NO. COA05-532

NORTH CAROLINA COURT OF APPEALS

Filed: 2 May 2006

STATE OF NORTH CAROLINA,

v. Durham County
Nos. 02 CRS 49147, 49149-50;
03 CRS 1782

MICHAEL BERNARD SULLIVAN

Appeal by defendant from judgments entered 25 October 2004 by Judge J. B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 7 December 2005.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Buren R. Shields, III, for the State.

Thomas R. Sallenger, for defendant-appellant.

JACKSON, Judge.

On 5 June 2002, Lois Cannady ("victim") was found shot to death in her home. Five men were accused of stealing one of her vehicles, breaking into her home, shooting and killing her, and attempting to steal a second vehicle from her. Michael Sullivan ("defendant"), Ricky Morris ("Morris"), Jerome Freeman ("Freeman"), Marcus Hawley ("Hawley"), and Gregory Lee ("Lee") were accused of acting in concert in the murder of Ms. Cannady.

The evidence presented at trial tended to show that defendant had not known the other four men for very long prior to 5 June

2002. On the morning of 5 June 2002, Ms. Cannady discovered that her white Chevrolet Corsica had been stolen. Lee, who lived across the street from the victim, knew the victim and knew where she kept the keys to her cars. Lee was seen driving the victim's car on 5 June 2002, and picked up the other four men in the car.

On 5 June 2002, Lee picked up defendant and the other men in Durham in a white Corsica. The men then drove to Roxboro, where they proceeded to sit in a Wal-Mart parking lot for several hours watching a car shop where Lee allegedly had a vehicle being repaired. While sitting in the parking lot, the men smoked marijuana, and at one point Lee went into Wal-Mart and bought bullets for a shotgun, and Hawley and Freeman went in and purchased bullets for an SKS rifle. Morris testified that the men returned to Durham after dark, where Lee and defendant shot at a parked vehicle with the shotgun and SKS rifle. The men then returned to Lee's house, where they parked the white Corsica down the street, and walked to Lee's home. Morris and Freeman both testified that the men's plan was to steal the victim's other car, and that Lee said that it would be easy to get the keys as he had done before.

Morris and Freeman testified that at all times during the events at the victim's house that night, defendant had the SKS rifle, Lee had the shotgun, and Morris had another gun. Defendant and the other four men went to the victim's house, where they kicked in the back door after having cut off the power to the house. The men then rushed into the house, at which point the victim fired a shot at the men. Morris and Freeman testified that

they ran, and that Lee and Sullivan were in the house when Morris heard a shot fired from the SKS rifle. All five men then ran from the victim's house, and Lee proceeded to fire a shot from the shotgun into the victim's car in her driveway. Testimony from the State's witness who performed the autopsy on the victim determined that the victim died as a result of a large, single gunshot wound. The bullet that killed the victim was recovered in her home, and testimony was presented showing that the fatal bullet had been fired from the SKS rifle recovered by police in the backyard of the residence of defendant's girlfriend.

Freeman later plead guilty to the second-degree murder of Cannady along with other charges in conjunction with the murder, in exchange for his participation in the prosecution of the other men, although he did not receive any deal concerning the type of sentence he would receive. Morris also plead guilty to second degree murder and other charges, all of which stem from these events. Like Freeman, Morris did not receive any deal concerning sentencing, and he was required to aid in the prosecution of the other men involved.

Defendant testified that while he was with the four men during the afternoon of 5 June 2002, he was not with them that evening when the shooting occurred at the victim's home. Defendant stated that the four men dropped him off at the bus station, and that he did not see the four men again until around 12:20 a.m. when the men came over to defendant's girlfriend's home. Defendant and his

girlfriend, Tonya Halsey, both testified that defendant was at Halsey's home that entire evening.

On 3 February 2003, defendant was indicted for first degree murder, first degree burglary, attempted robbery with a dangerous weapon, and felony possession of a stolen vehicle. On 25 October 2004, a jury found him guilty on all charges, and defendant was sentenced to an active term of imprisonment for life without parole. Defendant was sentenced only on the charge of first degree murder, with a prayer for judgment continued for the remaining three charges. Defendant now appeals from all of his convictions.

Defendant first argues the trial court erred in allowing witness Rebecca Reid ("Reid") to testify as an expert in the field of fingerprint comparison and identification. Defendant contends on appeal that the evidence presented showed that Reid's qualifications and experience were inadequate to allow her to qualify as an expert.

Rule 702(a) of the North Carolina Rules of Evidence provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702 (2004). "'Thus, under our Rules of Evidence, when a trial court is faced with a proffer of expert testimony, it must determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to determine a fact in issue.'"

State v. Berry, 143 N.C. App. 187, 202, 546 S.E.2d 145, 156, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 439 (2001) (citation omitted). The trial court's "acceptance of a witness as an expert and 'the admission of expert testimony are within the sound discretion of the trial court and will not be upset absent a showing of an abuse of discretion.'" *Id.* (quoting *State v. Willis*, 109 N.C. App. 184, 192, 426 S.E.2d 471, 475 (1993)). Our courts further have held that experts need not have specific credentials in order to be considered an "expert." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

The central issue in determining whether a witness qualifies as an expert, is to determine if she, "'through study or experience, has acquired such skill that [s]he was better qualified than the jury to form an opinion on the subject matter'" in question. *State v. Tyler*, 346 N.C. 187, 204, 485 S.E.2d 599, 608, *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997) (quoting *State v. Mitchell*, 283 N.C. 462, 467, 196 S.E.2d 736, 739 (1973)). In the instant case, the trial court heard testimony from Reid during *voir dire* concerning her training and experience in the field of fingerprint comparison and identification. Reid testified that although she did not have an undergraduate degree, she had graduated from high school, and had taken some classes at Durham Technical Community College. She stated that she had worked for the Durham Police Department as a Crime Scene Investigator for the previous nine years, during which time she had received over one hundred hours of training on fingerprint classification, comparison

and identification. Reid testified that since early 2002, her sole duties had included examination of latent fingerprint evidence and making fingerprint comparisons and identifications.

Reid stated that she had not obtained certification yet through the International Association of Identification, due to her ineligibility as a result of her lacking the required five years of full-time experience working as a latent print examiner. She stated that she is a member of the association, and that she is working to become certified. Reid also testified that she previously had been qualified to testify as an expert in the field of fingerprint comparison and identification on four separate occasions, twice in juvenile court and twice in superior court.

Following *voir dire*, during which both parties questioned Reid, the court made findings of fact concerning Reid's qualifications, training and experience. The trial court found that she had the knowledge, skill, experience and training to testify as an expert in this field. Defendant has not challenged these findings of fact by the trial court, thus the court's findings of fact concerning Reid's knowledge, skill, training and experience are conclusive on appeal, as they are supported by the evidence in the record. *See State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996).

In general, "[a] court may not rule that a witness is expert on the basis that another court has found that witness to be an expert." *State v. Oliver*, 85 N.C. App. 1, 10, 354 S.E.2d 527, 532 (1987). However, the trial court in this case did not rely solely

upon Reid's testimony that she testified previously as an expert witness on four occasions. The court also relied upon her testimony as to her knowledge, skills, experience, training and education. Since there was sufficient evidence upon which the trial court could base its decision that Reid was an expert in the field of fingerprint comparison and identification, we hold the trial court did not abuse its discretion in allowing Rebecca Reid to testify as an expert.

Defendant next contends the trial court committed reversible error when it instructed the jury on the issue of "acting in concert" as part of the felony murder instruction. Defendant contends, on appeal, that there was insufficient evidence presented at defendant's trial which would support the instruction.

During the charge conference, the trial court informed both the State and defendant that it intended to instruct the jury on the issue of "acting in concert" in connection with defendant's charges of first degree burglary, attempted robbery with a dangerous weapon and felony possession of a stolen vehicle. Neither party objected to the trial court's proposed instructions, and the proposed instructions were given to the jury without objection by either party. During deliberations, the jury sent a question to the trial court asking if the "acting in concert" instruction given in connection with the burglary, robbery, and possession of a stolen vehicle charges also applied to defendant's charge of first degree murder based on the felony murder rule. Over defendant's objection, the trial court instructed the jury on

the issue of "acting in concert" in connection with the elements of felony murder.

Defendant objected to the trial court's instruction on "acting in concert" in connection with the charge of felony murder, arguing that an "acting in concert" instruction was inappropriate in a felony murder case. Defendant argued that instead, an instruction on "aiding and abetting" would be more appropriate. Defendant did not object to the "acting in concert" instruction given in connection with the instructions on burglary, robbery, or possession of a stolen vehicle. Defendant's objection to the instruction on "acting in concert" was not based on the fact that the evidence presented at trial failed to support such an instruction, as is now argued on appeal. Rather, defendant's counsel objected only on the ground that an instruction on "acting in concert" was inappropriate for a felony murder charge.

"In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the [trial] court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1) (2005). Further, "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection." N.C. R. App. P. 10(b)(2) (2005).

> Our Supreme Court "has long held that where a theory argued on appeal was not raised before

> the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount'" in the appellate courts. . . . "The defendant may not change his position from that taken at trial to obtain a 'steadier mount' on appeal."

State v. Holliman, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations omitted). On appeal, defendant now attempts to argue that the evidence was insufficient to support the instruction on "acting in concert" for the first degree murder charge. Defendant does not argue on appeal, as he did at trial, that the instruction on "acting in concert" does not apply in a felony murder case. Further, defendant did not present to the trial court the grounds which he now asserts on appeal. Therefore, defendant has failed to preserve this argument for our review. As defendant also has failed to argue that the trial court's instruction amounted to plain error, we need not review the purported error under a plain error standard of review. We therefore dismiss defendant's argument that the trial court erred in instructing the jury on "acting in concert" as part of the felony murder instruction.

Finally, defendant contends the trial court erred in denying his motion to dismiss the charges of first degree murder, first degree burglary, attempted robbery with a firearm, and felony possession of a stolen vehicle, based on insufficient evidence being presented at trial which would support a conviction on each of the charges.

Per Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure,

> A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal . . . made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.
>
> A defendant may make a motion to dismiss the action . . at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(b)(3) (2005). During defendant's trial, his counsel made the following motion at the close of the State's case:

> Defense counsel: Judge, at this time, at the close of State's evidence, I would make a motion to dismiss the possession of stolen motor vehicle charge in that, even taking evidence in the light most favorable to the State, that they have not proved that he, [defendant], was in possession of that motor vehicle.

Defendant's motion was denied, and defendant proceeded with presenting evidence in his case. At the close of all evidence, defendant renewed his earlier motion, stating:

> Defense counsel: Yes, Judge. At the close of all the evidence, I'd like to renew my motion to dismiss as to the possession of a stolen motor vehicle.

This motion also was denied. At no time did defendant make a motion to dismiss the charges of first degree murder, first degree burglary, or attempted robbery with a firearm.

Defendant's assignments of error argue that the trial court erred, or in the alternative committed plain error, in failing to dismiss the murder, burglary, and robbery charges based on an insufficiency of the evidence to support these charges. However, defendant's brief fails to present any argument as to how the trial court committed plain error in failing to dismiss the charges *sua sponte* after defense counsel failed to preserve the issues for appellate review by entering a motion to dismiss on all of defendant's charges. As defendant has failed to present argument as to the trial court's plain error in failing to dismiss the charges based on an insufficiency of the evidence, this argument is deemed abandoned. N.C. R. App. P. 28(b)(6) (2005). Therefore, as to the charges of first degree murder, first degree burglary, and attempted robbery with a firearm, defendant's assignments of error that the trial court erred in denying his motion to dismiss the charges are dismissed, as he has failed to preserve the issues for appeal.

We therefore need only address defendant's argument that the trial court erred in failing to grant his motion to dismiss the charge of felony possession of a stolen vehicle. In reviewing the

denial of a motion to dismiss, our role is to determine whether the evidence, when taken in the light most favorable to the State, would permit a reasonable juror to find defendant guilty of each essential element of the offense beyond a reasonable doubt. *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987).

Defendant was charged with felony possession of a stolen vehicle, in violation of North Carolina General Statutes, section 20-106. In order for a defendant to be found guilty of felony possession of a stolen vehicle, the State must prove that the defendant was in possession of a stolen vehicle, and that he knew or had reason to know that the vehicle had been stolen or taken unlawfully. *State v. Bailey*, 157 N.C. App. 80, 86, 577 S.E.2d 683, 688 (2003). At trial, defendant argued that the State offered insufficient evidence that he was in possession of the victim's stolen white Chevrolet Corsica.

In order to survive a motion to dismiss, the State need only offer "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence" is that which "a reasonable mind might accept as adequate to support a conclusion." *Id.* The trial court does not weigh the evidence presented, instead it merely considers the sufficiency of the evidence to support the offenses charged, and the determination of any witness' credibility is left for the jury to decide. *Id.* The trial court must resolve all

contradictions and discrepancies in the evidence in favor of the State. *Id.* at 73, 472 S.E.2d at 926.

"Circumstantial evidence may be utilized to overcome a motion to dismiss '"even when the evidence does not rule out every hypothesis of innocence."'" *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229 (2000) (quoting *State v. Thomas*, 350 N.C. 315, 343, 514 S.E.2d 486, 503 (1999)). When the trial court has found there to be substantial evidence, whether direct or circumstantial, "'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.'" *Id.* (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). However, if the evidence "'is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.'" *Id.* at 458, 533 S.E.2d at 229-30 (quoting *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983)).

The evidence presented at trial tended to show that defendant was in the victim's stolen Corsica for an extended period of time on the day of the shooting. Not only were defendant's fingerprints found inside and outside of the vehicle, but defendant also testified that he had ridden in the vehicle that day. Both Morris and Freeman testified that defendant was with them when all five men rode in the car to a Wal-Mart in Roxboro, later returned to Durham where defendant and Lee shot at an Escalade, and then went to Lee's home prior to going to the victim's home.

Defendant testified that when Lee picked up defendant and the other men in the white Corsica, defendant and the other men pulled numerous items out of the car, including a cane and pillow, and left the items in the parking lot of a tire service station. Freeman testified that the items taken out of the car also included pictures and a walker. The walker was later identified by the victim's grandson as a walker belonging to the victim which she kept in the backseat of her car. Defendant testified that he did not know who the items belonged to, but he did not think they would be returning to retrieve the items later.

Freeman testified that Lee told him that the white Corsica Lee was driving belonged to the victim. In testifying about his relationship with Lee, defendant stated that he had only known Lee for about a week, but that he had stayed at Lee's home one night, and that he had never seen the white Corsica prior to 5 June 2002. Although defendant offered evidence that he was not with the other individuals when they returned to the victim's home, and that Lee told him the car belonged to Lee's father, it was for the jury to weigh the credibility of the testimony and to determine which version of events to believe.

Based on the evidence presented, including the fact that prior to this night, defendant had never seen the vehicle during his multiple interactions with Lee, the fact that defendant and the other men dumped items out of the car and left them in a parking lot, when the vehicle allegedly belonged to Lee's father, and the fact that the other men in the vehicle knew that it was stolen, we

hold there was sufficient evidence presented to the jury to support the jury's finding that defendant knew or had reason to know that the victim's white Corsica in which he was riding was stolen. We also hold there was sufficient evidence presented to support a finding that defendant was in possession of the stolen vehicle, in that he was in the car for an extended period of time and he exercised dominion and control over the contents of the vehicle. Therefore, we hold the trial court acted properly in denying defendant's motion to dismiss the charge of felony possession of a stolen vehicle.

No error.

Judges BRYANT and CALABRIA concur.

Report per Rule 30 (e).