purposes and imposed two consecutive active prison terms of 93 to 121 months. Defendant was also ordered to pay Roger restitution in the amount of $220.00. Defendant appeals.

II. Motions to Dismiss

In his first and second arguments, defendant contends the trial court erred by denying his motions to dismiss the charges of robbery with a dangerous weapon and possession of a firearm by a felon based upon the insufficiency of the evidence.[2] We disagree.

A. Standard of Review

"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) (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). When reviewing a trial court's ruling on a motion to dismiss, the evidence must be viewed "in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn [therefrom]." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387–88 (1984) (citation omitted).

B. Analysis

1. Robbery with a Dangerous Weapon

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[2]In defendant's third and fourth arguments, he contends the trial court erred by submitting these charges to the jury. Because these portions of his brief reiterate the same argument as is discussed herein, it is not necessary to repeat our analysis.

The essential elements of robbery with a dangerous weapon are: "(1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement or means'; and (3) danger or threat to the life of the victim." *State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978) (citation omitted); *see also* N.C. Gen. Stat. § 14-87 (2007). Defendant's argument is two-fold.[3]

First, defendant contends that there was no threat to Kenneth or Roger's life and that no serious harm was inflicted on either of them. Defendant cites that fact that while defendant and Kenneth struggled, defendant actually told Kenneth that he was not going to kill him. However, this Court has held that "a jury could reasonably infer that aiming a gun at someone and demanding money is sufficient evidence to show both that defendant threatened to use a firearm and that the victim's life was endangered and threatened." *State v. Hussey*, ___ N.C. App. ___, ___, 669 S.E.2d 864, 867 (2008). In the instant case, the evidence presented at trial tended to show that defendant pointed a loaded pistol at Roger. Defendant then assisted an unidentified male in taking Roger's wallet, which contained approximately $200.00.

We further note that the fact that a victim was not seriously injured is not relevant to the inquiry of whether there was

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[3]The indictment against defendant for robbery with a dangerous weapon pertains solely to Roger. The charge of attempted robbery with a dangerous weapon against Kenneth was dismissed by the State at the commencement of trial.

sufficient evidence to submit the charge of robbery with a dangerous weapon to the jury. Based upon *Hussey*, defendant's first argument is without merit.

Defendant next argues that "the evidence that [defendant] was the perpetrator of the offense was inadequate." Contrary to defendant's contention, two weeks after the robbery occurred Kenneth identified him as his attacker in a police photo lineup. At trial, both Kenneth and Roger unequivocally gave eye witness accounts of the events that transpired and asserted that defendant was one of the two perpetrators of the robbery. Defendant argues that both Kenneth and Roger's identifications were unreliable, but fails to cite to any authority supporting this contention. Our Supreme Court has held, "[w]here there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury . . . ." *State v. Miller*, 270 N.C. 726, 732, 154 S.E.2d 902, 906 (1967).

Further, a cell phone was found in the vicinity of the area where Kenneth and defendant were struggling. The account records associated with the cell phone showed that it belonged to "Terry Green." Terry Green was defendant's brother who had died two years prior to the opening of this account. The address listed on the account had been used by defendant in the past. Viewing the evidence in the light most favorable to the State, substantial evidence was presented tending to establish defendant was a

perpetrator of the robbery. The trial court properly submitted the charge of robbery with a dangerous weapon to the jury.

2. Possession of a Firearm by a Felon

Defendant's argument pertaining to the trial court's denial of his motion to dismiss the charge of possession of a firearm by a felon is based solely upon his contention that there was inadequate evidence presented to establish he was the perpetrator of the above crime. Based upon defendant's stipulation that he was a convicted felon on the date these offenses occurred and the above analysis, defendant's contention is without merit.

III. Closing Arguments

In his fifth argument, defendant contends the trial court erred by overruling his objections to portions of the State's closing argument. We disagree.

A. Standard of Review

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations omitted). "When applying the abuse of discretion standard to closing arguments, [the appellate court] first determines if the remarks were improper. . . . Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* (citations omitted).

B. Analysis

"[I]t is well settled that counsel are allowed wide latitude in arguments to the jury in contested cases." *State v. Payne*, 312 N.C. 647, 665, 325 S.E.2d 205, 217 (1985). However, during closing arguments an attorney may not

> become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record . . . . An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2007); *see also Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (stating that "improper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others"). In order to determine whether the prosecutor's closing argument was improper, we "must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999).

Defendant challenges two separate portions of the State's closing argument. Defendant first cites the following comments by the prosecutor:

> [Prosecutor]: The other thing we have to prove beyond a reasonable doubt and second that the [sic] thereafter his conviction date, the Defendant possessed a firearm. Is there any doubt about that? You know, I suppose that that's why [defense counsel] was arguing so loudly with Officer Shoffner.

> [Defense counsel]: I'm going to object to that, Your Honor.
>
> [The trial court]: Overruled.
>
> [Prosecutor]: Let me repeat that because it's so important. That's why he's arguing so hard with Officer Shoffner. Remember that glorious moment in the trial?
>
> [Defense counsel]: I'm going to object to that.
>
> [The trial court]: Overruled.
>
> [Prosecutor]: Remember that glorious moment in our trial when he's talking about --
>
> [Defense counsel]: Same objection.
>
> . . . .
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> [The trial court]: Overruled. Move on, please.
>
> [Prosecutor]: When he's talking about this picture right here (indicating), the gun damage on this sidewalk and he's saying, Officer Shoffner, you don't have a degree in concrete science or anything, do you? Didn't ask him if he had his degree in astrology either or meteorology. Does that mean he doesn't know when it's raining?
>
> You know, common sense and life experience will tell you what happened here. This officer says, That's a recent injury to the concrete. That it had just been shot. And that's a very much [sic] legal significance when we consider that's the area where this Defendant was standing.

At this point in his argument, the prosecutor was explaining to the jury the elements of possession of a firearm by a felon and arguing the evidence was sufficient to support a conviction on this charge. The prosecutor's comments above (*i.e.*, that there was no doubt that defendant possessed a firearm and "that's why [defense counsel] was arguing so hard with Officer Shoffner") reference defense counsel's

cross-examination of Officer Shoffner on the subject of whether damage to the sidewalk was a result of the gunshot defendant fired while he and Kenneth struggled. During his cross-examination, defense counsel insinuated that Officer Shoffner had no particular expert knowledge in concrete damage and therefore could not know if the damage to the sidewalk was created earlier that day. The logical inference from defense counsel's cross-examination was that if the officer could not show the damage to the concrete was recent, the State could not prove that defendant possessed a firearm.

The prosecutor's comments during closing argument referencing defense counsel's attempt to discredit Officer Shoffner's testimony were proper as part of his argument that the evidence established defendant possessed a firearm during this incident. *See* N.C. Gen. Stat. § 15A-1230(a) ("An attorney may . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue."); *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984) ("Counsel for each side may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his or her side of the case." (citation omitted)), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985).

Defendant next challenges the following colloquy:

> [Prosecutor]: You know, I would ask you to remember with your own recollections to what [defense counsel] told you in opening argument because, while it's not evidence, there's only a couple different ways to defend a case like this, isn't there? There is only two ways:

> SODDI, some other dude did it. Or this is something other than what it appears. And I think what [defense counsel] has done --
>
> [Defense counsel]: I'm going to object.
>
> [The trial court]: Overruled.
>
> [Defense counsel]: Counsel's not --
>
> [The trial court]: Overruled.
>
> [Defense counsel]: --allowed to consider -- to even refer to me in this manner.
>
> [The trial court]: Okay. Overruled.
>
> [Prosecutor]: Let me repeat that because it's so important[.] There's only two ways to defend a case like this: Some other dude did it defense, or this [is] something other than what it is. There is no evidence that this is a drug deal gone bad or anything of that matter.
>
> And if there's an attempt in closing to switch horses in the middle of the stream, so to speak, to suggest now that it wasn't his client, I want you to remember back to what [defense counsel] told you and more importantly, I want you to remember what the witnesses said during the course of this trial.
>
> Oh, it was Kevin. For whom the bell tolls, Kevin? Today it's for you. You left your phone, buddy. This shows who did it now.

In this portion of the prosecutor's argument, he was merely commenting on the different approaches defense counsel had employed during trial in order to defend his client. During the trial and his closing argument, defense counsel challenged both Kenneth and Roger's identification of defendant and asserted that neither of them had been truthful about the events that occurred on 3 May 2007. Defense counsel also stated to the jury that the prosecutor

had essentially told them to disregard the facts of the case and ignore the law. The prosecutor's comments above were merely a rebuttal of the defense counsel's assertions and theories advanced at trial. It is well-established that although "a trial attorney may not make uncomplimentary comments about opposing counsel" *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994), counsel may respond to arguments made by defense counsel and restore the credibility of a witness who has been attacked in defendant's closing argument, *State v. Perdue*, 320 N.C. 51, 62, 357 S.E.2d 345, 352 (1987) (citation omitted). Accordingly, we hold that the prosecutor's closing argument was proper and the trial court did not abuse its discretion by overruling defendant's objections.

IV. Acting in Concert Jury Instruction

In his sixth argument, defendant contends the trial court erred by instructing the jury on the theory of acting in concert. We disagree.

"To support an instruction of acting in concert, the State must present evidence that the defendant is 'present at the scene of the crime' and acts 'together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.'" *State v. Bagley*, ___ N.C. App. ___, ___, 644 S.E.2d 615, 622 (2007) (quoting *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979)). It is not necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted under the theory of concerted action, *Joyner*, 297 N.C. at 357, 255 S.E.2d at 395, nor is it

necessary to identify the other perpetrator of that crime, *State v. Liggons*, ___ N.C. App. ___, ___, 670 S.E.2d 333, 339 (2009).

In the instant case, the evidence at trial tended to show that defendant and an unidentified male were standing in a group across the street from where Kenneth and Roger were working for an hour before the robbery occurred. Roger testified that earlier that day, he had told a woman in the group that he had $200.00 in his wallet in order to "get [] a date." On the signal "[w]ork it[,]" defendant confronted Kenneth, placed a pistol against his head, and told him not to move. A struggle ensued. At approximately the same time, the unidentified male attacked Roger. Defendant subsequently joined the unidentified male, pointing his pistol at Roger, and then helped kick Roger and take his wallet. Defendant and the unidentified male fled the scene together in a gray Buick. We hold this evidence is sufficient to warrant an instruction on the theory of acting in concert. This argument is without merit.

NO ERROR.

Judges HUNTER, Robert C. and GEER concur.

Report per Rule 30(e).