IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-176

Filed: 3 October 2017

Forsyth County, No. 15 CRS 59002

STATE OF NORTH CAROLINA

v.

KENNETH JAMES ROUSE.

Appeal by defendant from judgment entered 23 August 2016 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Victoria L. Voight, for the State.

W. Michael Spivey, for defendant-appellant.

CALABRIA, Judge.

Where no evidence was presented at trial that defendant attempted to surrender himself to law enforcement, defendant was not entitled to a jury instruction on the defense of duress. We find no error.

I. Factual and Procedural Background

On 22 September 2015, Brittany Lashmit ("Lashmit") was working as a cashier at a Dollar General store. Two men, one younger and one older, entered the store. About five minutes later, the younger man came up behind Lashmit and told her to open the cash register, which she did. The older man took the money from the register, and both men left. Surveillance cameras at the store recorded the robbery.

Detective James Rae ("Det. Rae"), a detective with the Forsyth County Sheriff's Department, investigated the robbery. On 29 September 2015, Det. Rae contacted Kenneth Rouse ("defendant"). Defendant told Det. Rae that, on the day of the robbery, defendant was with his son, Christopher Rouse ("Christopher"), and Christopher's girlfriend. Defendant, who was intoxicated, went into the bathroom of the Dollar General, and as he was leaving, Christopher "decided to go crazy and commit the robbery[,]" and defendant went along with it. Defendant told Det. Rae that he was frightened that Christopher might hurt others present in the store. Christopher ultimately pleaded guilty to the robbery.

On 14 March 2016, defendant was indicted for robbery with a dangerous weapon. Defendant gave advance notice that he would present a defense of duress.

The matter proceeded to trial. Among other evidence, portions of the surveillance footage were shown to the jury. Additionally, Christopher testified that, after the robbery, he and defendant split the money from the robbery. After that, the two, along with Christopher's girlfriend, went to South of the Border in South

Carolina, then returned. Christopher told defendant not to contact law enforcement, and then left him at defendant's house. Christopher stayed outside of the house, in his car, and left for Greensboro the next day.

At the jury charge conference, defendant requested an instruction on duress. After some further discussion, the trial court declined to instruct the jury on duress.

The jury returned a verdict finding defendant guilty of robbery with a dangerous weapon. The trial court entered judgment upon the jury verdict, and sentenced defendant to a minimum of 84 and a maximum of 113 months in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. Duress

In his sole argument on appeal, defendant contends that the trial court erred in declining to instruct the jury on the defense of duress. We disagree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974).

B. Analysis

At trial, defense counsel argued that an instruction on duress was appropriate. Specifically, counsel argued:

> Your Honor, duress, as I understand it for duress to be present, must be an imminent and impending threat and such that would induce the well-rounded apprehension of death or serious bodily harm if the, I guess, criminal act is not done. I would contend that my client, when he saw -- there is evidence taken in the light most favorable -- the case most favorable in light of dealing with defense, that he had no idea that a robbery or criminal act was about to be done. And he wasn't there for any planning. His son said he just did it, he just wanted to do something wild. He didn't talk about it to anybody. They had no idea.
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> My client was in there. He saw his son go up there. He saw his son pull the knife and he heard the son screaming and yelling at the clerk about, you know, opening the cash register. That's the first time he knew of it. He had great concern his son was going to kill that girl, the lady, the clerk, and that was the life that he was trying to save by taking the money. He thought -- he felt that that was the fastest way to diffuse the situation, and that's what he did. I contend that that was a well-rounded apprehension of death or serious bodily harm. I contend that it was a present, imminent and impending situation and it was reasonable to suspect that someone could be seriously hurt or killed. And I contend that he was justified based on duress in taking the action he did.

In response, the State argued that defendant's assertion of duress was inconsistent with the facts of the case. Specifically, the State observed:

> [Defendant] would have had to as soon as practicable contact law enforcement. The evidence showed that the offense was committed on the 22nd. On the 29th he is

> contacted by law enforcement and speaks to them, but he made no efforts prior to that. He testified that he had a cell phone. He testified that he had a supportive landlord that helped him on occasion. He probably could have turned to him and the State would contend he could have, to try to report this crime and even could have reported anonymously in that manner. But he chose not to because he was not acting under duress. He was acting in concert.
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> The State's evidence through the [Dollar General surveillance] video, which was substantive evidence introduced at trial, shows that both of these men came into the store together, walked the perimeter of the store together, he's putting on his gloves, Christopher Rouse is putting on his gloves, he's taking out his knife, they go in together to the area that's only designated for cashiers and employees and the robbery goes down. I would contend that the evidence in this case wholly calls for an acting in concert instruction which, of course, is going to be given and defeats the duress instruction based on the evidence. So I would ask this Court to deny the request for a duress instruction.

On appeal, defendant contends that he cooperated with Christopher during the robbery in order to prevent harm to Lashmit, and that this constituted duress.

Duress is a defense against certain prosecutions. We have long held that,

> in order to constitute a defense to a criminal charge other than taking the life of an innocent person, the coercion or duress must be present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Furthermore, the doctrine of coercion cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm.

State v. Kearns, 27 N.C. App. 354, 357, 219 S.E.2d 228, 230-31 (1975). "In order to have the court instruct the jury on the defense, the defendant must present some credible evidence on every element of the defense." *State v. Henderson*, 64 N.C. App. 536, 540, 307 S.E.2d 846, 849 (1983).

> Secondly, once the crime was committed under duress and the defendant was out from under [the perpetrator's] coercive influence, the defendant was under a duty to surrender himself and the stolen goods to the police. The defendant as a matter of law is not entitled to an instruction on the theory of duress until he has proffered evidence in satisfaction of this element.

Id.

Even assuming *arguendo* that defendant proffered evidence which supported a jury's finding that an imminent threat of bodily harm existed to defendant or Lashmit if he did not cooperate with Christopher, *Henderson* stands for the proposition that defendant also had the burden of showing that he surrendered to law enforcement. The evidence in the record shows that defendant did not surrender to or contact law enforcement. Defendant testified that he did not contact law enforcement. Instead, he waited for them to contact him. And while defendant acknowledged that he had a good friend, his landlord, who would help him if he asked, he never asked his landlord to contact law enforcement on his behalf.

Defendant attempted to justify these failures by asserting that he was afraid of Christopher, who had threatened him if he were to contact law enforcement.

However, there was no evidence presented at trial that Christopher returned between his departure after the robbery and Det. Rae's contact with defendant. There was no evidence to support a determination of an imminent threat of bodily harm or death, given that Christopher was absent during that time period.

Defendant had the burden of proffering some evidence that, after the robbery, he attempted to contact law enforcement and surrender. Given that defendant failed to make such a proffer of evidence, we hold that the evidence at trial did not support a defense of duress, and that the trial court did not err in declining to instruct the jury on duress.

NO ERROR.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).