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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-827

Filed 05 July 2023

Johnston County, No. 20CRS51476

STATE OF NORTH CAROLINA

v.

MICHELE LEE GANNON, Defendant.

Appeal by defendant from judgment entered 26 January 2022 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 24 May 2023.

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Gail E. Carelli, for the State-appellee.*

GORE, Judge.

Defendant Michele Lee Gannon appeals from judgment entered upon her conviction for one count of felony fleeing to elude arrest. One issue is presented on appeal: whether the trial court erred by denying defendant's motion to dismiss. Upon review, we affirm.

Defendant appeals as a matter of right from a final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b) (2022).

**I.**

**A.**

The State's evidence at trial tended to show the following:

In the daylight hours of 9 March 2020, then Sheriff's Deputy Devonte Thorne of the Johnston County Sheriff's Office was on patrol and engaged in traffic enforcement as part of the department's SAFE (Sheriff's Aggressive Field Enforcement) team. Thorne was driving a marked Dodge Charger with radar equipment and patrolling the area of Brogden Road in Johnston County. The area is a rural, two-lane county road consisting of straightaways, curves, and hills. Thorne testified it was a clear sunny day, it was not raining, and there "wasn't much traffic on the road."

Shortly before 1:42 p.m., Thorne saw a motorcycle on Brogden Road traveling toward him at a rate of 87 miles per hour. The posted speed limit on Brogden Road is 55 miles per hour. Thorne engaged his lights and sirens and started his pursuit.

As Thorne followed the motorcycle, he saw the driver look back at him. The motorcycle did not stop. He could not see the license plate, and he could not see the driver's face because the person was wearing a helmet with a shield.

As Thorne continued pursuit, he saw the motorcycle pass another vehicle at a high rate of speed. He did not know if it was a no-passing zone, and he was not using

radar at that time. Thorne estimated he was traveling between 80 and 100 miles per hour on curves and between 100 and 110 miles per hour on straightaways. Another Sheriff's Deputy, John Long, engaged in the chase and noted the motorcycle crossing a bridge at a high rate of speed where the posted limit is 35 miles per hour.

Thorne testified the motorcycle didn't threaten the safety of another car that he could recall, and when the motorcycle passed the other vehicle, that vehicle did not have "to alter its status in the lane to swerve to try to avoid the motorcycle." Thorne testified that "whoever was riding that vehicle had pretty solid control of that vehicle at high rates of speed[.]"

Thorne and the officers assisting him eventually located the motorcycle, a Suzuki 2015 Gixxer, leaning against the back of a Citgo gas station in a concrete lot with no parking spaces. Thorne testified it was the same motorcycle that he was chasing. Thorne ran the motorcycle registration, and it came back belonging to defendant. Upon entering the station, defendant was questioned and placed under arrest.

**B.**

On 7 December 2020, the Johnston County Grand Jury indicted defendant on one count of felony fleeing to elude arrest, speeding in excess of 55 miles per hour over the posted speed limit or over 80 miles per hour, and reckless driving to endanger. Speeding 15 miles per hour over the speed limit and reckless driving served as aggravating factors for felony speeding to elude arrest.

After a jury trial conducted on 17 and 20 December 2022, the jury found defendant guilty as charged. The trial court arrested judgment on speeding 15 miles per hour over the speed limit and reckless driving; determined that defendant was a prior record level zero; entered judgment and commitment imposing a sentence of 6-17 months imprisonment; suspended the sentence; and placed defendant on 30 months of supervised probation. Defendant timely filed written notice of appeal.

## II.

Defendant contends the trial court erred by denying her motion to dismiss the felony speeding to elude arrest charge on grounds the two aggravating factors elevating the crime to a felony were supported by the same evidence.

### A.

As a preliminary matter, the State contends defendant waived review of her argument. Specifically, the State asserts defendant argued insufficient evidence of identity before the trial court, and this theory bears no relation to the theory defendant now advances on appeal.

Our Supreme Court's decision in *State v. Golder* forecloses the State's argument. 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020) (holding that "under Rule 10(a)(3) and our case law, [a] defendant's simple act of moving to dismiss at the proper time preserve[s] all issues related to the sufficiency of the evidence for appellate review."). Here, the defense renewed its motion to dismiss for insufficient evidence at the close of all evidence. The trial court denied this motion. Thus, defendant's

issue is preserved.

**B.**

In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion. In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. In other words, if the record developed at trial contains substantial evidence, whether direct or circumstantial, or a combination, 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. Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo.

*Id.* at 249-50, 839 S.E.2d at 790 (cleaned up).

**III.**

**A.**

In North Carolina, it is a Class 1 misdemeanor “for any person to operate a motor vehicle on a . . . highway . . . while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties.” § 20-141.5(a) (2020). This offense is elevated to a Class H felony when at least two of eight aggravating factors are present. § 20-141.5(b). “Although many of the enumerated aggravating factors are in fact separate crimes under various provisions of our

General Statutes, they are not separate offenses but are merely alternate ways of enhancing the punishment for speeding to elude arrest from a misdemeanor to a Class H felony.” *State v. Davis*, 163 N.C. App. 587, 590, 594 S.E.2d 57, 60 (2004) (cleaned up).

In this case, the aggravating factors submitted to the jury include: “[s]peeding in excess of 15 miles per hour over the legal speed limit[,]” § 20-141.5(b)(1), and “[r]eckless driving as proscribed by [section] 20-140.” § 20-141.5(b)(3). The State proceeded with its theory of reckless driving under section 20-140(b), which provides that “[a]ny person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.” § 20-140(b).

**B.**

Defendant argues in her brief, “assuming there was sufficient evidence the motorcycle was driven ‘at a speed . . . so as to endanger or be likely to endanger any person or property,’ there was insufficient evidence—apart from speeding—that the motorcycle was driven ‘without due caution and circumspection.’” We disagree.

“Defendant is correct that it is improper for the trial court to submit two aggravating circumstances supported by the same evidence.” *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993). “However, where there is separate evidence to support each aggravating circumstance, it is not improper for both of the

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circumstances to be submitted even though the evidence supporting each may overlap.” *Id.* (citation omitted). “Aggravating circumstances are not considered redundant absent a complete overlap in the evidence supporting them.” *State v. Moseley*, 338 N.C. 1, 54, 449 S.E.2d 412, 444 (1994) (citations omitted).

Here, the State’s evidence tended to show defendant traveled: (i) at speeds exceeding 80 miles per hour; (ii) on a rural, two-lane county road consisting of straightaways, curves, and hills; (iii) near another vehicle at a high rate of speed; and (iv) across a bridge where the posted speed limit was 35 miles per hour. When ruling on a motion to dismiss, “[t]he State is entitled to all reasonable inferences to be drawn from the evidence, and the trial court must resolve any contradictions and discrepancies in favor of the State.” *Davis*, 163 N.C. App. at 589, 594 S.E.2d at 59-60 (citation omitted). As defendant suggests, a reasonable person could weigh Detective Thorne’s testimony against the State. However, in ruling on a motion to dismiss, such a determination by the trial court would invade the province of the jury. *See State v. Smith*, 178 N.C. App. 134, 137, 631 S.E.2d 34, 37 (2006). Thus, we determine that the State presented sufficient evidence to survive a motion to dismiss, and we affirm the trial court’s ruling.

AFFIRMED.

Judges ARROWOOD and WOOD concur.

Report per Rule 30(e).