NO. COA05-1448

NORTH CAROLINA COURT OF APPEALS

Filed: 01 August 2006

STATE OF NORTH CAROLINA,
Plaintiff,

v. Washington County
No. 95 CRS 2086

ROBERT LEE BIGGS,
Defendant.

Appeal by defendant from judgment entered 13 November 1996 by Judge Dennis J. Winner in Washington County Superior Court. Heard in the Court of Appeals 7 June 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General, Lars F. Nance, for the State.

Sallenger & Brown, by Thomas R. Sallenger, for defendant-appellant.

STEELMAN, Judge.

Defendant was convicted of robbery with a dangerous weapon and sentenced as a Level V felon. For the reasons set forth herein, we find no prejudicial error.

On 10 November 1995, defendant entered the Pea Ridge "Y" convenience store with Haywood Johnson (Johnson). Lois Krawczyk (Krawczyk), was working behind the counter and was having a conversation with Fay Spruill (Spruill), who had just purchased coffee. Defendant set his hand on the counter and jumped over it. Krawczyk tried to get out of his way, but defendant grabbed her and

brought her back to the cash register. Defendant instructed Krawczyk to open the cash register and give him all the money. Krawczyk felt a knife at her throat. She opened the cash register and gave defendant the money. Spruill was told by Johnson that he had a gun and he would shoot him, if necessary. Spruill testified that he saw the knife blade against Krawczyk's throat, but did not see the knife handle because it was covered by defendant's hand.

After taking the money, defendant walked Krawczyk to the front door. Defendant and Johnson left the store and got into a car. Krawczyk wrote down the car's license plate number and called 911. Both Krawczyk and Spruill identified the car as a long, white, four-door.

Deputy Sheriff Greg Whitehurst saw a vehicle matching the description phoned in by Krawczyk on the outskirts of Edenton. He approached the vehicle and requested that the occupants exit the vehicle. The driver exited the vehicle, turned toward the officer and ran. The passenger, Johnson, remained in the vehicle. Defendant turned himself into the Sherrif’s Department three to four days after the incident. He was charged with robbery with a dangerous weapon.

Defendant was tried before a jury at the 11 November 1996 criminal session of Superior Court for Washington County. The jury found the defendant guilty as charged. The court sentenced the defendant to 114 months to 146 months in prison. This court allowed a petition for a writ of certiorari to review this judgment on 10 March 2005.

In defendant's first argument, he contends that the trial court erred in not dismissing the charge of robbery with a dangerous weapon for insufficiency of the evidence. We disagree.

To survive a defendant's motion to dismiss, the State must show substantial evidence of each element of the crime charged. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Earnhardt*, 307 N.C 62, 66, 296 S.E.2d 649, 652 (1982), (citing *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980)). The evidence must be viewed in the light most favorable to the State. *State v. Bates*, 313 N.C. 580, 581, 330 S.E.2d 200, 201 (1985). The trial court need not concern itself with the weight of the evidence, but only needs to satisfy itself that the evidence is sufficient to take the case to the jury. *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971).

In the present case, Krawczyk testified that she felt a knife blade on her throat when the defendant had his arm around her neck. She testified that she thought she was going to die. Spruill testified that he saw the knife blade up against Krawczyk's throat. He further testified that he owned a knife very similar to the one used by defendant and showed the court his knife, which had a blade approximately two-and-half to three-inches long. "A knife is not always a dangerous weapon *per se;* instead the circumstances of the case are determinative." *State v. Bellamy*, 159 N.C. App 143, 148, 582 S.E.2d 663, 667 (2003) (citing *State v. Smallwood*, 78 N.C. App 365, 368, 337 S.E.2d 143,144 (1985)). Depending on the manner in

which the knife is used and the victim's perception of the weapon, even a pocketknife may be a dangerous weapon. *State v. Sturdivant*, 304 N.C. 293, 301-302, 283 S.E.2d 719, 725-726 (1981).

There was sufficient evidence of a dangerous weapon for the charge of robbery with a dangerous weapon to be submitted to the jury. This argument is without merit.

In defendant's second argument, he contends the trial court erred by giving a flight instruction to the jury. We disagree.

An instruction on flight cannot be given based solely on the defendant's departure from the scene of the crime, there must be some evidence that the defendant also took steps to avoid apprehension. *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990) (citing *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)).

Deputy Whitehurst testified that he approached the white Lincoln automobile and asked the occupants to exit the vehicle. The driver, who Deputy Whitehurst recognized as defendant, ran from the scene. "So long as there is some evidence in the record reasonably supporting the theory that defendant fled after the commission of the crime charged, the instruction is properly given." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). The flight instruction was properly given to the jury. This argument is without merit.

In defendant's third argument, he contends that the trial court committed reversible error when it determined that defendant had sixteen prior record points and sentenced him as a prior record

level V. We hold that there was evidence before the court to support a finding of level V for felony sentencing purposes, and that any error by the court was harmless.

Under the provisions of North Carolina General Statute §15A-1442(5b), a defendant has the right to appeal if the sentence imposed "[r]esults from an incorrect finding of the defendant's prior record level under G.S. §15A-1340.14." N.C.G.S §15A-1442(5b)(a)(2005).

> "[A] prior conviction shall be proved by any of the following methods:
>
> (1) Stipulation of the parties.
> (2) An original or copy of the court record of the prior conviction.
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts.
> (4) Any other method found by the court to be reliable."

N.C.G.S §15A-1340.14(f)(2005).

Defendant does not contest the accuracy of the convictions shown on the worksheet except for the bank robbery convictions; which he stated were conspiracies to commit bank robbery, not bank robberies. At the sentencing trial, the court had the following dialogue with defendant's counsel.

> "Court: [I] have been handed a worksheet, a structured sentencing worksheet. Have you been over this with your client, the record on him?
>
> Skinner: I have not, Your Honor.
>
> Court: I think you need to do that, to see if it's correct. It's a lot of points.
>
> *Mr. Skinner reviews worksheet with the Defendant.*

> Court: Have you been over this record?
>
> Skinner: Yes, sir.
>
> Court: Is it correct?
>
> Skinner: He informs me that the bank robbery portion was a conspiracy. The rest of it he agrees with. State law offense in Pennsylvania."

R. P. 17.

We hold that this exchange was a stipulation as to defendant's record as shown on the worksheet with the exception of the bank robbery portion, which defendant stipulated was a conspiracy. *See State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005) (holding that defense counsel's statements to the court constituted stipulation as to defendant's record).

The trial court found a bank robbery from Pennsylvania to be a class G felony, with four prior record points. Defendant contends that this conviction was a conspiracy rather than a bank robbery, which would be a class H felony carrying only two prior record points. He further argues that the deduction of two prior record points changes his sentencing level from a level V to a level IV. N.C.G.S §15A-1340.14(c) (2005). However, the worksheet stipulated to by the defendant shows two bank robbery convictions, one in 1972 and one in 1984. The defendant stated that the "bank robbery portion" was a conspiracy. This constituted a stipulation to both bank robbery convictions as conspiracies to commit bank robbery, two class H felonies. As noted by the trial court, for purposes of computing a felony record level, it was immaterial whether there was one class G felony (four points) or two class H felonies (four

points). The result was the same, sixteen prior record points, resulting in a sentencing level V. To the extent that the trial court found one class G felony instead of two class H felonies, we find any error was harmless. This argument of error is without merit.

Defendant's other assignments of error are deemed abandoned because they have not been argued in his brief. N.C. R. App. P. Rule 28(b)(6) (2005).

NO PREJUDICIAL ERROR.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e)