IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-461

Filed 19 March 2024

Avery County, Nos. 21 CRS 50281, 50283, 244

STATE OF NORTH CAROLINA

v.

DANIEL DEREK BENNETT

Appeal by defendant from judgment entered 2 November 2022 by Judge Timothy G. Gould in Avery County Superior Court. Heard in the Court of Appeals 9 January 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

Clarke S. Martin for defendant-appellant.

ZACHARY, Judge.

Defendant Daniel Derek Bennett appeals from the judgment entered upon a jury's verdicts finding him guilty of larceny of a firearm, two counts of assault with a deadly weapon, and attaining habitual felon status. After careful review, we conclude that Defendant received a fair trial, free from error.

BACKGROUND

About three weeks prior to Defendant's arrest on 23 June 2021, 39-year-old Defendant moved into the Avery County home of his mother and stepfather, Mr. and Mrs. Haas. On 23 June 2021, Defendant spent the day at home alone, while Mr. and Mrs. Haas were at work. That evening, as Mr. and Mrs. Haas drove down their driveway, they heard a loud "bang" and saw Defendant standing on the front porch, pointing a handgun at them that Mrs. Haas recognized as belonging to her and her husband. From the vehicle, Mr. Haas asked Defendant what was wrong, to which Defendant replied: "You better get the F out of my driveway[.]" Defendant was still pointing the handgun at them, and Mrs. Haas told Mr. Haas to "[g]o, because I [don't] know if [Defendant is] going to shoot again[.]" Defendant continued to point the handgun at Mr. and Mrs. Haas as they drove away from the house. When they reached the main road, Mrs. Haas called 9-1-1. Deputies promptly arrived and arrested Defendant.

Mr. and Mrs. Haas subsequently discovered that their "small .22 automatic pistol" was missing from the living room. The Haases usually kept the gun in their vehicle, but the day before the shooting they had temporarily stored it in the living room. The Haases and law enforcement officers never recovered the gun after the incident on 23 June 2021.

On 7 September 2021, an Avery County grand jury indicted Defendant for larceny of a firearm, stealing or destroying evidence, possession of a firearm by a

felon, attaining the status of a habitual felon, and two counts of assault with a deadly weapon with intent to kill. On 31 October 2022, this matter came on for trial in Avery County Superior Court. On 1 November 2022, the jury found Defendant guilty of assault with a deadly weapon (Mr. Haas), assault with a deadly weapon (Mrs. Haas), and larceny of a firearm. On 2 November 2022, the jury found Defendant guilty of attaining habitual felon status. The trial court then consolidated the convictions and entered judgment, sentencing Defendant to a minimum of 60 to a maximum of 84 months in the custody of the North Carolina Division of Adult Correction, with credit for 407 days spent in confinement prior to the date of the judgment as a result of these charges. Defendant gave timely oral notice of appeal in open court.

DISCUSSION

Defendant argues that the trial court erred in admitting an ACIS printout indicating that he had a prior felony conviction in McDowell County, one of the felony convictions supporting Defendant's conviction of attaining the status of a habitual felon, and therefore in denying Defendant's motion to dismiss the habitual felon indictment. Defendant further asserts that the trial court erred when it denied his motion to dismiss the charge of larceny of a firearm.

I. State's Exhibit 8: the ACIS Printout

At the habitual felon phase of Defendant's trial, Defendant objected to the admission of State's Exhibit 8, an Automated Criminal/Infraction System ("ACIS") printout that showed that Defendant had a prior felony larceny conviction in

McDowell County. Defendant objected on the ground that the ACIS printout was not a certified public record under Rule 902 of the North Carolina Rules of Evidence and complains that the printout was authenticated at trial by an Avery County clerk rather than by a McDowell County clerk or an Administrative Office of the Courts ("AOC") representative. Defendant also maintains that because the trial court erred in admitting the ACIS printout, it additionally erred in denying Defendant's motion to dismiss the habitual felon indictment.

A. Standard of Review

Although Defendant states that "[a] trial court's determination as to whether a document has been sufficiently authenticated is reviewed de novo on appeal as a question of law" (quoting *State v. Watlington*, 234 N.C. App. 580, 590, 759 S.E.2d 116, 124 (2014) (emphasis omitted)), on appeal he challenges the *admissibility* of State's Exhibit 8. It is well settled that "the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion." *State v. Steele*, 286 N.C. App. 136, 140, 879 S.E.2d 387, 390 (2022) (citation omitted). Thus, despite the fact that our review of whether the trial court properly admitted this evidence entails an authentication element, we must review for abuse of discretion. *See id.*

"An abuse of discretion will be found only when the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision." *Id*. (citation omitted). "In addition, Rule 901 of our Rules of Evidence requires that as a condition precedent to admissibility evidence must be authenticated or identified sufficient to

support a finding that the matter in question is what its proponent claims." *Id.* (citation omitted). Authentication under Rule 901 may be satisfied through the "testimony of a witness with knowledge" of the matter, and who can testify that a matter is what it is claimed to be. *State v. Crawley*, 217 N.C. App. 509, 517, 719 S.E.2d 632, 638 (2011) (cleaned up), *disc. review denied*, 365 N.C. 553, 722 S.E.2d 607 (2012); *Steele*, 286 N.C. App. at 140–41, 879 S.E.2d at 390.

B. Analysis

A habitual felon is defined as "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court[.]" N.C. Gen. Stat. § 14-7.1(a) (2023). If a defendant has three qualifying convictions and commits a new felony, the defendant may be charged as a habitual felon under separate indictment. *Id.* § 14-7.3. An indictment charging a defendant as a habitual felon must indicate the date that the prior felonies were committed, the state or sovereign against which the felonies were committed, the date of the guilty plea or conviction, and the court where the pleas or convictions took place. *Id.*

1. Admissibility of the ACIS Printout

Pursuant to section 14-7.4 of the Habitual Felon Act, a prior felony is proved as follows:

> In all cases where a person is charged . . . with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. *A prior conviction may be proved*

> *by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction.* The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

Id. § 14-7.4 (emphasis added).

Section 14-7.4 is clearly "permissive, not mandatory, in that it provides [that] a prior conviction 'may' be proven by stipulation or a certified copy of a record. Thus, although section 14-7.4 contemplates the most appropriate means to prove prior convictions for the purpose of establishing habitual felon status," there is no exclusion of "other methods of proof." *State v. Wall*, 141 N.C. App. 529, 533, 539 S.E.2d 692, 695 (2000) (citation omitted), *cert. denied*, ___ N.C. ___, 566 S.E.2d 480 (2002). Indeed, this Court has held that "a certified copy of an ACIS printout is sufficient evidentiary proof of prior convictions under our habitual felon statute." *State v. Edgerton*, 266 N.C. App. 521, 533, 832 S.E.2d 249, 258 (2019), *disc. review denied*, 375 N.C. 496, 847 S.E.2d 886 (2020). "[T]he reliability of the method of proof is the important inquiry to be made in determining admissibility." *Wall*, 141 N.C. App. at 532, 539 S.E.2d at 694 (citation omitted).

In the instant case, the deputy clerk of the Avery County Clerk of Superior Court testified that ACIS is "an online record . . . of all judgments" entered in this State and that the county clerks "enter[] [the] data into that system[.]" According to

the deputy clerk, "the data entered into [ACIS is] complete and accurate as to the record of that case[,]" and ACIS "is [a] public record." The deputy clerk added:

> Q. And you've indicated that ACIS is a record system used by the clerk's office.
>
> A. Yes.
>
> Q. Does [ACIS] maintain official records of convictions in the state?
>
> A. It does.
>
> . . . .
>
> Q. And has that record of conviction been certified by the McDowell County clerk's office?
>
> A. Yes, sir.
>
> . . . .
>
> Q. And does it have a date that that judgment was, in fact, entered?
>
> A. Yes, 7/9 of '07.

The State offered the certified ACIS printout to show Defendant's third felony conviction, in McDowell County, to establish Defendant's status as a habitual felon. The trial court admitted the certified ACIS printout into evidence over Defendant's objection.

On appeal, Defendant argues that the Avery County deputy clerk's testimony "was insufficient to authenticate and admit [the] ACIS printout of [the] McDowell County conviction because [she was] neither a McDowell County clerk nor a

representative of the AOC." Defendant also complains that State's Exhibit 8 was not self-authenticating because a McDowell County clerk—and not an AOC representative—certified the record.

Rule 901 of the North Carolina Rules of Evidence requires authentication "as a condition precedent to admissibility" of evidence. N.C. Gen. Stat. § 8C-1, Rule 901(a). This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* The trial court is tasked with assessing the reliability of the evidence. *See Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695. Toward that end, this Court has concluded that an email containing a screenshot of an AOC record was sufficient evidence to support the calculation of a defendant's prior record level for sentencing purposes, explaining that "the information contained in the printed-out email provides sufficient identifying information with respect to [the] defendant to give it the indicia of reliability to prove [the] defendant's prior convictions under N.C. Gen. Stat. § 15A-1340.14(f)(4)[.]" *State v. Best*, 202 N.C. App. 753, 757, 690 S.E.2d 58, 61 (2010).

In the case at bar, the ACIS printout evinced similar indicia of reliability. The information in the ACIS printout is corroborated by both the deputy clerk's testimony and the habitual felon indictment: the name, birthdate, offense date, conviction date, and county are consistent in the ACIS printout, the clerk's testimony, and the indictment. Moreover, the Clerk of Superior Court in McDowell County certified the

ACIS printout as a true copy. Nor does Defendant "contend that [E]xhibit [8] was inaccurate or incomplete[.]" *Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695.

Based upon this information in the record, we conclude that the ACIS printout "appears to be a reliable source of [D]efendant's prior conviction[,]" *id.* (cleaned up), and its admission was the result of the trial court's reasoned decision. Accordingly, the trial court did not abuse its discretion in admitting the ACIS printout.

2. Confrontation Clause Challenge

Defendant further argues that "without certification of authenticity by the custodian of the ACIS printout or authenticating testimony by a clerk of court from the county where the judgment originated, [Defendant]'s right to confront the witnesses against him was violated." However, Defendant did not object below to the admission of State's Exhibit 8 on constitutional grounds—specifically, his rights under the Confrontation Clause—and we therefore will not consider his arguments concerning the same on appeal. *See State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.").

Nevertheless, Rule 2 of the North Carolina Rules of Appellate Procedure authorizes this Court to suspend the appellate rules in order to reach the merits of an otherwise unpreserved issue when doing so would be "necessary to prevent manifest injustice to a party[.]" *Dogwood Dev. & Mgmt. v. White Oak Transp.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (cleaned up). Rule 2, however, is an

"extraordinary step[,]" *State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 369 (2017), *disc. review denied*, 370 N.C. 695, 811 S.E.2d 159 (2018), that must be invoked cautiously "in exceptional circumstances[.]" *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999).

There being no showing of exceptional circumstances or other justification to do so, we decline to invoke Rule 2 of our Rules of Appellate Procedure to review Defendant's unpreserved constitutional argument for plain error.

3. Motion to Dismiss Habitual Felon Indictment

Defendant relatedly argues that because the trial court "erred when it admitted State's Exhibit 8 [(the ACIS printout)] into evidence at the habitual felon phase of the trial[,]" it compounded the error "when it denied [Defendant's] motion to dismiss the habitual felon indictment for insufficient evidence." As explained above, the trial court did not err in admitting the ACIS printout into evidence. But more significantly, "for purposes of examining the sufficiency of the evidence to support a criminal conviction, it simply does not matter whether some or all of the evidence contained in the record should not have been admitted[.]" *State v. Osborne*, 372 N.C. 619, 630, 831 S.E.2d 328, 335 (2019). As our Supreme Court has explained, "when evaluating the sufficiency of the evidence, all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question." *Id*. Thus, Defendant's challenge to the trial court's denial of his motion to dismiss the habitual felon indictment lacks merit.

II. Motion to Dismiss Charge of Larceny of a Firearm

Defendant also argues that the trial court "erred in denying [his] motion to dismiss the charge of larceny of a firearm because there was no evidence that [he] intended to permanently deprive [Mr. and Mrs.] Haas of their handgun."

A. Standard of Review

We review a "trial court's denial of a motion to dismiss *de novo*." *State v. Hobson*, 261 N.C. App. 60, 70, 819 S.E.2d 397, 404 (citation omitted), *disc. review denied*, 371 N.C. 793, 821 S.E.2d 173 (2018). "When ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted). The State is entitled to every reasonable intendment and "every reasonable inference" to be drawn from the evidence, with the trial court "resolving any contradictions in its favor." *Id.* (citation omitted). "The trial court must consider both competent and incompetent evidence." *State v. Parker*, 274 N.C. App. 464, 469, 852 S.E.2d 638, 644 (2020) (cleaned up). "Once the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Id.* at 468, 852 S.E.2d at 644 (cleaned up).

B. Analysis

The jury convicted Defendant of felony larceny of a firearm pursuant to N.C. Gen. Stat. § 14-72. That section provides that "[t]he crime of larceny is a felony, without regard to the value of the property in question, if the larceny is . . . [o]f any firearm." N.C. Gen. Stat. § 14-72(b)(4). The essential elements of larceny of a firearm are "(1) taking the firearm of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the firearm permanently." *State v. Rogers*, 255 N.C. App. 413, 415, 805 S.E.2d 172, 174 (2017) (cleaned up).

It is clear that "[f]elonious intent is an essential element of the crime of larceny, and if the defendant takes the property of another for his own immediate and temporary use without the intent to permanently deprive the owner of his property, then he is not guilty of larceny." *In re Raynor*, 64 N.C. App. 376, 377, 307 S.E.2d 219, 220 (1983). Nevertheless, "[i]ntent is a mental state that is seldom provable by direct evidence. Intent must ordinarily be proved by circumstances from which it may be inferred." *Rogers*, 255 N.C. App. at 415, 805 S.E.2d at 174 (cleaned up). "[T]he intent to permanently deprive an owner of his property [can] be inferred where there [is] no evidence that the defendant ever intended to return the property, but instead showed a complete lack of concern as to whether the owner ever recovered the property." *State v. Barts*, 316 N.C. 666, 690, 343 S.E.2d 828, 843–44 (1986).

In the instant case, the State presented ample testimony to support its contention that Defendant intended to permanently deprive Mr. and Mrs. Haas of the

handgun. Mr. and Mrs. Haas testified that although Defendant was "[n]ever allowed" or authorized to use the firearm, he took the gun and shot at them. Moreover, Mrs. Haas testified that the firearm was missing, and that neither she nor law enforcement officers were ever able to recover it after the incident in this case. Finally, off-duty Avery County Detective Tim Austin, who witnessed the altercation from outside a neighbor's home, testified that, after deputies detained Defendant and could not locate the firearm, he asked Defendant where the gun was, to which Defendant responded: "You'll never find it," and, "Talk to my lawyer." This circumstantial evidence supports a finding that Defendant intended to permanently deprive Mr. and Mrs. Haas of the pistol. *State v. Golder*, 374 N.C. 238, 249–50, 839 S.E.2d 782, 790 (2020).

Accordingly, the trial court did not err in denying Defendant's motion to dismiss the charge of felony larceny of a firearm.

CONCLUSION

For the reasons set forth herein, we conclude that the trial court did not abuse its discretion in admitting the ACIS printout into evidence, or err by denying Defendant's motion to dismiss the habitual felon indictment. The trial court also did not err in denying Defendant's motion to dismiss the charge of larceny of a firearm.

NO ERROR.

Judges STROUD and TYSON concur.

Report per Rule 30(e).