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NO. COA08-291

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

DARYL KEITH SILVER,
Defendant.

Pitt County
Nos. 07 CRS 2525
07 CRS 50226

Court of Appeals

Slip Opinion

Appeal by defendant from judgment entered 19 September 2007 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 17 November 2008.

Attorney General Roy Cooper, by Assistant Attorney General Terence D. Friedman, for the State.

John T. Hall for defendant-appellant.

GEER, Judge.

Defendant Daryl Keith Silver appeals from his conviction of common law robbery and his sentencing as a habitual felon. On appeal, defendant argues that the trial court erred in denying his motion to dismiss because the evidence was insufficient to establish the use or threatened use of force. Upon review of the record, we conclude that the State, in fact, presented sufficient evidence and, therefore, the trial court properly denied defendant's motion to dismiss.

Facts

The State's evidence tended to show the following facts. Early in the morning of 28 November 2006, William Earl King entered a convenience store in Pitt County to buy a cake and a soda. As he approached the cashier, he saw that she had the register open, and it was full of cash. She did not appear to be waiting on anyone and no one else was in the store.

Mr. King got into his vehicle, a 1993 green Ford Explorer, and defendant immediately approached Mr. King's vehicle and got into the passenger side. Mr. King noticed a "bulge" in defendant's jacket pocket. Although Mr. King did not see the object in the pocket, he said it looked "heavy." Mr. King did not know defendant.

Defendant told Mr. King that Mr. King had just cost him a great deal of money. Mr. King testified that, at that point, he was "not trying to resist" because he "just thought [he] was going to die." Defendant then ordered Mr. King to drive around to the side of another building, pointed at a brown van, and told Mr. King that some of "his men" were in it. Defendant then had Mr. King drive around the building again.

After the second trip around the building, defendant ordered Mr. King to stop the vehicle. He again said that Mr. King cost him a lot of money and that Mr. King "knew too much." As Mr. King raised his voice in response, defendant put his hand in his jacket pocket where the bulge was. Mr. King immediately lowered his voice. Mr. King explained at trial: "[T]his man said I knew too much, and so I ain't the smartest person in the world, but if you

know too much, then it must an answer [sic] to eliminating you knowing so much." Mr. King urged defendant to please notice the gospel music playing over the stereo and the Bible in the car and said "that ought to tell you something right there."

Defendant then claimed to be a police officer, told Mr. King he was under arrest, and instructed Mr. King to place his personal belongings on the dashboard. After Mr. King obeyed, defendant ordered Mr. King to switch seats with him. During the switch, Mr. King ran away and hid behind an air conditioning unit, while defendant drove away with Mr. King's vehicle. Mr. King later notified the police.

On 1 December 2006, the Nash County Sheriff's Department received a complaint that a few individuals were knocking on doors in a neighborhood and begging residents for gas money. The law enforcement officers who responded found defendant with a green Ford Explorer. Defendant told the officers that he had borrowed the vehicle from a friend and needed gas money. The officers ran the license tag and learned that the Explorer was the one taken from Mr. King.

Mr. King initially identified a different person in a photo lineup as being the perpetrator, but that individual was incarcerated at the time of the incident. Two months later, Mr. King was shown another photo lineup and identified defendant as the individual who took his vehicle.

Defendant was indicted on 5 March 2007 for robbery with a dangerous weapon and for being a habitual felon. Following the

conclusion of the State's evidence, defendant moved to dismiss all the charges. The trial court dismissed the armed robbery charge, but sent the charge of common law robbery to the jury. The jury found defendant guilty of common law robbery, and defendant subsequently pled guilty to having attained habitual felon status. The trial court sentenced defendant in accordance with the plea agreement to a mitigated-range sentence of 101 to 131 months imprisonment.

Discussion

On appeal, defendant contends that the trial court erred in denying the motion to dismiss the charge of common law robbery. A defendant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. On review of a denial of a motion to dismiss, this Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869.

Common law robbery requires proof of four elements: "(1) felonious, non-consensual taking of (2) money or other personal property (3) from the person or presence of another (4) by means of force." *State v. Robertson*, 138 N.C. App. 506, 508, 531 S.E.2d 490, 492 (2000), *cert. denied*, 560 S.E.2d 357 (2002). Defendant

argues that the State failed to present sufficient evidence to prove the element of force. He does not challenge the State's evidence on the remaining three elements.

The element of force requires proof of a taking either "by violence" or by "putting [the victim] in fear." *State v. Moore*, 279 N.C. 455, 457, 183 S.E.2d 546, 547 (1971). In other words, the element of force may be proven by actual or constructive force. *Robertson*, 138 N.C. App. at 508, 531 S.E.2d at 492. "Actual force connotes violence, or force to the body." *Id.* Constructive force, on the other hand, "exists if the defendant, by words or gesture, has placed the victim in such fear as is likely to create an apprehension of danger and thereby induce [him] to part with [his] property for the sake of [his] person." *Id.* at 510, 531 S.E.2d at 493.

In this case, we believe there was substantial evidence of constructive force. After Mr. King observed the clerk in the convenience store with a register of cash open although no other customers were in the store, he rushed out, only to have defendant immediately come up to him with a noticeable bulge in his pocket that appeared to be a heavy object. Defendant made threatening remarks, including that Mr. King had cost him a lot of money and "knew too much." On the sole occasion that Mr. King showed any resistance, defendant shoved his hand in his pocket with the bulge. Mr. King did everything that defendant asked, including driving around and emptying his pockets.

Mr. King explained: "I tried to go along with whatever he was saying to keep from getting hurt, sir. I mean basically to come right down to it I was scared. It was simply that." Viewing the evidence in the light most favorable to the State, we find that a reasonable juror could conclude that defendant's actions placed Mr. King in such fear that it created an apprehension of danger and thereby induced Mr. King to part with his property.

The trial court, therefore, properly denied the motion to dismiss the charge of common law robbery. Defendant does not dispute that if there was sufficient evidence of common law robbery, then he was properly sentenced as a habitual felon.

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).