IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-257

No. COA20-582

Filed 1 June 2021

Robeson County, No. 15 CRS 51892

STATE OF NORTH CAROLINA

v.

WALTER McKOY, Defendant.

Appeal by Defendant from judgment entered 10 May 2019 by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 13 April 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General, Thomas O. Lawton, III, for the State.

William D. Spence for Defendant-Appellant.

INMAN, Judge.

¶ 1 Walter McKoy ("Defendant") appeals from a jury verdict finding him guilty of first-degree murder, robbery with a dangerous weapon, and discharge of a firearm within the city limits, in violation of a city ordinance. Defendant contends the trial court erred in denying his motions to dismiss each of these charges. After careful

review, we hold the trial court erred in denying the motion to dismiss on the discharge of a firearm charge.

I. FACTS & PROCEDURAL BACKGROUND

¶ 2 The evidence presented at trial tends to show the following:

¶ 3 Defendant shot and killed William Covington ("Mr. Covington") in Mr. Covington's Chevrolet Malibu in the early morning hours of 31 March 2015.

¶ 4 Earlier that night, Defendant, Mr. Covington, Alex Robinson ("Mr. Robinson"), and Pat Stephens ("Mr. Stephens") smoked marijuana in Mr. Covington's parked Malibu outside Mr. Stephens's home in Lumberton, NC. There was an ongoing conflict between Defendant and Mr. Covington about a missing gun.

¶ 5 The foursome temporarily dispersed when Defendant drove Mr. Robinson home. Mr. Robinson warned Defendant not to drive back to Mr. Stephens's home, but Defendant returned and rejoined Mr. Stephens and Mr. Covington in the Malibu. Mr. Covington was in the driver's seat, Defendant was in the passenger's seat, and Mr. Stephens was in the back seat.

¶ 6 When Mr. Stephens left the car, Defendant shot Mr. Covington three times in the side of the head, above and around his right ear, killing him. Defendant immediately exited the Malibu, opened the driver's side door, and took a .32-caliber revolver from the victim. Defendant placed that revolver and his own .38-caliber revolver in the sunroof of his Jeep Grand Cherokee and fled the scene.

¶ 7 In a videotaped interview with police, Defendant initially lied about being at the scene of the murder. Later in the interview, when Defendant eventually admitted his participation, he contradicted himself about how and why he shot the victim. Defendant claimed he shot Mr. Covington after Mr. Covington reached for his own gun in the car.

¶ 8 At trial, in addition to presenting the videotape of Defendant's interview with police, the State relied on physical evidence and testimony from Mr. Robinson, Mr. Stephens, the medical examiner, and police officers. Defendant did not testify or present evidence at trial. Defendant's counsel argued that he shot Mr. Covington in self-defense.

¶ 9 Although Defendant was charged with discharging a weapon within the city limits of Lumberton in violation of a local ordinance, the arrest warrant and indictment did not include the applicable city ordinance caption—"Discharging firearms." Nor could the jury review the ordinance because the State failed to introduce the ordinance in evidence at trial.

¶ 10 The jury found Defendant guilty on all charges. The trial court consolidated the offenses and sentenced Defendant to life in prison without the possibility of parole. Defendant gave oral notice of appeal.

II. ANALYSIS

¶ 11 On appeal, Defendant argues the trial court erred by denying his motions to dismiss: (1) the charge of first-degree murder, (2) the robbery with a dangerous weapon charge, and (3) the charge of firing a weapon within city limits.

¶ 12 We review each motion to dismiss *de novo*, *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010), viewing the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference, and resolving any contradictions in the State's favor, *State v. Billinger*, 213 N.C. App. 249, 253, 714 S.E.2d 201, 205 (2011) (citation omitted). "Contradictions and discrepancies do not warrant dismissal . . . but are for the jury to resolve." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). In order to survive a motion to dismiss, substantial evidence must exist of each essential element of the charged offense, and of the defendant's being the perpetrator. *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 636 (2000) (quotation marks and citation omitted).

A. First-Degree Murder

¶ 13 Defendant contends that the trial court erred in denying his motion to dismiss the charge of first-degree murder because the State did not disprove his theory of self-defense and the State presented insufficient evidence of the elements of premeditation and deliberation. We disagree.

1. Contradicting Evidence of Self-Defense

¶ 14 Defendant argues the State did not disprove self-defense, even though the evidence—mainly exculpatory portions of Defendant's interview with police—raised it.

¶ 15 When the evidence supports a claim of self-defense, the State, not the defendant, must disprove it. *State v. Gilreath*, 118 N.C. App. 200, 208, 454 S.E.2d 871, 876 (1995). Perfect self-defense requires that: (1) a defendant believes it necessary to kill decedent to save himself from death or great bodily harm, (2) the defendant's belief was reasonable, (3) the defendant was not the aggressor, and (4) the defendant did not use excessive force. *State v. Harvey*, 372 N.C. 304, 307-08, 828 S.E.2d 481, 483 (2019) (citation omitted). The State is bound by a defendant's exculpatory statements "which are not contradicted or shown to be false by any other facts or circumstances in evidence." *State v. Carter*, 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961). As noted above, when the evidence is in conflict, we review it in the light most favorable to the State. *Billinger*, 213 N.C. App. at 253, 714 S.E.2d at 205.

¶ 16 Here, Defendant contradicted his own statements to police about why he shot Mr. Covington. At one point during the interview, Defendant claimed he thought the victim was going to rob him and that he did not intend to kill Mr. Covington. At another point, Defendant told police he feared for his life because the victim was reaching into his coat pocket for his gun. He later stated he only shot when the victim "pointed the gun at [him.]"

¶ 17 In addition, the State presented evidence contradicting Defendant's statements about how he shot the victim. Defendant claimed he was leaning away from Mr. Covington to his right and fired his gun from his waist at a downward angle. But the physical evidence along with testimony from the medical examiner and responding police officers tended to show Mr. Covington was shot in the right side of his head, near his ear, three times, indicating he was sitting upright and looking straight ahead. The location of Mr. Covington's fatal wounds contradicted Defendant's testimony that he fired from his waist at a downward angle. Responding officers also testified that Mr. Covington's body was found facing forward—not toward the right or in an offensive position, as Defendant claimed.

¶ 18 Viewing the conflicting evidence of self-defense—including Defendant's own statements to police—in the light most favorable to the State, the first-degree murder charge properly went to the jury to resolve. *See Gilreath*, 118 N.C. App. at 209, 454 S.E.2d at 876; *Barnes*, 334 N.C. at 75, 430 S.E.2d at 918.

2. Sufficient Evidence of Premeditation & Deliberation

¶ 19 Defendant further contends that the prosecution failed to present sufficient evidence that the killing was premeditated and deliberate because the evidence showed he fired his weapon only after Mr. Covington reached for his own gun.

¶ 20 Premeditation requires that "the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing[,]" and

deliberation necessitates that the intent to kill was formed "in a cool state of blood . . . and not under the influence of a violent passion, suddenly aroused by . . . provocation." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991) (citations omitted). However, deliberation does not preclude emotion or passion, *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citation omitted), and it may even arise during a quarrel, *State v. Larry*, 345 N.C. 497, 513, 481 S.E.2d 907, 916 (1997) (citation omitted).

¶ 21 Defendant relies exclusively on our Supreme Court's decision in *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981). That case is distinguishable. In *Corn*, the decedent, who was highly intoxicated at the time, barged into the defendant's home unannounced and insulted him. 303 N.C. at 297-98, 278 S.E.2d at 223-24. The defendant immediately grabbed a rifle and shot decedent several times, killing him. *Id.* Our Supreme Court held there was insufficient evidence of premeditation and deliberation because the dispute was a "sudden event" lasting "only a few moments," providing the defendant no time to weigh his actions or act according to some "fixed design." *Id.*

¶ 22 In this case, even if Defendant were provoked by a quarrel with Mr. Covington, their dispute was not a "sudden event" so that Defendant did not have time to weigh his actions. Defendant drove Mr. Robinson home and returned to the scene even though Mr. Robinson had discouraged him from doing so. Defendant got back into

Mr. Covington's car armed with a gun, waited until Mr. Stephens left the car, and then he shot Mr. Covington three times in the head. This evidence substantially supports the charge that Defendant acted with premeditation and deliberation. *See State v. Childress*, 367 N.C. 693, 695, 766 S.E.2d 328, 330 (2014) ("[The Supreme Court of North Carolina] has additionally considered whether a defendant arrived at the scene of the crime with a weapon and whether a defendant fired multiple shots."). Defendant's attempt to hide his gun and the victim's gun also constitutes substantial evidence of premeditation and deliberation. *See State v. Chapman*, 359 N.C. 328, 376, 611 S.E.2d 794, 828-29 (2005) (considering that the defendant hid two firearms after the shooting as a factor to demonstrate the killing was premeditated and deliberate).

¶ 23 There was substantial evidence presented to satisfy the elements of premeditation and deliberation such that the first-degree murder charge could go to the jury. *See Israel*, 353 N.C. at 216, 539 S.E.2d at 636. We hold the trial court did not err in denying Defendant's motion to dismiss the first-degree murder charge.

B. Robbery with a Dangerous Weapon

¶ 24 Defendant asserts that the trial court also erred in denying his motion to dismiss the charge of robbery with a dangerous weapon. We disagree.

¶ 25 Our General Statutes provide:

> Any person or persons who, having in possession or with

> the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2019). The prosecution must show: (1) the 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; and (3) whereby the life of a person is endangered or threatened. *State v. Willis*, 127 N.C. App 549, 551, 492 S.E.2d 43, 44 (1997) (citation omitted).

¶ 26 Defendant does not dispute that there was substantial evidence to satisfy each element of armed robbery. Instead, Defendant argues that: (1) he broke the chain of events between killing Mr. Covington and taking his gun, (2) he had not formed the intent to rob Mr. Covington at the time he shot him, and (3) he took Mr. Covington's gun in a panicked response, as an afterthought, after he killed him.

¶ 27 To support a conviction for robbery with a dangerous weapon, the use of the dangerous weapon "must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction. Where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial." *State v. Olson*, 330 N.C. 557, 566,

411 S.E.2d 592, 597 (1992) (quotation marks and citations omitted). However, the taking of another's property cannot be an "afterthought once the victim ha[s] died." *State v. Powell*, 299 N.C. 95, 102, 261 S.E.2d 114, 119 (1980). "[I]t makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction." *State v. Fields*, 315 N.C. 191, 203, 337 S.E.2d 518, 525 (1985).

¶ 28 The evidence in this case is similar to that reviewed by our Supreme Court in *State v. Fields*. In *Fields*, the defendant stole items from a shed before a neighbor, carrying a shotgun, confronted him. 315 N.C. at 199-201, 337 S.E.2d at 523-24. When the neighbor turned away momentarily, the defendant shot him, immediately grabbed his shotgun, and fled the scene. *Id.* at 200-01, 337 S.E.2d at 524. As in this case, the defendant in *Fields* argued that he had no intention to take the neighbor's shotgun, but that he took it as a mere afterthought while fleeing the scene. *Id.* at 201-03, 337 S.E.2d at 524-25. Our Supreme Court expressly rejected this argument and held no error as to the defendant's armed robbery conviction:

> Not only does *[the defendant's] intent to deprive [the neighbor] of his gun appear to be so joined in time and circumstances with his use of force against [neighbor] that these elements appear inseparable*, but this Court has held that mixed motives do not negate actions that point undeniably to a taking inconsistent with the owner's possessory rights.

Id. at 202, 337 S.E.2d at 525 (emphasis added).

¶ 29 Defendant contends this case is more similar to *State v. Powell*, in which our Supreme Court held the State failed to present evidence supporting a conviction for robbery with a dangerous weapon. 299 N.C. at 101-02, 261 S.E.2d at 119. In *Powell*, the defendant murdered a woman in the course of raping her. *Id.* at 100, 261 S.E.2d at 118. As the defendant was leaving the home, he stole the victim's television set and her vehicle. *Id.* at 102, 261 S.E.2d at 119. The Supreme Court concluded that the defendant had committed larceny of the television and vehicle from elsewhere in the victim's home as an afterthought to the murder and not in "one continuous chain of events." *Id.*

¶ 30 This case is distinguishable. In *Powell*, the taking of the victim's property was separated in time and place from the principal murder. Here, however, there is no evidence of any time elapsing between the murder and Defendant's taking of the victim's gun to constitute an afterthought. Unlike in *Powell*, Defendant also took the gun from Mr. Covington's person. The two acts were linked as a continuous transaction. *See id.*

¶ 31 Based on our precedent and viewing the evidence in the light most favorable to the State, we hold the trial court did not err in denying Defendant's motion to dismiss the charge of robbery with a dangerous weapon.

C. Firing Weapon within City Limits in Violation of Local Ordinance

¶ 32 Finally, Defendant argues that the charge of discharging a weapon within Lumberton city limits should have been dismissed because the charging documents did not include the caption of the ordinance—"Discharging firearms"—and the prosecutor failed to introduce the ordinance in evidence. We agree.

¶ 33 N.C. Gen. Stat. § 160A-79(a) requires that "[i]n all civil and criminal cases a city ordinance that has been codified in a code of ordinances adopted and issued in compliance with [N.C. Gen. Stat. §] 160A-77 *must be pleaded by both section number and caption*." (emphasis added). N.C. Gen. Stat. § 8-5 further provides that "[i]n a trial in which the offense charged is the violation of a town ordinance, *a copy of the ordinance* alleged to have been violated, proven as provided in [N.C. Gen. Stat. §] 160A-79, *shall be prima facie evidence* of the existence of such ordinance." (emphasis added). But courts "cannot take judicial notice of the provisions of municipal ordinances." *Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 776, 796 S.E.2d 120, 123 (2017) (citation omitted).

¶ 34 In this case, the arrest warrant stated that there was probable cause to believe that Defendant

> unlawfully and willfully did DISCHARGE FIREARM [sic] TO WIT A .38 CALIBER REVOLVER WHILE INSIDE THE CITY LIMITS OF LUMBERTON NC IN VIOLATION OF CITY ORDINANCE CODE SECTION 15-6.

The indictment charged that Defendant

> unlawfully and willfully did discharge a firearm, to wit, a .38 caliber revolver, while inside the city limits of Lumberton, NC, in violation of City Ordinance Code Section 15-6, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

Article I, Section 15-6(a) of the Code of Ordinances of the City of Lumberton is captioned "Discharging firearms." It states "[n]o person shall discharge a firearm within the city unless otherwise permitted by the provisions of this section." The indictment and arrest warrant did not contain the caption of the city ordinance as required by N.C. Gen. Stat. § 160A-79(a). The State concedes that the charging documents did not comply with the statute, but it argues that Defendant had actual notice of the caption of the ordinance nonetheless. The State cites no authority to support this argument. This issue is not dispositive because the State also failed to introduce the ordinance in evidence at trial.

¶ 35 Only after the close of evidence, and outside the presence of the jury, did the prosecutor present copies of the ordinance, along with the proposed jury instruction, to the trial court. That was too late. *See In re Jacobs*, 33 N.C. App. 195, 197, 234 S.E.2d 639, 641 (1977) (reversing the trial court where "[t]he ordinance was clearly not proven at trial and the record does not contain a caption").

¶ 36 We hold the trial court erred in denying Defendant's motion to dismiss the charge of discharging a weapon within city limits in violation of Lumberton's ordinance. Therefore, we vacate the judgment of conviction on this charge.[1]

III. CONCLUSION

¶ 37 For the above-mentioned reasons, we hold the trial court did not err in denying Defendant's motion to dismiss the charge of first-degree murder and robbery with a dangerous weapon. We reverse the trial court's denial of Defendant's motion to dismiss the charge of discharging a firearm within city limits and vacate Defendant's judgment of conviction on this charge.

NO ERROR IN PART; VACATED IN PART.

Judges MURPHY and WOOD concur.

Report per Rule 30(e).

[1] While we typically remand a case for a new sentencing hearing when one or more conviction consolidated for judgment is vacated, *see, e.g., State v. Mello*, 200 N.C. App. 561, 570, 684 S.E.2d 477, 483 (2009), we need not do so here as N.C. Gen. Stat. § 15A-1340.17(c) dictates that Defendant receive a sentence of life without parole.