IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-46

Filed: 1 October 2019

Cumberland County, No. 15 CRS 55152

STATE OF NORTH CAROLINA

v.

ROBERT LEE JACKSON

Appeal by defendant from judgment entered 31 May 2017 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 21 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Michael E. Casterline, P.A., by Michael E. Casterline, for defendant-appellant.

ZACHARY, Judge.

Defendant Robert Lee Jackson appeals from the judgment entered upon the jury's verdict finding him guilty of robbery with a dangerous weapon. We find no error.

I. Background

On the evening of 17 February 2015, members of the Fayetteville Police Department responded to a 911 call requesting a well-being check at the home of 74-year-old Charles Vester Johnson, Jr. Emergency responders broke into the home, where they found Mr. Johnson face down in a pool of blood, barely breathing. The responders discovered a hammer underneath Mr. Johnson's body, and as EMS rolled him onto the transport board, "parts of his skull from where he was bludgeoned fell off onto the floor." Mr. Johnson died in the hospital five days later, the cause of death being blunt force trauma to the head.

Officers began to process the crime scene after Mr. Johnson was transported to the hospital. They noted that Mr. Johnson's home "was in disarray," that his safe was open, and that a cellphone, wallet, or identification were nowhere to be found.[1] A Cadillac belonging to Mr. Johnson was still parked in the driveway. However, officers also discovered that a second vehicle registered to Mr. Johnson—a Lincoln Town Car—was missing, and officers subsequently issued a "be-on-a-lookout" for that vehicle.

Later that same evening, Deputy Kevin Hamlett of the Cumberland County Sheriff's Office spotted the Lincoln Town Car at a gas station. Defendant was pumping gas into the vehicle while talking on a cellphone.

[1] Officers were able to identify Mr. Johnson by reference to a prescription pill bottle.

Deputy Hamlett, along with three other deputies, apprehended Defendant and searched him and the Lincoln Town Car. Defendant was found to also have in his possession Mr. Johnson's house keys, driver's license, debit card, social security card, and the keys to Mr. Johnson's Cadillac. The deputies further discovered that the cellphone Defendant was using belonged to Mr. Johnson. Defendant was transported to the police department where officers collected fingerprints and a DNA sample, but no forensic evidence—DNA, fingerprints, or otherwise—conclusively linked Defendant to the crime scene at Mr. Johnson's home.

Defendant was arrested on 12 May 2015 and subsequently charged with robbery with a dangerous weapon and first-degree murder. Defendant was tried before a jury beginning on 22 May 2017 before the Honorable Gale M. Adams. At the close of the State's evidence, Defendant made a motion to dismiss, which the trial court denied. Defendant did not offer any evidence at trial, and the trial court again denied his motion to dismiss.

The jury found Defendant guilty of robbery with a dangerous weapon, but was unable to reach a unanimous verdict on the first-degree murder charge. The trial court declared a mistrial as to the first-degree murder charge,[2] and sentenced Defendant as a prior record level VI offender to 128 to 166 months in the custody of

[2] The first-degree murder charge was dismissed on 13 November 2018.

the North Carolina Division of Adult Correction for his conviction of robbery with a dangerous weapon. Defendant entered oral notice of appeal in open court.

On appeal, Defendant argues that the trial court erred in (1) denying his motion to dismiss the charge of robbery with a dangerous weapon for insufficient evidence, (2) "failing to give a curative instruction after the defense objected to the prosecutor's improper comment on [Defendant's] exercise of his right not to testify," and (3) concluding that his prior out-of-state conviction for second-degree robbery was substantially similar to a Class G felony in North Carolina, thereby increasing his prior record level and applicable sentencing range.

II. Motion to Dismiss

Defendant first argues that the trial court erred in denying his motion to dismiss because the State presented insufficient evidence for the jury to find him guilty of robbery with a dangerous weapon. We disagree.

a. Standard of Review

Whether the State presented sufficient evidence to withstand a motion to dismiss is a question of law, reviewed *de novo*. *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013).

"Upon a defendant's motion to dismiss for insufficient evidence, the question for the court is whether there is substantial evidence (1) of each essential element of

the offense charged and (2) of defendant's being the perpetrator of such offense." *Id.* at 150, 749 S.E.2d at 274.

> Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012). The same test applies "whether the evidence is direct, circumstantial, or both." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). "Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Hunt*, 365 N.C. at 436, 722 S.E.2d at 488.

b. Elements of Robbery With a Dangerous Weapon

Defendant first argues that the State's evidence was insufficient to establish that a robbery with a dangerous weapon occurred in the instant case. Specifically, Defendant maintains that the State's evidence "could not establish that Johnson's property was actually stolen," rather than consensually given to Defendant.

In order to withstand a motion to dismiss the charge of robbery with a dangerous weapon pursuant to N.C. Gen. Stat. § 14-87, the State must present substantial evidence that there was: "(1) [an] unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or

threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992).

In the instant case, the State's evidence was uncontroverted that upon responding to the wellness call, officers found Mr. Johnson face down in a pool of his own blood. Mr. Johnson had been bludgeoned with a hammer, and his home "was in disarray." His safe was open, his Lincoln Town Car was missing from the driveway, and his cellphone, wallet, and identification were also missing.

Viewed in the light most favorable to the State, such circumstances were more than sufficient to allow a jury to reasonably infer that Mr. Johnson had been the victim of an unlawful taking of his property by the use of a dangerous weapon, whereby his life was endangered. "[W]e do not require the evidence to rule out every possible hypothesis of innocence." *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000). Accordingly, we conclude that the State presented substantial evidence of each essential element of robbery with a dangerous weapon.

c. Defendant's Being the Perpetrator of the Offense; Doctrine of Recent Possession

Defendant next argues that the State presented insufficient evidence of his identify as the perpetrator of the robbery with a dangerous weapon. Defendant cites the lack of direct evidence that he had ever been inside Mr. Johnson's home, and maintains that the trial court "improperly employed the doctrine of recent possession"

in order to overcome this "evidentiary deficiency." We disagree, and conclude that the State presented substantial evidence that Defendant perpetrated the robbery with a dangerous weapon under the doctrine of recent possession.

The doctrine of recent possession is a rule of law that "allows the jury to infer that the possessor of recently stolen property is guilty of taking it." *State v. Mohamed*, 205 N.C. App. 470, 489, 696 S.E.2d 724, 738 (2010). The presumption arises when the State's evidence proves

> (1) that the property was stolen; (2) that the defendant had possession of the stolen property, which means that he was aware of its presence and, either by himself or collectively with others, had both the power and intent to control its disposition or use; and (3) that defendant's possession of the stolen property occurred so soon after it was stolen and under such circumstances that it is unlikely he obtained possession honestly.

Id.

"When the doctrine of recent possession applies in a particular case, it suffices to repel a motion [to dismiss] and [the] defendant's guilt or innocence becomes a jury question." *State v. Maines*, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981).

Here, having already concluded that the State presented substantial evidence that Mr. Johnson's property was stolen in the course of a robbery with a dangerous weapon, the first element of the doctrine of recent possession is satisfied. Additionally, the State presented substantial evidence of the second element of the

doctrine of recent possession, in that Defendant was apprehended while in actual possession of Mr. Johnson's stolen property.

We also conclude that Defendant's possession of Mr. Johnson's property occurred so soon after it was stolen and under such circumstances that it was unlikely he obtained the possession honestly, thereby satisfying the third element of the doctrine of recent possession. Defendant was found in possession of Mr. Johnson's Lincoln Town Car, cellphone, driver's license, debit card, social security card, and the keys to Mr. Johnson's home and second vehicle on the same evening that officers discovered Mr. Johnson's body.[3] Moreover, the fact that Defendant was found in possession of *each* of the items taken from Mr. Johnson's home together renders it unlikely that he had obtained possession of any one of those items honestly.

Accordingly, "when viewed in the light most favorable to the State, the record contains more than sufficient evidence to support Defendant's conviction for robbery with a dangerous weapon" under the doctrine of recent possession. *Mohamed*, 205 N.C. App. at 490, 696 S.E.2d at 738. The trial court did not err in denying Defendant's motion to dismiss.

III. Closing Arguments

Defendant next argues that the trial court erred in failing to give a curative instruction after the prosecutor made comments during closing arguments that

[3] The medical examiner testified that it could have been "hours or days" after the robbery before the officers found Mr. Johnson, but that "I can't tell you exactly how long."

Defendant maintains "were a direct reference to [his] decision not to testify," in violation of Defendant's right to remain silent. We disagree that the prosecutor's statements required curative instruction by the trial court.

It is well established that "[a] criminal defendant may not be compelled to testify, and [that] any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent." *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994). It is also well established, however, "that a prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State." *State v. Morston*, 336 N.C. 381, 406, 445 S.E.2d 1, 15 (1994). Only when the prosecutor "directly comments on a defendant's failure to testify" will a curative instruction be required. *Baymon*, 336 N.C. at 758, 446 S.E.2d at 6.

Defendant challenges the following two statements made by the prosecutor during closing arguments as being direct references to his decision not to testify:

> Now, if you will bear with me—in this case, the State's evidence is uncontradicted. You saw counsel's questions of the State's witnesses, did you hear from any defense witnesses to impeach the State's case? No.
>
> . . . .
>
> You can't explain why you have all those [items] because Mr. Johnson would not have given them up unless they were taken from him by force.

These statements were not references to Defendant's decision not to testify, but rather to his overall "failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State." *Morston*, 336 N.C. at 406, 445 S.E.2d at 15. In fact, Defendant concedes that the first statement was "probably permissible."

Nonetheless, Defendant argues that when taken in conjunction with the prosecutor's subsequent statement—that "[y]ou can't explain why you have all those [items]"—it was clear that the prosecutor was making an "impermissible inference that it was [Defendant's] responsibility to explain to the jury why he was in possession of [Mr.] Johnson's" belongings. It is apparent from the context, however, that the "you" to whom the prosecutor was referring were the members of the jury, and that the second challenged statement was simply a continued reference to the lack of exculpatory evidence before the jurors. The mere fact that Defendant was a potential witness from whom the jury could have received such exculpatory evidence does not render the prosecutor's statements a direct reference to his decision not to testify.

Accordingly, we conclude that the challenged statements by the prosecutor were "merely comment[s] on [Defendant's] failure to produce a witness to refute the State's case," and that the trial court was therefore not required to provide a curative instruction. *Id.* Defendant is not entitled to a new trial on this ground.

IV. Substantial Similarity of Prior Out-of-State Conviction

Lastly, Defendant argues that the trial court erred in concluding that his prior out-of-state conviction for second-degree robbery was substantially similar to a Class G felony offense in North Carolina, thereby increasing his prior record level and applicable sentencing range.

Pursuant to N.C. Gen. Stat. § 15A-1340.14,

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in [another] jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2017). In the absence of such evidence, however, an out-of-state felony offense must be classified as a Class I felony offense for purposes of assigning prior record level points. *Id.*

In the instant case, the State's prior record level worksheet indicated that Defendant had a prior New York conviction from 1993 for "Robbery—2nd: Aided By Another," which the State classified as a Class G felony offense for purposes of calculating Defendant's prior record level points. The trial court concluded that the prior New York robbery conviction was substantially similar to a Class G felony offense in North Carolina, and that the State had properly classified it as such for sentencing purposes.

The record does not indicate the particular North Carolina Class G offense to which Defendant's New York conviction was found to be substantially similar, but the parties presume it to be the Class G felony offense of common law robbery. Common law robbery requires proof that the defendant committed a "felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982).

By comparison, the State's description of Defendant's 1993 New York robbery conviction reveals that he was convicted under N.Y. Penal Law § 160.10(1), which provides that

> [a] person is guilty of robbery in the second degree when he forcibly steals property and when:
>
> > 1. He is aided by another person actually present . . .
> >
> > . . . .
>
> Robbery in the second degree is a class C felony.

N.Y. Penal Law § 160.10(1) (1993).

Defendant argues that "[b]ecause the New York offense requires an element *in addition to* forcible taking, it is not substantially similar to common law robbery."[4]

[4] Although he does not indicate so, we assume that the additional element to which Defendant is referring is subsection (1) of N.Y. Penal Law § 160.10 under which he was convicted, which requires that he was "aided by another person actually present." N.Y. Penal Law § 160.10(1).

However, Defendant cites no authority to support this proposition. Nor does Defendant otherwise delineate the applicable framework for determining whether an out-of-state offense is "substantially similar" to a North Carolina offense pursuant to N.C. Gen. Stat. § 15A-1340.14(e). Accordingly, this argument is deemed abandoned. *See State v. Velazquez-Perez*, 233 N.C. App. 585, 595, 756 S.E.2d 869, 876 ("Failure to cite to supporting authority is a violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and constitutes abandonment of [the] argument."), *appeal dismissed and disc. review denied*, 367 N.C. 509, 758 S.E.2d 881 (2014); *see also State v. Dinan*, 233 N.C. App. 694, 698-99, 757 S.E.2d 481, 485 ("[A] reply brief is not an avenue to correct the deficiencies contained in the original brief."), *disc. review denied*, 367 N.C. 522, 762 S.E.2d 203 (2014).

V. Conclusion

For the reasoning contained herein, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).