NO. COA09-1389

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v. Forsyth County
No. 07 CRS 51937-9

DEXTER EUGENE RUCKER,
Defendant.

Appeal by defendant from judgments entered 11 May 2009 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 15 April 2010.

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

M. Alexander Charns for defendant.

ELMORE, Judge.

On 24 February 2007, Dexter Rucker (defendant) and Devin Campbell robbed the apartment of Benigno "Benny" Perez Martinez (victim).[1]

Campbell testified to the following: He and defendant were walking home around midnight "talking about robbing some people, robbing whoever." Defendant had a gun on him at the time. As they walked up Academy Street, they saw a man, Benny, standing outside his apartment, talking on his cell phone. Campbell struck up a

[1]Campbell pleaded guilty to second degree murder in exchange for testimony against defendant.

conversation with him about drugs as an excuse to get close to Benny; defendant then pulled out his gun and Campbell took Benny's phone and wallet. Defendant then suggested that they go inside the apartment to see if they could find more to take. Inside, they encountered a family friend, Victor, asleep on the couch; Campbell searched him and took his wallet.

Antonio, Benny's brother, testified that he entered the kitchen during the commotion, at which point Campbell approached him and asked him for money. Antonio stated that he did not have any, and Campbell then struck him with a flashlight. Then both defendants made Victor, Benny, and Antonio lie down on the living room floor. At that point, Margarita, Antonio and Benny's mother, entered the room from a bedroom, and defendant and Campbell demanded money from her; when she told them that she had none, Campbell struck her. She was then made to lie on the floor with the others. Antonio and Margarita both testified that defendant held the gun on them throughout the encounter.

When defendant and Campbell noticed there was nothing else to take, they left the apartment. Benny got up as they left to try to push the door closed. There was a struggle at the door, and Benny was not able to close the door completely. Once outside, defendant and Campbell ran in opposite directions. Benny chased after defendant, and Antonio chased after Campbell. Benny chased defendant to the fence around the apartment building -- a five foot, chain-link fence, with barbed wire at the top. Per Margarita's testimony, defendant then turned around at the fence

and shot Benny in the left portion of his abdomen; he later died in surgery at the hospital.

Defendant and Campbell ran home. At home, defendant put one of the wallets in the trash, put the gun under a couch cushion, and pocketed the twenty dollar bill and a key chain. Defendant then went to sleep for the night. Later, police found the weapon under the couch cushion, found the wallet in a trash bag, and also found the money and the key chain from the robbery. Defendant admitted that the key chain and the $20.00 belonged to one of the victims of the robbery.

Defendant was found guilty of two counts of robbery with a dangerous weapon and first degree murder on the basis of felony murder. He was sentenced to life imprisonment on the murder charge and to a term of sixty-four to eighty-six months for the count of robbery with a dangerous weapon that did not merge with felony murder. He now appeals.

I. Motion to Dismiss

Defendant first argues that the trial court erred by failing to grant his motion to dismiss based on insufficiency of the evidence. Challenges to sufficiency of evidence are reviewed in the light most favorable to the State with all reasonable inferences drawn in the State's favor. *State v. Payne*, 149 N.C. App. 421, 424, 561 S.E.2d 507, 509 (2002). This Court must determine whether substantial evidence supports each essential element of the crime and shows defendant is the perpetrator. *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996).

"Substantial evidence is that which a reasonable juror would consider sufficient to support a conclusion that each essential element of the crime exists." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000).

In order to prove felony murder, the State must show that the murder was "committed in the perpetration or attempted perpetration of any . . . robbery . . . or any other felony committed or attempted with the use of a deadly weapon." N.C. Gen. Stat. § 14-17 (2009). Further, the State must prove that all of the elements of the underlying felony "occur[red] in a time frame that can be perceived as a single transaction[.]" *State v. Trull*, 349 N.C. 428, 449, 509 S.E.2d. 178, 192 (1998). "A killing committed during escape or flight is ordinarily within the felony-murder rule." *State v. Squire*, 292 N.C. 494, 512, 234 S.E.2d. 563, 573 (1977).

In this case, the evidence -- taken in the light most favorable to the State -- shows that defendant shot the victim as he was fleeing the scene of an armed robbery. Defendant does not dispute any of the elements of the armed robbery. Instead, he makes two arguments as to why the killing was not part of the robbery: first, that the armed robbery was completed when he closed the door and left the home, and thus the killing did not constitute an act in "perpetration" of the robbery; and, second, that "running home on foot to his mother's house after committing a crime is not considered escaping" because, in this context, "escaping" means running from police and prosecution. Thus, defendant argues, the killing was outside of the perpetration of the armed robbery as the

robbery was completed and he was simply returning home. These arguments are not persuasive.

Defendant admitted that the shooting took place "a couple of feet" from where he took off running from the home after committing the burglary. This Court has repeatedly upheld felony murder convictions where the killing took place in this type of physical proximity to the predicate felony. *See Squire*, 292 N.C. at 513, 234 S.E.2d at 574 (holding there was no break in time or place when a trooper was shot ten miles from where the felony occurred and the trooper was not stopping the vehicle pursuant to that felony); *State v. Jaynes*, 342 N.C. 249, 274-75, 464 S.E.2d 448, 464 (1995) (holding no break in time even where felony murder was predicated on an arson that was committed three and a half hours after the murder); *State v. Doyle*, 161 N.C. App. 247, 251, 587 S.E.2d 917, 920-21 (2003) (holding no break in time or place where death was a result of highway chase thirty minutes after the initial felony, and the victim who was killed was not the victim of the initial felony).

As to defendant's proposed definition of "escaping," he has not presented any authority suggesting that "escape" refers solely to running from police or prosecution. Instead, defendant cites to two cases in which the defendants were in fact running from police apprehension, but in neither does the Court consider whether *only* the avoidance of police apprehension constitutes an "escape." *See Squire* at 494, 234 S.E.2d at 563; *Doyle* at 247, 587 S.E.2d at 917. He also quotes at length from *State v. Holland*, which is inapt

here; it did not involve felony murder and only addressed a definition of "flight" as it pertained to supporting a theory of premeditation and deliberation. *State v. Holland*, 161 N.C. App. 326, 330, 588 S.E.2d 32, 36 (2003). Further, while the term "escape" is used most commonly to refer to breaking free from incarceration or custody by the police, we note that, in this case, defendant in fact shot and killed the individual who was chasing him down to detain him following commission of his crime. Defendant has not shown that his pursuer's status as a citizen -- rather than as a police officer -- makes the term "escape" inapplicable.

The State presented substantial evidence to support each element of the crimes with which defendant was charged, including the fact that the killing was within the perpetration of the armed robbery. Accordingly, we find no error.

II. Ineffective Counsel

Defendant also argues that he received ineffective assistance of counsel because his trial counsel did not ask to record jury selection, opening statements, and closing arguments. The standard for proving ineffective assistance of counsel is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the

> conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

Defendant claims that the failure to record jury selection, opening statements, and closing arguments has not only violated his Sixth Amendment rights but also prevented appellate counsel from showing prejudice. We first note that, per statute, in non-capital cases it is not required that the jury selection, opening statement, and closing arguments be recorded. N.C. Gen. Stat. § 15A-1241(a) (2009). This Court has specifically rejected as a basis for reversal the argument that appellate counsel is unable to show prejudice because jury selection, opening statements, and closing arguments were not recorded. *See State v. Hardison*, 326 N.C. 646, 660-62, 392 S.E.2d 364, 372-73 (1990) (holding that the argument that "without a transcript of every aspect of the trial, it is impossible to effectively evaluate what possible appellate issues might be advanced" does not meet the standards set forth in *Strickland* and *Braswell*). This Court has also held that trial counsel is effective even when counsel does not request that jury selection, opening statements, and closing arguments be recorded in non-capital cases. *Hardison*, 326 N.C. at 660-62, 392 S.E.2d at 372-73 (holding that the defendant had a fair trial free from error despite the fact that counsel did not ask to record jury selection,

opening statements, and closing arguments). Accordingly, we find no error.

No error.

Judges BRYANT and ERVIN concur.

Report per Rule 30(e).