NO. COA08-1449

NORTH CAROLINA COURT OF APPEALS

Filed: 18 August 2009

STATE OF NORTH CAROLINA

v.

SHAYNIO MARCUS THOMAS

Guilford County
Nos. 03 CRS 095102-05
03 CRS 095109-10
03 CRS 095113

Appeal by defendant from judgments entered 24 April 2008 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 7 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Russell J. Hollers III for defendant-appellant.

BRYANT, Judge.

Defendant appeals from judgments entered by the Guilford County Superior Court following jury verdicts finding him guilty of attempted robbery with a dangerous weapon, five counts of second degree kidnapping, and possession of a firearm by a felon. For the reasons stated herein, we affirm the judgment of the trial court.

The evidence presented at trial tended to show that on 24 August 2003, just before 9:00 p.m. Samuel Robertson, his wife, and their four-year-old daughter were eating at a KFC restaurant on North Main Street in High Point, North Carolina when two men wearing ski masks entered. Mr. and Mrs. Robertson testified that

the men wore dark clothing — "[b]lack hoodies, dark jeans and ski masks or toboggans." And, "[t]hey both had nickel plated revolvers." The robbers moved the Robertson family to the back of the restaurant and into the kitchen along with two employees. There, the robbers demanded the managers present themselves and open the cash registers and the safe.

Mr. Robertson testified that as he was being herded into the kitchen he passed through a narrow hallway at which time one of the robbers lifted his mask to wipe sweat from his face. Standing approximately a foot away in a well-lit area, Mr. Robertson viewed the man's face for approximately two to three seconds. "I wanted to see who was going to shoot me." While in the kitchen, the robber once again lifted his mask for "[p]robably five seconds." Mr. Robertson further testified that "[o]nce they determined the managers weren't there and you know they had been there for awhile. It felt like forever. But once they determined they couldn't get in — you know, couldn't get in the safe and couldn't get no money, they just — they just ran out the back door." From the time they walked into the store until the time they left, three to five minutes elapsed. At trial, Mr. Robertson identified defendant as the man whose face he saw when the mask was lifted.

That evening, KFC General Manager Terry Dennison and Assistant Manager Doris Jenkins were on duty. Dennison was in the back of the store when Jenkins ran and told Dennison they were being robbed. Dennison and Jenkins then ran out of a rear exit. Once outside, in the dark, Dennison hid behind a hedge surrounding the

restaurant and spoke to a 9-1-1 dispatcher from his cell phone. Jenkins continued running to a nearby house. While hiding, Dennison saw the back door of the restaurant open and a person run out. The person ran through the hedge at a point approximately fifteen feet from Dennison and continued in the direction of the nearby house. Dennison believed the person had on washed-out jeans and a dark colored "hoodie." The 9-1-1 dispatcher advised Dennison to stay where he was and that law enforcement was en route. Dennison testified that from the time he ran out of the building until someone ran past him, approximately six minutes elapsed.

Officer K.D. Green, a Master Police Officer III with the High Point Police Department, testified that he was on duty the evening of 24 August 2003 and, sometime after 8:30 that evening, received a dispatch regarding an armed robbery in progress at a KFC located at 1711 North Main Street. At the time he received the dispatch, Officer Green was headed north on North Main Street between the 900 and 1000 blocks. The dispatcher informed him that a suspect had run out of the restaurant's back door. Just before arriving at the restaurant, Officer Green deactivated his emergency equipment so as to not alert anyone to his presence. He "headed westbound onto Rockspring Road and took a right headed northbound onto Long Street." "Taking that route . . . put [him] in direct line with the rear of the KFC parking lot."

Approximately a half block from the KFC, Officer Green observed "a black male walking southbound toward my direction very briskly on the east side of Long Street." The man fit the general

description of the suspect, "[b]lack male, dark clothing, possibly a hoodie, armed with a handgun." The officer illuminated the man with a spotlight, identified himself as a High Point police officer, and twice ordered the man to get on the ground. A second officer arrived. Refusing to comply with the order, defendant stated, "I haven't done anything," and ran. The officers soon found defendant hiding under a vehicle. Along the path that defendant ran, officers found a black do-rag, two blue and two white work gloves, a shoe defendant lost while running, a toboggan with eye holes cut out, and a revolver. From the time Officer Green received a call alerting him to the robbery and the time he first observed defendant, no more than two minutes passed. At trial, Officer Green identified defendant as the man he saw that night.

After the close of the evidence, the jury returned verdicts finding defendant guilty of possession of a handgun by a convicted felon, attempted armed robbery, and five counts of second degree kidnapping. The trial court entered judgments in accordance with the jury verdicts and sentenced defendant as a Level IV offender to 117 to 150 months in the custody of the North Carolina Department of Correction for attempted armed robbery; 46 to 65 months for three counts of second degree kidnapping; 46 to 65 months for each additional count of second degree kidnapping; and 16 to 20 months for possession of a firearm by a felon, all to be served consecutively. Defendant appeals.

On appeal, defendant raises the following arguments: The trial court erred in (I) sentencing defendant; (II) denying defendant's motion to suppress; and (III) failing to intervene *ex mero motu* during the prosecutor's closing arguments.

I

Defendant first argues the trial court erred in sentencing him as a Level IV offender. Defendant concedes that during the sentencing hearing, he stipulated he had been convicted of three felonies in New York; however, he contends that because the State failed to present any additional evidence that the out-of-state convictions were felonies, the trial court's determination that defendant was a Level IV offender was without sufficient basis. We disagree.

Under North Carolina General Statutes, section 15A-1340.14(e),

> [e]xcept as otherwise provided in this subsection, *a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony*. . . . If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2007).

"Determining a defendant's prior record involves a complicated calculation of rules and statutory applications. This calculation is a mixed question of law and fact." *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006) (citations and internal quotations omitted). "[W]hether an out-of-state offense is *substantially similar* to a North Carolina offense is a question of law that must be determined by the trial court." *Id.* (citation omitted) (emphasis added). "The 'fact' is the fact of the conviction[.]" *Id.* Under General Statute 15A-1340.14(f), "[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists . . . ." N.C.G.S. § 15A-1340.14(f) (2007). But, a prior conviction may be proven upon stipulation of the parties. *Id.*

If the State is unable to satisfy its burden that the defendant's out-of-state felony conviction is substantially similar to a North Carolina offense classified as a Class I felony or higher, the out-of-state felony conviction must be classified no higher than a Class I felony for sentencing purposes. *State v. Huu The Cao*, 175 N.C. App. 434, 443, 626 S.E.2d 301, 307 (2006) (citations omitted). Thus, for the purpose of calculating a defendant's prior record level, where the out-of-state felony conviction is classified as the default Class I felony, the State is relieved of its burden to establish that the conviction is substantially similar to a North Carolina felony. *See State v. Hinton*, ___ N.C. App. ___, ___, 675 S.E.2d 672, 675 (2009); *accord State v. Hanton*, 140 N.C. App. 679, 540 S.E.2d 376 (2000).

Here, during the sentencing hearing, the State and defendant stipulated to three prior convictions from New York — one count of "Second Degree Robbery" and two counts of "Grand Larceny" — to be classified as Class I felonies for the purpose of determining defendant's prior record level. Defendant did not argue or offer evidence that the offenses classified as felonies in New York were substantially similar to offenses categorized as misdemeanors in North Carolina. Likewise, the State did not argue or offer evidence that the felony convictions in New York were substantially similar to crimes categorized in North Carolina as Class I felonies or higher. Therefore, we hold the trial court did not err in classifying defendant's prior convictions in New York as Class I felonies to determine defendant's prior record level for sentencing purposes. *See Hinton*, ___ N.C. App. ___, 675 S.E.2d 672; *Cao*, 175 N.C. App. 434, 626 S.E.2d 301. Accordingly, this assignment of error is overruled.

II

Defendant next argues the trial court erred in denying his motion to suppress. Defendant argues that law enforcement detained him without a reasonable suspicion that he was involved in criminal activity or probable cause to believe defendant had committed some crime. Therefore, defendant argues the trial court erred in failing to suppress any evidence obtained from defendant in violation of his constitutional rights.

> "[A] ruling on a motion in limine is a preliminary or interlocutory decision which the trial court can change if circumstances develop which make it necessary." *State v.*

> *Lamb*, 321 N.C. 633, 649, 365 S.E.2d 600, 608 (1988) (quoted with approval in *State v. Smith*, 352 N.C. 531, 553, 532 S.E.2d 773, 787 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360, 121 S. Ct. 1419 (2001)); *see also State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (reversing this Court's opinion to the contrary: "Rulings on motions in limine are preliminary in nature and subject to change at trial, depending on the evidence offered, and thus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.") (internal quotations omitted). Thus, any ruling on a motion to suppress prior to trial is not final and the trial court may reverse its decision.

State v. McNeill, 170 N.C. App. 574, 579, 613 S.E.2d 43, 46 (2005).

Here, in a pre-trial motion *in limine*, defendant argued that the evidence obtained as a result of his initial stop and ultimate detention by law enforcement should be suppressed. During a hearing on the matter, Officer Green testified to the sequence of events that started with receiving a dispatch regarding an armed robbery in progress and culminated in the seizure of defendant. The trial court denied defendant's motion. At trial, Officer Green again testified without objection to the events that transpired from the moment he received a dispatch of the armed robbery in progress until he took defendant into custody.

As defendant failed to renew his objection during trial to the admission of evidence obtained as a result of being seized by police, his pre-trial motion to suppress such evidence is insufficient to preserve for appeal the question of the admissibility of such evidence. *Id.* Accordingly, we dismiss this argument.

III

Last, defendant argues that the trial court erred in failing to intervene *ex mero motu* while the prosecutor made grossly improper remarks during closing arguments. Defendant argues that the prosecutor personally vouched for the credibility of his witness and told the jury about defendant's prior conviction for common law robbery in an effort to obtain a guilty verdict. For these reasons, defendant argues he is entitled to a new trial. 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) (internal citation omitted).

In *Jones*, our Supreme Court held that the prosecutor's closing arguments were grossly improper and prejudicial. In a trial where the defendant was charged with first-degree murder, the prosecutor opened with references to tragic events such as the Columbine shooting and the Oklahoma City bombing. *Id.* at 132, 558 S.E.2d at 107 n.2. The Court held that the impact of those statements could

not easily be removed from the consciousness of the jury and such language exceeded what had previously been held to be prejudicial error.

Here, the prosecutor stated, "I stand by every witness that took that witness stand . . . ." And, "I asked Mr. Robertson, how certain are you. I will never forget his face. I will never forget his face. That's believable. That's credible. And it's the truth." These statements, the State argues on appeal, were in response to defendant's closing argument which directly and repeatedly attacked the credibility of the State's witnesses.

In his closing, defendant argued that Mr. Robertson's testimony was not credible and specifically attacked Mr. Robertson's testimony that he saw and focused on the robber's face when the robber lifted his mask.

> "And the only main interest that you are worrying about, and which he testified, was if he is going to shot [sic] me, I want to see his face. I can't believe he absolutely sat on that stand and said that. . . . [H]e's going to protect his wife and his kids. . . . [If it were me,] [a]in't no way I'm going to sit and try to look at a suspect's face. It didn't add up . . . ."

In closing, defendant also attacked the credibility of the testimony of law enforcement with statements, such as: "I don't believe a criminal is going to throw a ski mask here and a glove. Then go somewhere else, here, throws another glove over there. Come on." "[Law enforcement] put the glove there." Defendant argued that the police expected the jury to believe that defendant was a "dumb criminal."

We find the prosecutor's comments on the credibility of the State's witnesses made in response to defendant's strong attacks on the credibility and character of the State's witnesses, to be fair rebuttal argument, clearly not grossly improper, such as would require the trial court to intervene *ex mero motu*.

Defendant also argues on appeal that the State's argument to the jury regarding defendant's prior conviction for common law robbery was an improper misstatement of the law. We note that the State acknowledged defendant's prior felony conviction for common law robbery while explaining the charge of possession of a firearm by a felon.

> Possession of a firearm by a felon. . . . We have to prove that the defendant was convicted of a felony. You heard and saw the judgment for this defendant being convicted of a robbery back in 2001 down in Charlotte. You know, I mean, not only is he identified in the store, . . . but lo and behold he's been convicted of a robbery before. And you saw the judgment.

While the comments by the prosecutor discussing the prior robbery in conjunction with the recent charge of attempted robbery were improper, they were not so grossly improper that the trial court was required to intervene *ex mero motu*. Further, the trial court's instruction to the jury included the following:

> Now, evidence has been received that at an earlier time the defendant was convicted of common law robbery in Mecklenburg County. You may consider this evidence for one purpose only. Namely, in connection with the charge against the defendant in this case for possession of a firearm by a felon. This past conviction is not evidence of the defendant's guilt with regard to the other charges against him in this case. You may not convict the

> defendant on the present charges because of something the defendant may have done in the past . . . .

Accordingly, defendant's assignment of error is overruled.

No prejudicial error.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).