

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-258

Filed: 3 October 2017

Union County, Nos. 14 CRS 1605, 1606

STATE OF NORTH CAROLINA

v.

HENRY LEE CLYBURN

Appeal by defendant from judgments entered 26 September 2016 by Judge Jeff Carpenter in Union County Superior Court. Heard in the Court of Appeals 25 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Hugh A. Harris, for the State.

Tin Fulton Walker & Owen, PLLC, by Matthew G. Pruden, for defendant-appellant.

TYSON, Judge.

Defendant appeals from guilty verdicts of robbery with a dangerous weapon (“RWDW”) and possession of a firearm by a convicted felon. We find no error.

I. Background

A. State’s Evidence

STATE V. CLYBURN

Opinion of the Court

The State's evidence tended to show that in May of 2014, fifteen-year-old **Ka.M.** and her brother, twelve-year-old K.M. lived with their mother and their aunt, Chelsa Wesley, in a house located on Aurora Boulevard in Stallings, North Carolina. Charmon Cureton, their mother's boyfriend, occasionally stayed overnight at the residence. A friend of Mr. Cureton, known as "Pumpkin," also used their garage to work on vehicles. The garage is located at the back of the house, and adjoining the kitchen.

On the night of 5 May 2014, K.M. and Ka.M. were alone at home, while their mother was out of town with Mr. Cureton and their aunt was at work. At approximately 8:00 p.m., Ka.M. heard an unexpected knock at the front door, but did not understand what the person had said. She told her brother, who went to the door. The men told K.M. they were looking for "Chelsie." K.M. opened the door and saw two strangers, later identified as Defendant and Wesley Baker. Defendant placed a handgun at K.M.'s side and forced his way into the house, followed by Mr. Baker. The two men brought K.M. and Ka.M. into the master bedroom, took their phones, and repeatedly demanded to know, "[W]here is the money at, where is the money[?]"

Defendant waved his gun at the children and threatened to kill them, if they moved from the corner of the bedroom. After ransacking the house, Defendant and Mr. Baker entered and searched the master bedroom closet. As "they were digging

STATE V. CLYBURN

Opinion of the Court

out the closet,” Ka.M. observed the two men held “something plastic in their hand.”

At some point, Mr. Baker obtained a shotgun.

When lights from police vehicles appeared outside the residence, Defendant and Mr. Baker panicked and ran through the house emptying plastic bags and other items from their pockets. They returned to the bedroom no longer carrying guns. Mr. Baker gave Ka.M. her phone and stayed in the bedroom with the children. Defendant ran into the bathroom and tried to escape by breaking out a window. Police saw Defendant climbing out of the window and shouted at him. Defendant ran back through the house and into the garage before hiding in the attic.

Mr. Baker left the bedroom briefly and returned asking where Defendant had gone. After checking the house again, Mr. Baker came outside through the front door with K.M., claiming they were the victims of the home invasion. K.M. revealed the truth once he was separated from Mr. Baker. He told the officers that his sister was still inside the house, as was the second intruder, whom K.M. believed to be in the attic. Ka.M. contacted her aunt by text message and eventually escaped the house by jumping from the bathroom window into the arms of a deputy sheriff.

After deploying chemical agents into the attic and master bedroom, members of the Union County Sheriff’s Office’s Special Response Team entered the house and located Defendant hiding under a pile of insulation in the attic. He was taken into custody without incident.

Officers began searching the house, found a shotgun in the living room, and two semiautomatic handguns, a Ruger and a Beretta, in the bedroom adjacent to the kitchen. Several hundred dollars of United States currency was “kind of thrown on the floor at the entrance” of the “middle front bedroom.” In the garage, officers found additional loose currency and a roll of \$1,100 in cash wrapped in plastic. Another plastic bag was found on the floor in the master bedroom.

The trial court denied Defendant’s motion to dismiss the charges at the conclusion of the State’s evidence.

B. Defendant’s Evidence

Defendant testified that he drove to the Aurora Boulevard residence on the afternoon of 5 May 2014, so that Pumpkin could install brakes on Defendant’s car. After fixing Defendant’s brakes, Pumpkin agreed to perform additional repairs for Defendant and Mr. Baker later in the day.

At approximately 6:00 p.m., Pumpkin met Defendant and Mr. Baker at Mr. Baker’s house in order to install a windshield in Mr. Baker’s car. Pumpkin drove Defendant and Mr. Baker back to Aurora Boulevard, saying that “he needed to get something from the house and he had to get his tools.” On the way to the residence, Pumpkin called K.M. to let him know they were coming. When they arrived, Pumpkin asked Defendant to go into the house and retrieve a coffee can full of money from the master bedroom closet. Although the money belonged to him, Pumpkin

STATE V. CLYBURN

Opinion of the Court

explained he did not want to go into the house, because he would be “stuck” babysitting K.M. and Ka.M. Pumpkin said he would tell K.M. that Defendant was coming for the coffee can and asked Mr. Baker to accompany Defendant to ensure he did not take anything else from the house.

Defendant, who was unarmed, knocked at the front door and was greeted by K.M. After they discussed basketball, Defendant told K.M. that Pumpkin had asked him to get the coffee can. K.M. invited Defendant inside and directed him to his mother’s bedroom.

When Defendant offered to let him retrieve the coffee can from the closet, K.M. replied, “[N]o, you can go ahead and get it.” Defendant said hello to Ka.M., who was in her room talking on the phone, before entering the master bedroom and obtaining the coffee can from a shelf in the closet. He saw money inside the can but stated he did not remove it. Defendant also saw a shotgun in the closet, but claimed he did not touch it.

As Defendant was leaving the bedroom, Mr. Baker said he was “going to get something else” and picked up the shotgun. Defendant confronted Mr. Baker and argued with him. When Mr. Baker continued “rummaging through the house,” Defendant decided to leave without him. He opened the front door, and saw “police everywhere” with their guns drawn. Noting Pumpkin’s car was gone, Defendant

closed the door and dropped the coffee can. He went into the garage and looked out of the window to confirm that Pumpkin's car was no longer in the driveway.

When Defendant returned to the bedroom, Mr. Baker cocked the shotgun and accused Defendant of "set[ting] him up." Defendant tried to climb out of the bedroom window, but saw additional police located outside. He then told Mr. Baker to flee through the back door while he went out the front door. After Mr. Baker moved to the back of the house, however, Defendant pulled down the attic door in the hallway ceiling and hid in the attic. He remained in the attic "for several hours," because he was afraid of the police and Mr. Baker.

Massi Omar Olin testified he had mistakenly left his Ruger nine-millimeter handgun at Chelsa Wesley's house while smoking marijuana with her in early 2014. He called Ms. Wesley about recovering his gun but "just never got a chance to get back down there to get it." She later told Mr. Olin "that the police ran in the house and the gun was gone[.]"

Defendant renewed his motion to dismiss at the conclusion of all the evidence. The trial court denied the motion. The jury returned guilty verdicts of robbery with a dangerous weapon ("RWDW") and possession of a firearm by a convicted felon. The trial court sentenced Defendant to consecutive prison terms of 84 to 113 months for RWDW and 17 to 30 months for possession of firearm by a felon. Defendant gave timely notice of appeal in open court.

STATE V. CLYBURN

Opinion of the Court

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Issue

Defendant's sole argument asserts the trial court erred by denying his motion to dismiss the RWDW charge at the conclusion of the evidence.

IV. Standard of Review

We review the court's ruling *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). "When considering a motion to dismiss for insufficiency of the evidence, we consider whether, in the light most favorable to the State and with all reasonable inferences drawn in the State's favor, there is enough evidence of each essential element of the crime charged to persuade a rational juror that the defendant was the perpetrator." *State v. Childress*, 367 N.C. 693, 694-95, 766 S.E.2d 328, 330 (2014). "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted). "The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both." *State v. Lynch*, 327 N.C. 210, 216, 393 S.E.2d 811, 814 (1990) (citations omitted).

V. Analysis

The essential elements of RWDW are as follows:

(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, (3) whereby the life of the person is endangered or threatened. The intent required for the offense is the intent to permanently deprive the owner of the property at the time of the taking.

State v. Mann, 355 N.C. 294, 303-04, 560 S.E.2d 776, 782 (citations and internal quotation marks omitted), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). “[T]he intent to permanently deprive need not be established by direct evidence but can be inferred from the surrounding circumstances.” *State v. Kemmerlin*, 356 N.C. 446, 474, 573 S.E.2d 870, 889 (2002). “In determining the presence or absence of the element of intent the jury may [also] consider the acts and conduct of [the] defendant . . . at the time of the alleged commission of the offense.” *State v. Bronson*, 10 N.C. App. 638, 641, 179 S.E.2d 823, 825 (1971).

In challenging the trial court’s denial of his motion to dismiss, Defendant contends “there was no evidence that [he] took, or attempted to take, property to which he was not entitled” or “that he intended to permanently deprive the owner or owners of such property.” We disagree.

Notwithstanding Defendant’s testimony that he entered the residence with K.M.’s permission and at Pumpkin’s request, the jury was entitled to consider and credit K.M. and Ka.M.’s account of his actions. Defendant’s use of a handgun to force

his way into the house, his repeated demands to be shown the location of “the money,” his threat to kill the children if they moved from the bedroom, and his ransacking of the house with Mr. Baker all support a finding that he was attempting to take money to which he was not entitled.

Defendant argues that neither K.M. nor Ka.M. saw him take any money. However, circumstantial evidence that Defendant and Mr. Baker panicked and emptied their pockets in response to the police presence, and the officers’ subsequent finding of significant amounts of currency strewn on the floor in the house and the garage, permits a reasonable inference of an attempted taking. The fact that Defendant and Mr. Baker had discarded the money after the police arrived does not negate the reasonable inference that they intended to deprive the owner of the money permanently. *See State v. Walker*, 6 N.C. App. 740, 743, 171 S.E.2d 91, 93 (1969).

VI. Conclusion

Defendant received a fair trial free from prejudicial error. We find no error the jury’s verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).