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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1422

Filed: 18 September 2018

Forsyth County, No. 15CRS052678

STATE OF NORTH CAROLINA

v.

JASMINE CHEREA GAINNEY, Defendant.

Appeal by Defendant from judgement entered 12 July 2016 by Judge R. Allen Baddour, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

James R. Parrish for the Defendant-Appellant.

DILLON, Judge.

Jasmine Cherea Gainney (“Defendant”) appeals from the convictions and final judgments after a jury trial in superior court. We hereby grant Defendant’s petition for *certiorari* to address the issues presented on appeal.

I. Background

STATE V. GAINES
Opinion of the Court

Defendant was convicted of robbery with a dangerous weapon. She received an aggravated sentence based on a finding that the victim was “very old.” Defendant’s appeal focuses on this finding of an aggravating factor.

The evidence at trial, in the light most favorable to the State, showed that the victim sold produce out of a truck to earn extra money. The victim and Defendant had seen each other in the past when the victim was selling produce. On the day of the robbery, the victim was eighty (80) years old. On that day, as the victim was leaving an apartment building where he had regular customers, Defendant called out to him, indicating that she wanted to buy produce. Defendant asked the victim to wait while she retrieved money. However, Defendant returned with a male friend, who proceeded to hold up the victim at gunpoint. Defendant’s friend demanded money from the victim, telling the victim, “Give me your money or you’re dead.”

The victim proceeded to hand over cash, but Defendant’s friend demanded that the victim also hand over a billfold. The victim was able to kick the gun out of the man’s hand, but Defendant was able to put the victim in a “bear hug” while her accomplice grabbed the victim’s billfold from the victim’s pants. The victim was allowed to leave. The victim identified Defendant in court as the woman who participated in the robbery.

The jury convicted Defendant of robbery with a dangerous weapon. The jury also found as an aggravating factor that the victim was “very old.” Defendant timely appealed. Defendant was sentenced accordingly.

II. Analysis

Defendant makes three arguments on appeal, all pertaining to the jury's finding of an aggravating factor based on the victim's age. We address each argument in turn.

First, Defendant argues that the trial court erred by failing to dismiss the aggravating factor that the victim was "very old," based on insufficient evidence. Defendant concedes on appeal that her counsel did not object to the submission of the aggravating factor at trial. But her appellate counsel asks this Court to invoke Rule 2 to review this issue. In our discretion, we decline to invoke Rule 2.

We note that Defendant also argues for plain error review. Assuming her argument is reviewable under plain error review, we conclude that the trial court's submission of the victim's advanced age as an aggravating factor did not amount to plain error.

Our General Assembly has provided that the victim's advanced age may be used as an aggravating factor. N.C. Gen. Stat. § 15A-1340.16(d)(11). Concerning this aggravating factor, our Supreme Court has stated as follows:

There are at least two ways in which a defendant may take advantage of the age of his victim. First, he may "target" the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to

STATE V. GAINES
Opinion of the Court

effectively intervene or defend himself. In either case, the defendant's culpability is increased.

State v. Thompson, 318 N.C. 395, 398, 348 S.E.2d 798, 800 (1986).

In the present case, we conclude that there was substantial evidence at trial from which the jury could find the presence of this aggravating factor. The victim testified that he was 80 years old on the day of the robbery. The victim had regularly seen Defendant when he was in the area. Defendant was familiar with the fact that the victim sold produce in the area and that he would probably be carrying money. Defendant, a young woman, was able to restrain the victim with a "bear hug" while she and her accomplice carried out the robbery. Accordingly, we conclude that the trial court did not commit error, much less reversible error, in submitting the aggravating factor regarding the victim's advanced age to the jury.

Second, Defendant argues that she was prejudiced by her trial counsel's failure to move for the dismissal of the aggravating factor regarding the victim's advanced age. However, because we have concluded that the State met its burden of offering substantial evidence as to this factor, we conclude that there is not a reasonable probability that the outcome would have been different had Defendant's counsel moved to dismiss this aggravating factor. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that defendant, in part, "must show that the deficient performance prejudiced the defense").

Third, Defendant argues that the trial court committed plain error by failing to properly instruct the jury on the aggravating factor regarding the victim's

STATE V. GAINES
Opinion of the Court

advanced age. At trial, the court instructed the jury that it could find the existence of an aggravating factor by finding (beyond a reasonable doubt) that the victim “was very old.” Defendant contends that this instruction was not enough and that the trial court should have further instructed the jury that such finding could not be based merely on the victim’s chronological order. We note that Defendant did not ask for any further instruction, nor did she object to the instruction given.

We cannot say that there is a reasonable probability that the result would have been different had the jury been further instructed on the aggravating factor. *See State v. Tadeja*, 191 N.C. App. 439, 446, 664 S.E.2d 402, 408 (2008) (“In deciding whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury’s finding of guilt.”). As discussed above, the State put on substantive evidence to meet its burden regarding the aggravating factor. Accordingly, we conclude that Defendant failed to meet her burden of showing that the trial court committed plain error in its jury charge.

NO ERROR.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).