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NO. COA13-146  
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v.

Cabarrus County  
Nos. 09 CRS 52656, 52747  
11 CRS 1116

DONNIE GEORGE MORTON

Appeal by defendant from judgment entered 2 August 2012 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 4 June 2013.

*Attorney General Roy Cooper, by Assistant Attorney General LaShawn S. Piquant, for the State.*

*Bushnaq Law Office, PLLC, by Faith S. Bushnaq for defendant-appellant.*

STEELMAN, Judge.

Where evidence was sufficient to support a jury's finding that defendant committed the robbery, the trial court did not err in denying defendant's motion to dismiss. Where documents were admitted for the purpose of connecting defendant to the crime scene, the trial court did not err in overruling defendant's objection to their admission. The trial court correctly determined that defendant's *pro se* motions for a

speedy trial were legal nullities. A motion for a speedy trial by defendant's counsel, filed one week before trial, was not a valid exercise of his right to a speedy trial.

### I. Factual and Procedural History

On 7 August 2009, a masked man walked into the Harrisburg Hometown Pharmacy and robbed it. The robber wore a gray hooded sweatshirt and carried a silver revolver. Subsequently, the owner and operator of the pharmacy, Penny Jordan, identified Donnie George Morton (defendant) as the robber. While executing a search warrant at defendant's residence, police found a silver revolver less than two feet from where defendant was seated. Police also found bond-related documents connecting defendant to Stephanie Young, whose car was seen outside of the pharmacy at the time of the robbery. Defendant gave a statement to police acknowledging his familiarity with the weapon. Defendant was indicted for robbery with a dangerous weapon, conspiracy to commit armed robbery, possession of a firearm by felon, and being an habitual felon.

On 20 January 2010, defendant filed a *pro se* "motion for a speedy trial." This motion was denied, because defendant was represented by counsel, and could not also proceed *pro se*. On 14 May 2012, defendant filed a *pro se* motion to dismiss the

charges based upon a violation of his right to a speedy trial. On 18 May 2012, the trial court held that this motion was a nullity, again because defendant was represented by counsel. On 7 June 2012, defendant filed a *pro se* motion for a writ of *habeas corpus* based upon a violation of his right to a speedy trial. On 12 June 2012, the trial court denied this motion, again based upon the fact that defendant was represented by counsel, and could not proceed *pro se*.

On 24 July 2012, defendant filed a motion to remove his attorney due to "lack of Honesty, interest, And preformance [sic][.]" On 25 July 2012, defense counsel filed a motion to suppress evidence obtained pursuant to a search warrant. Defense counsel also filed a motion to dismiss the charges based upon a violation of defendant's right to a speedy trial. On 26 July 2012, defense counsel filed an amended motion to dismiss.

On 2 August 2012, the State voluntarily dismissed the charge of conspiracy to commit armed robbery. That same day, the jury found defendant guilty of robbery with a firearm, possession of firearm by a felon, and being an habitual felon. The trial court consolidated the charges for judgment and sentenced defendant to an active term of imprisonment of 116-149 months.

On 9 August 2012, the trial court filed a written order denying defendant's amended motion to dismiss, which had previously been denied in open court.

Defendant appeals.

## II. Motion to Dismiss

In his first argument, defendant contends that the trial court erred in denying defendant's motion to dismiss the charge of robbery with a firearm. We disagree.

### A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

"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.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the

light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 32 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

#### B. Analysis

At trial, the State presented the testimony of Penny Jordan, the owner of the pharmacy, who identified defendant as the robber. Detective Larry Brian Heintz testified concerning the investigation which led him to Stephanie Young, the owner of the car seen near the pharmacy at the time of the robbery; this in turn led him to Jamie Lynn Burris and defendant; which in turn led to the issuance of a search warrant which resulted in finding defendant and the gun. Defendant, when questioned by police, gave a written statement that he was in the vicinity of the pharmacy at the time of the robbery, and that the gun used in the robbery was in his possession.

Defendant contends that this evidence was not sufficient to withstand a motion to dismiss the armed robbery charge because it was not credible. However, the credibility of witnesses is not for this Court to determine. *State v. Buckom*, 126 N.C. App. 368, 375, 485 S.E.2d 319, 323 (1997) (quoting *State v. Hanes*,

268 N.C. 335, 339, 150 S.E.2d 489, 492 (1966)). It is the role of the trial court to determine the admissibility of evidence, and of the jury to determine its credibility. In the instant case, we hold that the evidence, viewed in the light most favorable to the State, constituted substantial evidence of defendant being the perpetrator of the robbery with a firearm.

This argument is without merit.

### III. Bond Indemnity Documents

In his second argument, defendant contends that the trial court erred in overruling his objection to the introduction of documents showing that defendant had been released on bond when those documents were not relevant to whether he committed the offenses for which he was being tried. We disagree.

#### A. Standard of Review

Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the "abuse of discretion" standard which applies to rulings made pursuant to Rule 403.

*Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted).

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000).

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

#### B. Analysis

At trial, the State sought to introduce bond-related documents, dated a week before the robbery took place, in order to connect defendant with Stephanie Young. Young, whose name was on the documents, was also a suspect in the robbery. Her vehicle was seen in the vicinity of the pharmacy at the time of the robbery. Defendant objected to the relevance of the documents pursuant to Rule 401 of the North Carolina Rules of Evidence, and contended that they were prejudicial and should be excluded pursuant to Rule 403. The trial court overruled

defendant's objection, holding that the evidence was relevant to show that defendant was living with Young, who was tied to the scene of the crime, and further that the probative value of the documents outweighed any prejudice from the fact that defendant was out on bond.

Defendant first argues that the documents were not relevant. However, the bond documents have a logical tendency to prove a connection between defendant and Young, whose presence was tied to the scene of the robbery. Giving appropriate deference to the trial court, we hold that this evidence had a logical tendency to prove a connection between defendant and the robbery, and was therefore relevant.

Defendant next argues that the documents were prejudicial. The trial court found that this was not the case, and defendant has not shown an abuse of the trial court's discretion. Accordingly, we hold that the trial court did not err in overruling defendant's objection.

This argument is without merit.

#### IV. Speedy Trial Violation

In his third argument, defendant contends that his right to a speedy trial was violated when nearly three years elapsed



between his arrest and trial, and he had asserted that right approximately five months after his arrest. We disagree.

A. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

B. Analysis

The trial court correctly held that defendant's *pro se* motions while he was represented by counsel were legal nullities. Accordingly, the denial of these motions is not properly before us on appeal.

The motions filed by defense counsel on 25 and 26 July 2012 are not nullities. However, the trial court acted on these motions within a week. The conspiracy charge was dismissed on 2 August 2012, and a jury found defendant guilty of the remaining charges that same day.

In the case of *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed.2d 101 (1972), the United States Supreme Court set forth a four-part test for determining if a defendant had been denied his

constitutional right to a speedy trial. These four elements are (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to defendant resulting from the delay. *Barker* at 530-32, 33 L. Ed. 2d at 117-18. Our Supreme Court has held that this analysis applies when a defendant asserts a violation of North Carolina's speedy trial law. *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000). There is no exact calculus for balancing these factors; rather, they are to be considered together on a case-by-case basis, with no one factor being outcome-determinative. *State v. Washington*, 192 N.C. App. 277, 282-83, 665 S.E.2d 799, 803 (2008). If a defendant establishes that the factors weigh in his favor, the charges against him or her should be dismissed. *Id.* at 297-98, 665 S.E.2d at 812.

We have previously held that a defendant's exercise of his right to a speedy trial a week before trial was not, on its own, sufficient to show a valid assertion of the right to a speedy trial. See *State v. Shelton*, 53 N.C. App. 632, 638, 281 S.E.2d 684, 690 (1981), *appeal dismissed and disc. review denied*, 305 N.C. 306 (1982). In the instant case, not only was the trial held within one week, but final disposition of the case was

reached. Accordingly, we hold that defendant has failed to show a valid exercise of his right to speedy trial.

This argument is without merit.

NO ERROR.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).