NO. COA 07-1528

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2008

STATE OF NORTH CAROLINA,
Plaintiff,

v.

EZAVIA QUENTEZ ALLEN,
Defendant.

Wake County
No. 05CRS035195
05CRS035196-97
05CRS037635
05CRS065514-19

Appeal by defendant from judgments entered 20 November 2006 by Judge James C. Spencer, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 15 May 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General L. Michael Dodd, for the State.

Parish, Cooke & Condlin, by James R. Parish, for the defendant.

STROUD, Judge.

On or about 14 November 2006, a jury found defendant guilty of first degree murder, attempted first degree murder, attempted robbery with a firearm, and seven additional robberies with a firearm. Defendant appeals and presents six issues before this Court, including whether the trial court erred: (1) in denying defendant's motion to suppress; (2) in instructing the jury on felony murder; in denying defendant's motion to dismiss the charges of (3) first degree murder, (4) attempted murder and attempted

robbery with a dangerous weapon, and (5) robbery with a dangerous weapon; and (6) in its instructions to the jury on flight. For the following reasons, we find no prejudicial error.

I. Background

The State's evidence tended to show the following: In April of 2005, defendant, along with Marvin Johnson ("Johnson") and Cameron Morris ("Morris"), conducted several armed robberies. During the robberies, defendant and Johnson usually covered their faces in red bandanas, brandished a gun, and demanded money from the victims, while Morris drove the car. On 28 April 2005, at approximately 3:00 a.m., defendant, Johnson, and Morris attempted to rob Mr. Roger Ricks ("Ricks") while he was still in his vehicle. Ricks drove away. Defendant and Johnson fired several shots at Ricks' vehicle.

Later that evening, defendant, Johnson, and Morris stopped their vehicle behind Ms. Shirley Newkirk's ("Newkirk") car. Newkirk was seated inside her car. When defendant reached for the door handle to Newkirk's car, she began honking the horn. Defendant shot through the window of Newkirk's car. Newkirk died as a result of a gunshot wound. After the shooting, defendant, Johnson, and Morris were stopped by the police. After Morris stopped the vehicle, defendant ran from the vehicle and was subsequently arrested. While in custody, defendant was informed of his Miranda rights, and he waived them. Defendant admitted to shooting at Newkirk's car and to several of the robberies.

Defendant was indicted for the murder of Newkirk, attempted murder and attempted robbery with a firearm of Ricks, and seven additional counts of robbery with a dangerous weapon. The jury found defendant guilty of all charges, and defendant was sentenced to life imprisonment without parole for the murder of Newkirk and within the presumptive range on all the other convictions.

II. Motion to Suppress

Defendant argues that the trial court erred in denying his motion to suppress. Specifically defendant argues that

> [t]he trial court erred in denying the defendant's motion to suppress a statement the defendant gave April 28, 2005 to law enforcement officers as the defendant was not completely and adequately advised of his right to remain silent as guaranteed by *Miranda v. Arizona* and the Fifth Amendment to the United States Constitution.

In *State v. Golphin*, defendants argued the trial court erred in denying a pretrial motion to suppress a statement made by one of the defendants. 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), *cert. denied*, 532 U.S. 931, 149 L.Ed. 2d 305 (2001). The North Carolina Supreme Court stated,

> [A] motion *in limine* was not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial. As a pretrial motion to suppress is a type of motion *in limine*, [defendant]'s pretrial motion to suppress is not sufficient to preserve for appeal the question of the admissibility of his statement because he did not object at the time the statement was offered into evidence. In addition, . . . [defendant]'s assignment of error [does not] include[] plain error as an alternative . . . [and] his brief contains no specific argument that there is plain error in

> the instant case. Accordingly, [defendant]'s argument is not properly before this Court.

Id. at 405, 533 S.E.2d at 198-99 (internal citations omitted).

As in *Golphin*, defendant here "did not object at the time the statement was offered into evidence." *See id.* He also did not assign or argue the admission of the statement as plain error. This "argument is not properly before this Court."[1] *See id.* This argument is overruled.

III. Motion to Dismiss

Defendant next argues the trial court erred in denying his motion to dismiss the charges of first-degree murder, attempted murder, attempted robbery with a dangerous weapon, and one of the seven counts of robbery with a dangerous weapon; defendant claims that his motion should have been granted because there was insufficient evidence to convict him on each of the noted charges.

In *State v. Richardson*, the defendant made a motion to dismiss at the close of the State's evidence, but failed to renew the motion at the close of all of the evidence. 341 N.C. 658, 676, 462 S.E.2d 492, 504 (1995). The North Carolina Supreme Court determined, "under Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure, the issue of insufficiency was not preserved for appellate review" and overruled the defendant's assignment of

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[1] We note that in *State v. Golphin*, the North Carolina Supreme Court invoked Rule 2 of the North Carolina Rules of Appellate Procedure to address defendants' argument on the merits. 352 N.C. 364, 406, 533 S.E.2d 168, 199. However, after careful review of the record, transcript, and briefs we decline to invoke Rule 2 to address this appeal. *See Dogwood Dev. & Mngt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194-96, 657 S.E.2d 361, 363-64 (2008) ("Rule 2 . . . must be invoked 'cautiously[.]'").

error. *Id.* at 676-77, 462 S.E.2d at 504; *see* N.C.R. App. P. 10(b)(3) ("[I]f 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.")

As in *Richardson*, defendant here made a motion to dismiss at the close of the State's evidence, *see Richardson* at 676, 462 S.E.2d at 504, but failed to renew his motion at the close of all of the evidence; therefore defendant "may not challenge on appeal the sufficiency of the evidence to prove the crime charged." N.C.R. App. P. 10(b)(3). These arguments are overruled.

IV. Jury Instructions

Our standard of review for jury instructions is

> only for abuse of discretion. Abuse of discretion means manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. Jury instructions must be supported by the evidence. Conversely, all essential issues arising from the evidence require jury instructions.

State v. Bagley, 183 N.C. App. 514, 524, 644 S.E.2d 615, 622 (2007) (internal citations, quotation marks, and ellipses omitted).

A. Felony Murder Instruction

Defendant argues "[t]he trial court erred in instructing the jury . . . on felony murder as a theory by which the jury could convict the defendant of the murder of Mrs. Newkirk as there was no evidence of the predicate felony of attempted robbery with a dangerous weapon." Defendant contends that

> the State's evidence fails to present any evidence the defendant made any kind of demand for money or property upon Mrs. Newkirk. . . . In light of this insufficiency it was error for the trial court to instruct the jury they could convict the defendant of first-degree murder if they believed it was committed during the commission of attempted robbery.

"An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *State v. Miller*, 344 N.C. 658, 667-68, 477 S.E.2d 915, 921 (1996) (citation and quotation marks omitted). At trial, Johnson testified that after they saw Newkirk, defendant "got out of the front seat with the .45 handgun, and I got out of the back. And I reached down to tie my shoe, because I didn't want my string dragging, you know, *while we were about to rob somebody*." (Emphasis added.) The trial court did not abuse its discretion in instructing the jury on felony murder predicated by the felony of attempted robbery as the evidence shows defendant attempted to rob Newkirk. *See Miller* at 667-68, 477 S.E.2d at 921. This argument is overruled.

B. Flight

Lastly, defendant argues "[t]he trial court committed prejudicial and reversible error in instructing the jury on flight as evidence of consciousness of guilt when there was no evidence to support this instruction." We disagree.

> A trial judge is not required to instruct a jury on defendant's flight unless there is some evidence in the record reasonably

> supporting the theory that defendant fled after commission of the crime charged. Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.

State v. Thompson, 328 N.C. 477, 489-90, 402 S.E.2d 386, 392 (1991) (internal citation and internal quotation marks omitted) (quoting *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 435 (1990)). Officer Sara Goree testified that when she stopped Morris' car, the two other individuals fled. Furthermore, Johnson testified that he and defendant left the scene of the crime and ran from the car once it was stopped by the police. Officer Goree's and Johnson's testimony is "evidence that defendant took steps to avoid apprehension". *Thompson* at 490, 402 S.E.2d at 392. Therefore, the trial court did not abuse its discretion in giving the jury an instruction on flight. *Bagley* at 524, 644 S.E.2d at 622. This argument is overruled.

V. Conclusion

For the reasons stated above, we find no error.

NO ERROR.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).