IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-618

Filed: 18 December 2018

Mecklenburg County, Nos. 16 CRS 242889, 242891; 17 CRS 34630

STATE OF NORTH CAROLINA

v.

RAYMOND MALIK TIMMONS

Appeal by defendant from judgment entered 24 January 2018 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Steven Armstrong, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant.

ARROWOOD, Judge.

Raymond Malik Timmons ("defendant") appeals from judgment entered on his convictions for simple assault, robbery with a dangerous weapon, and possession of a firearm by a felon. For the following reasons, we dismiss the appeal.

I. Background

Defendant was arrested for an armed robbery and an assault committed on 16 November 2016 after the alleged victim identified defendant in a police "show-up." A Mecklenburg County Grand Jury later indicted defendant on one count of simple assault on 28 November 2016, one count of robbery with a dangerous weapon on 5 December 2016, and one count of possession of a firearm by a felon on 18 December 2017.

Prior to the case being tried, on 22 January 2018, defendant filed an authorization to make admission of criminal culpability, thereby authorizing and directing defense counsel to admit "[t]hat on [16 November 2016], [defendant] did commit the criminal charge of misdemeanor larceny, in that he did steal, take, and carry away another's personal property, a cellular phone." On 22 January 2018, defendant also filed a stipulation that he had previously been convicted of a felony which made it illegal for him to possess a firearm on 16 November 2016.

Defendant's case was tried in Mecklenburg County Superior Court before the Honorable Carla Archie beginning on 22 January 2018.

The evidence at trial tended to show that defendant and the victim agreed to meet on the afternoon of 16 November 2016 because defendant was interested in an iPhone 7 that the victim had listed for sale using the "OfferUp" app. The victim arrived at the apartment complex where defendant wanted to meet and waited for a short time before observing defendant walk out from between two buildings.

Defendant approached the driver's side of the victim's tow truck and the victim handed defendant the phone to look at. Defendant "turned it on and played with it" and made a call using the phone. The victim testified that it seemed like a normal transaction except that it was taking a long time, "[defendant] just kept prolonging it."

The victim testified that "[e]ventually [defendant] came around to the passenger's side of the truck." Defendant then opened the passenger's side door, pointed a semi-automatic firearm at the victim, and proceeded to rob the victim. Defendant, who still had possession of the iPhone 7 that the victim was selling, grabbed another cell phone that the victim had sitting on the center console and the victim's Glock 9-millimeter firearm that was sitting on the center console. Defendant then demanded the victim's wallet. The victim testified that he refused because he did not want to reach for anything out of fear that defendant might shoot him. Defendant then made a swiping motion towards the victim with his firearm, striking the victim in the shoulder. Defendant then fled on foot. The victim followed defendant in his tow truck and observed defendant enter an apartment. The victim then called 911 and waited for police to arrive.

On 24 January 2018, the jury returned verdicts finding defendant guilty of simple assault, robbery with a dangerous weapon, and possession of a firearm by a felon. The trial court consolidated the offenses under robbery with a dangerous

weapon and entered a single judgment sentencing defendant to a term of 66 to 92 months' imprisonment, awarding credit for time served. Defendant gave notice of appeal in open court.

II. Discussion

The sole issue raised by defendant on appeal is whether the trial court erred in entering judgment on both robbery with a deadly weapon and simple assault in violation of defendant's right to be free from double jeopardy. Defendant contends the trial court did err because the simple assault was part of the robbery with a dangerous weapon and is a lesser included offense.

Generally, this Court reviews double jeopardy issues *de novo*. *State v. Baldwin*, 240 N.C. App. 413, 416, 770 S.E.2d 167, 170 (2015); *see also State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) ("The standard of review for alleged violations of constitutional rights is *de novo*."), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010). However, "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). Regarding issues of double jeopardy, this Court has specifically explained as follows:

> "The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived." *State v. Hopkins*, 279 N.C. 473, 475, 183 S.E.2d 657, 659 (1971). To avoid waiving this right, a defendant must properly raise the issue of double jeopardy before the trial court. *See State v. McKenzie*, 292 N.C. 170, 175, 232

> S.E.2d 424, 428 (1977). Failure to raise this issue at the trial court level precludes reliance on the defense on appeal. *Id.* Simply put, "double jeopardy protection may not be raised on appeal unless the defense and the facts underlying it are brought first to the attention of the trial court." *Id.* at 176, 232 S.E.2d at 428.

State v. White, 134 N.C. App. 338, 342, 517 S.E.2d 664, 667 (1999).

Defendant acknowledges that he did not raise the double jeopardy issue before the trial court. Nevertheless, defendant requests that this Court invoke Rule 2 to review the merits of his argument to avoid manifest injustice. *See* N.C.R. App. P. 2 (2018) ("To prevent manifest injustice to a party, . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . .").

"As this Court has repeatedly stated, Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (internal quotation marks and citations omitted). "[W]hether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *Id.* at 603, 799 S.E.2d at 603; *see also State v. Mulder*, 233 N.C. App. 82, 87, 755 S.E.2d 98, 101 (2014) ("The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary.").

Upon review of the record evidence in this case, we conclude this is not the rare case meriting suspension of our appellate rules to prevent manifest injustice to a party. Therefore, we decline to invoke Rule 2 to review the merits of the unpreserved issue. Defendant's appeal is dismissed.

DISMISSED.

Judges TYSON and INMAN concur.

Report per Rule 30(e).