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NO. COA11-855
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Beaufort County
Nos. 09 CRS 754-55

JOE MACK TYSON, JR.

Appeal by Defendant from judgments dated 23 February 2011 by Judge Walter H. Godwin, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 12 January 2012.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Angell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for Defendant.

STEPHENS, Judge.

Defendant Joe Mack Tyson, Jr. was indicted on one count each of possession of a controlled substance and robbery with a dangerous weapon. Tyson pled not guilty to the charges and was tried before a jury in Beaufort County Superior Court, the Honorable Walter H. Godwin, Jr. presiding. The jury returned verdicts of guilty on both charges, and the trial court sentenced Tyson to consecutive terms of 146 to 185 months for

the robbery charge and 10 to 12 months for the possession charge. Tyson appeals.

Tyson first argues that the trial court erroneously denied his motion to dismiss the charge of robbery with a dangerous weapon. We disagree.

A motion for dismissal is properly denied if there is substantial evidence (1) of each essential element of the offense charged, and (2) of defendant's being the perpetrator of such offense. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

The elements of robbery with a dangerous weapon are: "(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 (3) whereby the life of a person is endangered or threatened." *State*

v. Hope, 317 N.C. 302, 305, 345 S.E.2d 361, 363 (1986) (quoting *State v. Beatty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982)); see also N.C. Gen. Stat. § 14-87(a) (2009). Additionally, the State must show the defendant intended to permanently deprive the owner of its property at the time the taking occurred. *State v. Richardson*, 308 N.C. 470, 474, 302 S.E.2d 799, 802 (1983). Evidence that a defendant took and subsequently abandoned another's property is sufficient to show the defendant's intent to permanently deprive the owner of its property. See *State v. Mann*, 355 N.C. 294, 304, 560 S.E.2d 776, 783 (2002). In this case, Tyson does not dispute the existence of sufficient evidence showing that he took property from another by use of a weapon endangering the life of another. Thus, the only issue is whether the State presented sufficient evidence to demonstrate Tyson's intent to permanently deprive the owner of its merchandise.

The relevant evidence presented at trial tended to show the following: On 8 June 2009, at the Belk Department Store in Washington, North Carolina, the regional loss prevention manager for Belk observed Tyson walk behind the fragrance bay - a circular enclosed area not intended for customers - kneel down, take 13 bottled fragrances from a glass case, and place the

fragrances into a bag taken from the store. When the loss prevention manager approached Tyson and tried to restrain him, Tyson pulled a box cutter from his pocket and made "swiping motion[s]" at the loss prevention manager and the store manager. Tyson then ran from the premises and left in a vehicle; on his way out of the store, Tyson abandoned the bag of fragrances. The loss prevention manager gave to the Washington Police Department ("WPD") the vehicle's description and license plate number and Tyson's physical description and name. WPD Officers stopped a vehicle matching the description and arrested Tyson.

The foregoing evidence, viewed in the light most favorable to the State, sufficiently establishes that Tyson took and abandoned Belk's property and, therefore, had the intent to permanently deprive Belk of its property. Accordingly, Tyson's argument is overruled.

Next, Tyson argues that the trial court erroneously admitted, in violation of North Carolina Rules of Evidence 401, 402, 403, and 404(b), "prejudicial testimony about unrelated [merchandise] found with [] Tyson" when he was arrested.¹

¹Tyson also asserts on appeal, but failed to argue at trial, that the admitted statements violated his constitutional rights. However, "[a] constitutional question not presented and passed upon at trial will not ordinarily be considered on appeal." *State v. Howell*, 169 N.C. App. 741, 746, 611 S.E.2d 200, 204

Assuming the admission of the evidence was error, we cannot conclude that Tyson has satisfied his burden of showing that the error was prejudicial. See *State v. Murphy*, 100 N.C. App. 33, 41, 394 S.E.2d 300, 305 (1990) (noting that the burden is on the defendant not only to show error but to show that the error was prejudicial); see also N.C. Gen. Stat. § 15A-1443(a) (2009) (providing that an error is prejudicial if there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial). The evidence of Tyson's guilt was overwhelming. We conclude that had the trial court not admitted the challenged testimony, a different result would not have been reached at trial. Tyson's argument is overruled.

Tyson further argues that the trial court erred in failing to order a mistrial *ex mero motu* "based on the cumulative prejudice of [the statement about merchandise found in the vehicle] and other witness statements." We are unpersuaded.

"A mistrial is generally granted where there have been improprieties in the trial of such a serious nature, that defendant cannot receive a fair and impartial verdict." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998); see

(2005). Thus, Tyson's constitutional claims are not properly before us, and, accordingly, are not addressed.

also N.C. Gen. Stat. § 15A-1061 (2009). The decision to grant or deny a motion for mistrial will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion. *State v. Lloyd*, 354 N.C. 76, 113, 552 S.E.2d 596, 622 (2001).

In this case, the trial court sustained objections to each of the four statements that Tyson alleges were prejudicial. For two of those objections, the trial court specifically instructed the jury to disregard the testimony. Because "[j]urors are presumed to follow a trial court's instructions," *State v. McCarver*, 341 N.C. 364, 384, 462 S.E.2d 25, 36 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996), and because Tyson has presented no evidence to rebut that presumption, we conclude that the challenged testimony did not deprive Tyson of a fair and impartial verdict.

The other two challenged statements involved the loss prevention manager's attempt to explain that part of his reason for approaching Tyson in the store rather than outside was the loss prevention manager's prior dealings with Tyson. Tyson argues that the loss prevention manager's attempted explanation, to which the trial court sustained objections, along with the loss prevention manager's testimony that he thought approaching

Tyson in the store would be safer, gave the jury "reason to believe that [] Tyson not only had previously stolen from the Belk store, but that he had done so in a manner that threatened the safety of employees." The effect of this testimony on the jury, Tyson alleges, was to deprive Tyson of his "presumption of innocence." We disagree. First, although the trial court did not immediately instruct the jurors to disregard the challenged statements, the trial court did instruct the jury generally that

[w]hen the [c]ourt sustains an objection to a question, you must disregard the question and the answer if one has been given and draw no inference from the question or answer or speculate as to what the witness would have said if the witness had been permitted to answer.

As discussed *supra*, with no evidence indicating otherwise, we must presume that the jury followed that instruction and drew no inference from the loss prevention manager's attempt to explain that he knew Tyson from prior dealings. *Id.* Second, the loss prevention manager's testimony that the safest place to approach Tyson was inside the store did not imply to the jury that Tyson had previously stolen from the Belk store "in a manner that threatened [] safety." Rather, this testimony serves only to explain the loss prevention manager's action in this case and gives no insight into any supposed previous dealings between the

loss prevention manager and Tyson. Accordingly, we conclude that Tyson has not met his burden of proving that he was prevented from "receiv[ing] a fair and impartial verdict," *Davis*, 130 N.C. App. at 679, 505 S.E.2d at 141, and that the trial court did not abuse its discretion by failing to order a mistrial. Tyson's argument is overruled.

We hold that Tyson received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR.

Judges STROUD and BEASLEY concur.

Report per Rule 30(e).