IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-159

Filed: 1 October 2019

New Hanover County, No. 17 CRS 051278

STATE OF NORTH CAROLINA

v.

EDWIN FRANKLIN THORNE, JR., Defendant.

Appeal by Defendant from judgment entered 1 August 2018 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 4 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Lee J. Miller, for the State.

Charlotte Gail Blake for defendant-appellant.

MURPHY, Judge.

A trial court does not err in instructing the jury on flight where some evidence in the record reasonably supports the theory that defendant fled after the commission of the charged crime. That evidence must show that defendant went beyond merely leaving the scene and took steps to avoid apprehension. Here, such evidence was presented and supported a flight instruction, and we find no error.

BACKGROUND

On 11 February 2017, Tori Rose ("Ms. Rose") traveled to Wilmington to celebrate her friend's twenty-second birthday. Joining Ms. Rose in Wilmington were her brother, Hunter Rose ("Mr. Rose"), her brother's friend, Gabriel Barksdale ("Mr. Barksdale"), and another friend, Baileigh Moser Davis ("Ms. Davis"). The celebration began that night at a friend's apartment, where the group met and enjoyed drinks before making their way downtown. The first stop of the night was at a bar named The Husk. The group met other friends and stayed at The Husk for approximately an hour before deciding to move the celebration to another bar, named Growlers.

Ms. Rose and Ms. Davis were the first to leave The Husk for Growlers. Also at Growlers was Defendant, Edwin Franklin Thorne, Jr. Defendant was a Marine stationed in Jacksonville who had traveled to Wilmington for a night downtown with three fellow Marines. Defendant first approached Ms. Rose while she and Ms. Davis were having a drink at the bar. He made a joke to Ms. Rose in an admitted attempt "to flirt with her." Ms. Rose had never previously met Defendant and stated that she "didn't entertain it or anything [and] just kind of turned back around" to Ms. Davis. At that point, Defendant did not try "to get [Ms. Rose's] attention anymore."

Shortly thereafter, Mr. Rose and Mr. Barksdale arrived at Growlers and began to play a ring-toss game in the corner of the bar. Upon realizing the two had arrived, Ms. Rose, Ms. Davis, and their friend celebrating a birthday joined. When the group

reunited, they were standing around an island bar. At this time, Defendant and one of his friends walked over and approached the group. Defendant's friend made fun of Mr. Rose and Mr. Barksdale's clothing and appearances. Defendant began laughing at his friend's remarks and then turned his attention to the women in the group. He called the group of girls "hoes" and then specifically called Ms. Rose "a bitch."

When Defendant made the derogatory comment to Ms. Rose, Mr. Rose stated, "Hey, man, that's my sister, don't call my sister a bitch." Defendant responded, "I don't give a fuck who that is." Mr. Rose "didn't have time to react" to that statement before Defendant punched him in the nose. Mr. Rose fell back and "grabbed his nose." As soon as he threw the punch, Defendant "backed up" and "ran out" of the bar. The bartender then started "yelling that everybody need[ed] to get out because it was getting close to 2:00[A.M.]"

When Defendant left the bar, Mr. Barksdale "followed behind him at a distance" to "keep eyes on him just in case . . . the cops came . . . ." When Mr. Barksdale saw Defendant outside of the bar, he recalled, "I think he was just like standing there for a second and I believe – I believe the cops came then and then that's when he walked away." Mr. Barksdale then informed the officers that Defendant was the one who punched Mr. Rose, and Defendant was apprehended shortly thereafter.

Meanwhile, Mr. Rose's nose was bleeding heavily and had shifted "all the way to . . . one side . . . ." Mr. Rose had to be taken to the hospital, where he was informed that his nose was broken and required surgery within a short time frame to prevent the deformity from becoming more permanent. By the time treatment was completed, Mr. Rose had accrued over $12,000.00 in medical expenses and "a dip" remained in Mr. Rose's nose.

Defendant was indicted on one count of assault inflicting serious bodily injury. After a trial in New Hanover County Superior Court, a jury convicted Defendant of the lesser included offense of assault inflicting serious injury. The trial court imposed a sentence of 60 days, suspended for 36 months, and placed Defendant on supervised probation. Defendant was ordered to pay restitution in the amount of $12,432.53 as a condition of his probation. Defendant timely appeals.

ANALYSIS

Defendant's sole argument on appeal is that the trial court erred in instructing the jury on flight.

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *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). "[A] trial judge should not give instructions to the jury which are not supported by the evidence

produced at the trial." *Id.* Challenges to the trial court's decisions regarding jury instructions, when preserved by objection below, are reviewed *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

The trial court provided the following instruction on flight:

> The State contends and the defendant denies that the defendant fled. Evidence of flight may be considered by you together with all the other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt.

Defendant objected to the instruction, which the trial court overruled.

It is well established under our caselaw that "flight from a crime shortly after its commission is admissible as evidence of guilt, and a trial court may properly instruct on flight [s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after the commission of the crime charged[.]"[1] *State v. Tucker*, 329 N.C. 709, 722, 407 S.E.2d 805, 813 (1991) (internal citations and quotation marks omitted). "Mere evidence that [the] defendant left the

[1] We note that the probative value of flight evidence has been "consistently doubted" in our legal system. *See Wong Sun v. United States*, 371 U.S. 471, 483, n. 10, 9 L. Ed. 2d 441, 452 n. 10 (1963). Nevertheless, a flight instruction may be given upon the showing of some evidence reasonably supporting the theory that defendant fled after the commission of the crime charged.

scene of the crime is not enough to support an instruction on flight. There must also be some evidence that [the] defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

"Evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so should not be left to the jury." *State v. Lee*, 287 N.C. 536, 540, 215 S.E.2d 146, 149 (1975) (citation, alteration, and internal quotation marks omitted). However, "[t]he fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). The central inquiry remains whether there is *some* evidence to support the theory of defendant's flight, in which case "the jury must decide whether the facts and circumstances support the State's contention that the defendant fled." *State v. Norwood*, 344 N.C. 511, 535, 476 S.E.2d 349, 360 (1996).

The evidence introduced at trial certainly establishes that Defendant left the scene of the crime. Ms. Davis testified that as soon as Defendant struck Mr. Rose, "he was gone[.]" Mr. Barksdale similarly stated Defendant "went out [of] the club" with his friends after striking Mr. Rose. The remaining question is whether there was some evidence that Defendant took steps to avoid apprehension. We conclude such evidence was presented.

Ms. Davis stated that after striking Mr. Rose, "It's like [Defendant] ran out and *then* I saw the bartender start yelling that everybody needs to get out . . . ." (emphasis added). Thus, contrary to Defendant's argument that he left the bar because "the bartender told everyone to leave the bar at this time as it was past closing time[,]" this evidence indicates that Defendant willingly left before the bartender's directive. Once outside of the bar, Defendant admitted that he did not call for medical assistance or wait for law enforcement to arrive. To the contrary, the State presented evidence that Defendant walked away from the bar upon realizing that law enforcement arrived:

> [Mr. Barksdale]: So whenever he left the club, like, I just caught him going, like, around the corner . . . I think he was just like standing there for a second and I believe – I believe the cops came then and then that's when he walked away.
>
> [The State]: So the [D]efendant walked away after the cops were present?
>
> [Mr. Barksdale]: Yeah . . .

We conclude that this evidence, that Defendant left the bar upon striking Mr. Rose without rendering medical assistance and walking away upon the arrival of law enforcement officers, reasonably supports the theory that Defendant fled after the commission of the assault and is sufficient to support an instruction on flight. This evidence is consistent with that in cases where our courts have held the same. *State v. Anthony*, 354 N.C. 372, 425, 555 S.E.2d 557, 591 (2001), *cert. denied*, 536 U.S. 930,

153 L. Ed. 2d 791 (2002) ("After shooting [the victim] . . . , defendant immediately entered his car and quickly drove away from the crime scene without rendering any assistance to the victims or seeking to obtain medical aid for them. Defendant passed [a law enforcement officer] who was en route to the scene of the shooting in response to a dispatcher's call, but did not flag the officer down."); *State v. Reeves*, 343 N.C. 111, 113, 468 S.E.2d 53, 55 (1996) ("In this case, there was evidence tending to show that defendant, after shooting the victim, ran from the scene of the crime, got in a car waiting nearby, and drove away. This is sufficient evidence of flight to warrant the instruction.").

Defendant argues the evidence presented is not indicative of avoiding apprehension because he "left the bar after hitting [Mr.] Rose because he was afraid the bigger [Mr.] Rose and his friends would hit him [and he] wanted to get away from the threat they posed." Assuming *arguendo* this is a reasonable explanation, a flight instruction is not rendered improper by the fact that there may be another reasonable explanation for the defendant's conduct. *Irick*, 291 N.C. at 494, 231 S.E.2d at 842. Our inquiry remains whether there is *some* evidence supporting the theory that Defendant fled. For the reasons we have stated herein, the State presented "some evidence" that went beyond mere conjecture and reasonably supported the theory that Defendant fled from the scene of the crime charged. Accordingly, the trial court did not err in instructing the jury on flight.

CONCLUSION

The instruction on flight given to the jury by the trial court was supported by sufficient evidence. Defendant has not shown error entitling him to a new trial.

NO ERROR.

Judges INMAN and BERGER concur.

Report per Rule 30(e).