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NO. COA14-648
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.

Henderson County
Nos. 12 CRS 54867
12 CRS 54928
12 CRS 54933
13 CRS 489

MICHAEL JAMES COFFMAN

Appeal by defendant from judgment entered 21 November 2013
by Judge Bradley B. Letts in Henderson County Superior Court.
Heard in the Court of Appeals 22 October 2014.

*Roy Cooper, Attorney General, by Mary S. Mercer, Assistant
Attorney General, for the State.*

*Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for
defendant-appellant.*

STEELMAN, Judge.

Where the State did not present substantial circumstantial
evidence that defendant committed the crimes of felony fleeing
to elude arrest and possession of a concealed weapon, the trial
court erred in denying defendant's motion to dismiss. Where one

of the counts of assault on a law enforcement officer was consolidated for judgment with the carrying a concealed weapon charge, that matter is remanded to the trial court for resentencing.

I. Factual and Procedural Background

Roxanne Milstead (Milstead) lived in Hendersonville with her two children and Michael Coffman (defendant). On the night of 15 November 2012, Milstead, her mother, and her two children, returned to Milstead's home to find the front door hanging off of its hinges. Someone had been inside, and one of Milstead's cars was missing. Milstead entered the house, while her mother and children waited in the car. While Milstead was inside, defendant returned from work. Milstead determined that the home was safe, then called the Sheriff to report the break-in and stolen car. Deputy McMurray responded to Milstead's call, and refused to take her report, informing her that he had been the person who broke into her home. He had done so because he had a warrant for defendant's arrest for leading police on a high-speed chase through Henderson County in Milstead's car.

The next day, defendant turned himself in to police, and was released on bond. He made his first appearance in court the following Monday. That afternoon, Deputies Hartline and

Blackwell arrived at Milstead's home. Defendant was playing with one of his dogs, a neighbor, and one of Milstead's children at the time. Deputy Hartline informed defendant that they had a warrant for his arrest on the charge of carrying a concealed weapon. When defendant expressed disbelief, Deputy Hartline wrestled defendant to the ground. In the process, Deputy Hartline struck his head against a brick, and blacked out. One of defendant's dogs seized Deputy Blackwell about the ankle. The deputies eventually restrained defendant.

At trial, the State presented evidence that Milstead's car had been used in a chase which began at 8:00 p.m. on 15 November 2012. Deputy Mitchell, driving on U.S. Highway 25 towards Hendersonville, saw the vehicle driving in the opposite direction at approximately 80 miles per hour, and began pursuit. The car left Highway 25, then returned to the highway, then turned off of the highway into a residential neighborhood, drove through the front yard of a private residence, drove back onto Highway 25, then turned into another residential neighborhood, where it became "disabled." The vehicle stopped approximately one quarter-mile from Milstead's home. The driver then fled into the woods and eluded police.

No witnesses were able to identify the driver of the vehicle. However, one deputy found defendant's identification in a wallet in the front seat of the vehicle. A cooler was also found in the front passenger seat of the vehicle, containing a small silver tin, which in turn contained a pistol.

Defendant was charged with one count of felony fleeing/attempting to elude arrest with a motor vehicle, one count of driving while license revoked, and one count of misdemeanor carrying a concealed weapon; arising out of the high speed chase. Defendant was also charged with two counts of felony assault inflicting serious injury on a law enforcement officer arising out of the incident with Deputies Hartline and Blackwell. The charges were joined for trial.

At the close of the State's evidence, defendant moved to dismiss the charges against him. The trial court denied this motion. At the conclusion of all of the evidence, the trial court allowed defendant's renewed motion to dismiss the charge of driving while license revoked, but denied the motion as to the other charges. Defendant was found guilty of the remaining charges. The trial court sentenced defendant to an active term of imprisonment of 8-19 months for felony fleeing to elude arrest, 6-17 months on one count of felony assault on a law

enforcement officer, and 6-17 months for the second count of assault on a law enforcement officer and carrying a concealed weapon; all judgments to run consecutively.

Defendant appeals.

II. 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). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable

inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citation and quotation marks omitted).

III. Evidence of Defendant's Identity as Perpetrator of High-Speed Chase and Possessor of a Concealed Weapon

In his first argument, defendant contends that there was insufficient evidence that defendant committed the offenses of fleeing to elude arrest and carrying a concealed weapon, and that the trial court erred in denying his motion to dismiss. We agree.

The evidence at trial showed (1) that defendant's identification was found in Milstead's stolen vehicle; (2) that defendant arrived at Milstead's home sometime after the car was disabled; and (3) that the firearm was found in the vehicle.

Defendant contends that the State's evidence of him as the perpetrator of these offenses was merely circumstantial evidence. While we recognize that circumstantial evidence carries as much weight as direct evidence for the purpose of a motion to dismiss, see *State v. Salters*, 137 N.C. App. 553, 557,

528 S.E.2d 386, 390 (2000), we agree that the evidence in the instant case was insufficient.

North Carolina statute requires the State to prove that a defendant was actually operating a vehicle in order to find that defendant guilty of vehicular offenses. For example, in *State v. Ray*, 54 N.C. App. 473, 283 S.E.2d 823 (1981), the defendant was charged with driving under the influence. In that case, the only evidence that the defendant had been driving his vehicle was the testimony of the arresting officer that the defendant was seated "approximately halfway in the front seat, between the driver and passenger area in the front seat." *Id.* at 473, 283 S.E.2d at 824. We held that "[t]his circumstantial evidence alone is insufficient to support a conclusion that the defendant was the driver." *Id.* at 475, 283 S.E.2d at 825. We recognized that such circumstantial evidence could be bolstered by other evidence, but noted that "no other such evidence was presented." *Id.*

We hold that the instant case is similar to *Ray*. The only evidence tying defendant to the high-speed chase and the firearm was the presence of defendant's identification in his girlfriend's car. Even accepting *arguendo* that this might be sufficient evidence to show defendant's presence in the vehicle

at some point in the past, it was insufficient to show that defendant was operating the vehicle during the specific time when the high-speed chase took place. The State presented no other evidence to support its identification of defendant as the driver. Accordingly, we hold that the State did not present substantial evidence of defendant's being the perpetrator of the offense of felony fleeing to elude arrest, and that the trial court erred in denying defendant's motion to dismiss that charge.

IV. Defendant's Reach and Control of Firearm

In his second argument, defendant contends that there was insufficient evidence that the firearm was within his reach and control, and that the trial court therefore erred in denying his motion to dismiss. We agree.

As we stated above, the only evidence tying defendant to the vehicle in which the firearm was discovered was the identification found in the front seat. Because we have held above that the trial court erred in denying defendant's motion to dismiss on the grounds of the failure of the State to establish defendant's identity as the perpetrator of the offense of felony fleeing to elude arrest, we hold that this is equally determinative of the charge of carrying a concealed weapon. The

trial court erred in denying defendant's motion to dismiss that charge.

V. Assault on a Law Enforcement Officer

In his brief on appeal, defendant makes no argument with respect to the charges of assault on a law enforcement officer. We hold that any challenge to those convictions is deemed abandoned, pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.

One of the two assault charges, case number 13 CRS 489, was consolidated with the charge for carrying a concealed weapon. Where it is "probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated." *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987). We therefore remand case number 13 CRS 489 for resentencing.

NO ERROR IN PART, REVERSED IN PART, AND REMANDED IN PART.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).