NO. COA12-1566
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v. Catawba County
No. 11 CRS 8038

ANTHONY PARKS WEISS

Appeal by Defendant from judgment entered 26 September 2012 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 19 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Elder, for the State.

Kevin P. Bradley for Defendant.

DILLON, Judge.

Anthony Parks Weiss (Defendant) appeals from a judgment entered based upon a jury verdict finding him guilty of robbery with a dangerous weapon. The trial court sentenced Defendant within the presumptive range to a term of 73 to 97 months imprisonment. We hold that Defendant received a fair trial, free from prejudicial error.

Defendant first argues that he received ineffective assistance of trial counsel because counsel did not move to dismiss the charge of robbery with a dangerous weapon. Defendant contends that the State did not present sufficient evidence to prove that he was the perpetrator of the robbery. We disagree.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "To show that he was prejudiced by trial counsel's failure to move for dismissal at the close of all evidence, [a] defendant must show that he would have been entitled to a dismissal had the motion been made." *State v. Mitchell*, ___ N.C. App. ___, ___, 735 S.E.2d 438, 442 (2012).

> "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the

> evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion."

Id. (quoting *State v. Miller*, 363 N.C. 96, 98-99, 678 S.E.2d 592, 594 (2009)).

The victim of the robbery, Kassie Warrick, testified as follows regarding her identification of the man who robbed her:

> [Prosecutor:] Ms. Warrick, do you remember being asked by the officers or an officer that evening to come outside and see if you could identify who was in your house?
>
> [Warrick:] Yes, sir. I definitely remember that.
>
> [Prosecutor:] And when you were asked to do that, what did you do, ma'am?
>
> [Warrick:] I went outside and they had [Defendant] in the back of one cruiser and Billy in the back of another cruiser. And both of them [were] pretty much dressed alike. And they asked me to identify and I identified [Defendant].
>
> [Prosecutor:] You identified the defendant in this courtroom --
>
> [Warrick:] Yes, sir.
>
> [Prosecutor:] -- as the person that was in your house?

> [Warrick:] Yes, sir. I think [Defendant] has maybe put on a little bit more weight.
>
> . . . .
>
> [Prosecutor:] So the person you identified to the officers as having been in the house and robbed you is sitting in this courtroom today; is that correct?
>
> [Warrick:] I feel like yes. Yes.
>
> [Prosecutor:] And is that the defendant?
>
> [Warrick:] Yes, sir. . . .

We hold that this testimony constitutes both a confirmation that Defendant was the person Warrick had previously identified as the man who robbed her and an in-court identification of Defendant as the robber. This testimony alone is sufficient evidence that Defendant was the perpetrator of the offense, and thus, a motion to dismiss arguing the State had presented insufficient evidence on this basis would have been denied. Accordingly, Defendant was not prejudiced by his trial counsel's failure to move for the dismissal of the charge against him on this ground, so counsel's performance cannot be considered ineffective. This argument is overruled.

Defendant also argues that the trial court failed to exercise its discretion when sentencing him in the presumptive range even though it found a statutory mitigating factor.

Generally, "[w]hen a sentence is within the statutory limit it will be presumed regular and valid unless 'the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence.'" *State v. Davis*, 167 N.C. App. 770, 775, 607 S.E.2d 5, 9 (2005) (quoting *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)). However, "[w]hen a trial court fails to exercise its discretion in the erroneous belief that it has no discretion as to the question presented, there is error." *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992).

Here, the trial court acknowledged at sentencing that a mitigating factor existed in that "[t]he defendant does have a support system in the community and pretrial credit." N.C. Gen. Stat. § 15A-1340.16(e)(18) (2011). Nonetheless, the court "conclude[d] as a matter of law [that] sentencing in the presumptive range is appropriate." Defendant contends the fact that the court stated it concluded "as a matter of law" that a presumptive-range sentence was appropriate shows that the court failed to exercise its discretion in sentencing Defendant. We disagree.

The mere use of the phrase "as a matter of law" does not compel a conclusion that the trial court failed to exercise its

discretion, and there is nothing in the court's statements that suggests the court believed it could not exercise its discretion in sentencing Defendant. Examining the totality of the court's statements made at sentencing, we think it is clear that the trial court considered Defendant's mitigating factor, but in its discretion concluded that a presumptive-range sentence was appropriate as opposed to a sentence in the mitigated range. Moreover, the fact that the court found a presumptive-range sentence was "appropriate" suggests that the court was making a discretionary conclusion and not one compelled by law. Accordingly, we overrule this argument.

NO ERROR.

Judges GEER and ERVIN concur.

Report per Rule 30(e).