NO. COA08-1347

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

STATE OF NORTH CAROLINA

v. Pitt County
No. 05CRS060746

JAMES LEE HILL,
Defendant.

Appeal by defendant from judgment entered on or about 23 May 2008 by Judge James E. Hardin, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 8 April 2009.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Richard L. Harrison, for the State.

Winifred H. Dillon, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of robbery with a dangerous weapon and first degree murder. Defendant appeals, arguing the trial court erred in denying his motion to dismiss and in not intervening during the State's closing argument. For the following reasons, we find no error.

I. Background

The State's evidence tended to show the following: On 10 October 2005, victim and Ali Almunstaser were working at Kash and Karry. At around 10:00 p.m., victim and Mr. Almunstaser were preparing to leave when three masked men, including defendant,

walked in with a rifle and a shotgun. The men took money, including the "safe drop" for coins. Defendant shot victim. Victim died from the gunshot wound. On or about 31 October 2005, defendant was indicted for first degree murder and robbery with a dangerous weapon. Defendant was found guilty of both charges. Defendant was determined to have a prior record level of one; judgment was arrested on the robbery with a dangerous weapon conviction, and defendant was sentenced to life imprisonment without parole on the murder conviction. Defendant appeals, arguing the trial court erred in denying his motion to dismiss and in not intervening during the State's closing argument. For the following reasons, we find no error.

II. Motion to Dismiss

Defendant first contends that "the trial court erred in denying defendant's motion to dismiss the charges of armed robbery and first-degree murder because the evidence was insufficient to prove that defendant was a perpetrator of the crimes charged." (Original in all caps.) We disagree.

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
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> 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 of it, the motion should be allowed.
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> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the

> State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.
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> Both competent and incompetent evidence must be considered. In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict may be used to explain or clarify the evidence offered by the State. When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455-56 (citations, quotation marks, and brackets omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000).

"The elements required for [a] conviction of first-degree murder [on the basis of malice, premeditation, and deliberation] are (1) the unlawful killing of another human being, (2) with malice, and (3) with premeditation and deliberation." *State v. Lawson*, ___ N.C. App. ___, ___, 669 S.E.2d 768, 776 (2008) (citation omitted), *disc. review denied*, ___ N.C. ___, ___ S.E.2d

___ (2009). "The elements necessary to prove felony murder are that the killing took place while the accused was perpetrating or attempting to perpetrate one of the statutorily enumerated felonies. The enumerated felonies include robbery or other felony committed or attempted with the use of a deadly weapon." *State v. Dawkins*, ___ N.C. App. ___, ___, 675 S.E.2d 402, 405 (2009) (citations, quotation marks, and brackets omitted).

> The essential elements of robbery with a dangerous weapon are: (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 a person is endangered or threatened.

Dawkins at ___, 675 S.E.2d at 405 (citations and quotation marks omitted).

Here, the evidence showed, *inter alia* that: Mr. Almunstaser witnessed one of the masked men shoot the victim while the victim was offering for the masked men to take the money and requesting several times that the masked men "just calm down." The victim ultimately died from the shotgun wound. One of the fellow perpetrators testified that defendant planned to and did rob the Kash and Karry with him; he also identified defendant as the one holding the shotgun. An inmate from the Pitt County Detention Center testified that defendant admitted that he had robbed "the store" and was the shooter. A tire impression from behind the Kash and Karry lot corresponded to the tires from the gray Buick vehicle in which officers found defendant's driver's license. A shoe impression from the scene corresponded with a shoe found at

defendant's residence. Law enforcement officers searched two apartments, including defendant's residence, and found a rifle, a shotgun, and three masks hidden in the ceilings. During the trial defendant admitted that he hid the mask which was found at his residence. The shotgun pellets in the victim's body were consistent with shotgun pellets found at defendant's residence. After the robbery, defendant took a large number of rolled coins to a local bank to exchange for dollar bills. This evidence is clearly sufficient to survive a motion to dismiss, and thus the trial court did not err in denying defendant's motion. This argument is overruled.

III. State's Closing Argument

Defendant next contends that "the trial court erred in not intervening during the State's grossly improper closing argument and the trial court's error was prejudicial." (Original in all caps.) Defendant claims that

> the prosecutor engaged in name-calling, disparaged Defendant's attorney, and repeatedly expressed his personal opinion about the veracity of the Defendant. . . .
>
> . . . .
>
> The prosecutor's closing argument prejudiced Defendant because, by appealing to the passion and prejudice of the jury, and repeatedly improperly disparaging the defendant's credibility, it led the jury to focus away from the weaknesses in the state's case[.]

We disagree.

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed

> reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

Here, the prosecution stated, *inter alia*, during closing arguments:

> Those three criminal *thugs* who went into the Cash and Carry to rob the place that night didn't have a bit of sympathy for Ali . . . The defendant thinks its cute to run around with a sawed off .20 gauge shotgun because he might get robbed when these hard working guys at the Cash and Carry don't even have a gun there to protect themselves. Ali and [victim] didn't have their *high-priced lawyer* to sit there and plea for their lives . . . .
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> . . . .
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> And the other thing that just kind of *struck me as incredible*, . . . but he said that he kept [the shotgun] when he knew it was in his house -- at the times he knew it was there, he kept it loaded under his bed with a two-year old in the house. I asked him about that and he said, well, I only stuck it under there when the kid wasn't in the room so the kid wouldn't know it was under there. *How laughable is that? How unbelievable is that?*
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> . . . .
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> The mask was found hidden in his ceiling and I asked him, well, why did you hide it in the ceiling? Well because the police were coming. Why did you chose [sic] your ceiling? Well, I knew that's where [another perpetrator] hid his mask. Sometimes the truth does come out. But why did he say he had the mask? So he could discipline the two year old. . . . *Well, I must have missed that chapter in Dr. Spock's*

> *book on child raising. It's laughable. It's not believable. . . .*
>
> These size ten Nike shoes -- Now first of all, he says they're Demetrius' shoes because he wears a size ten and a half. They're found on the floor of his bedroom . . . . *Outrageous.*

(Emphasis added.)

The trial court did not err in failing to intervene *ex mero moto* during the State's closing argument. We first note that as defendant elected to testify at trial, it was appropriate for the State to address defendant's credibility in its argument to the jury. *See State v. Scott*, 343 N.C. 313, 344, 471 S.E.2d 605, 623 (1996) ("With reference to the prosecutor's argument that defendant had lied, we note that a prosecutor may properly argue to the jury that it should not believe a witness. When read in context, the prosecutor's argument was no more than an argument that the jury should consider defendant's credibility since he had lied about [the murder victim's] whereabouts before her body was found." (citation omitted)). Furthermore, even assuming the State made improper statements by classifying defendant as a "thug" and referring to defendant's attorney as "high-priced[,]" these statements do not rise to the level that the trial court was required to intervene, without objection, in the argument which comprises approximately seventeen pages of the transcript. *See State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998) ("The impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense

counsel apparently did not believe was prejudicial when he heard it." (citation, quotation marks, and brackets omitted)), *cert. denied*, 525 U.S. 1180, 143 L.Ed.2d 114 (1999); *see generally State v. Fletcher*, 354 N.C. 455, 484-85, 555 S.E.2d 534, 552 (2001) (citation omitted), *cert. denied*, 537 U.S. 846, 154 L.Ed.2d 73 (2002) ("[W]e decline to hold that this one brief comment out of thirty-two transcript pages of closing argument was so grossly improper as to warrant intervention *ex mero motu*. The offending comment was not only brief, but its overall significance to the entire closing argument was minimal . . . ."). This argument is overruled.

IV. Conclusion

We conclude that the trial court did not err in denying defendant's motion to dismiss and in allowing the State's closing argument to proceed without intervention. Accordingly, we find no error.

NO ERROR.

Judges ELMORE and ERVIN concur.

Report per Rule 30(e).