

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-1531
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Durham County
Nos. 07 CRS 54602
08 CRS 13587

TORY JAREL NELSON

Appeal by defendant from judgments entered 26 July 2011 by Judge James E. Hardin in Durham County Superior Court. Heard in the Court of Appeals 5 April 2012.

Roy Cooper, Attorney General, by C. Norman Young, Jr., Assistant Attorney General, for the State.

Sue Genrich Berry for the defendant.

THIGPEN, Judge.

Tory Jarel Nelson ("Defendant") appeals from a judgment convicting him of first-degree murder on the basis of the felony murder rule. We must determine whether the trial court erred by denying Defendant's motion to dismiss. Because there was sufficient evidence from which the trial court could draw a reasonable inference of Defendant's guilt, we find no error.

I. Factual and Procedural History

At trial, the State's evidence tended to show that on the morning of 26 September 2007, Charles Davis dropped his wife, Sallie, off for dialysis treatment. Mr. Davis' white Buick Century was seen outside his home in Durham, North Carolina, around noon and again at approximately 5:00 or 5:30 p.m., but not after that time. When Mr. Davis did not return to pick his wife up from dialysis, his brother-in-law, James Taylor, and his wife, Annie, picked Mrs. Davis up and drove her home. When the Taylors arrived at the Davis residence around 9:00 p.m., Mr. Davis' car was not outside. Both Mr. and Mrs. Taylor entered the home and saw Mr. Davis lying in a pool of blood. They then called 911.

When the police responded to the 911 call, they found the Davis residence in disarray with drawers pulled out and mattresses overturned, and Mr. Davis' deceased body lying in a pool of blood. Mr. Davis' body and the surroundings suggested that there had been a struggle and that Mr. Davis had defended himself. Mr. Davis died as a result of at least forty-seven stab wounds. In the Davis residence, the police found a bloody shoe print with a "Converse" logo and took an impression of the print. Additionally, the police took seven latent fingerprint

lifts from the Davis residence, but were not able to obtain a match for any of the fingerprints.

Around 8:00 p.m. the same evening, Stephon Hinton ("Hinton"), a friend of Defendant, saw Defendant in a white "Century" vehicle, which Hinton later identified at trial as Mr. Davis' car. When Hinton asked Defendant about the vehicle, Defendant told him "[h]e had rented it out from a crack head for some drugs." Hinton asked Defendant if he could drive the car, and he drove himself and Defendant to the home of his friend, Richard Little ("R.J."). Defendant and Hinton stayed at the Little home for about an hour or two smoking marijuana outside and talking with others. Defendant had approximately \$30 or \$40, a bottle of prescription pills, and some marijuana. While there, Defendant tried to sell the car to R.J., but R.J. was not interested. R.J. also testified that Defendant told him he had obtained the pills in a small-time robbery to get respect. Jonathon Wahome ("Wahome") was also at the Little house that evening and testified that Defendant tried to sell him the car for \$50. Wahome also stated Defendant told him he had robbed and killed someone. Both R.J. and Wahome testified Defendant was wearing black Air Force 1 tennis shoes.

That evening, Defendant stayed at Hinton's home. The next day, Hinton was driving to school in the white Buick with Defendant in the passenger seat when he saw a police car drive past him and turn around. The police had been notified to be on the lookout for the white 1993 Buick Century taken from the Davis home. Hinton attempted to avoid the police officer and eventually pulled the car over so that he and Defendant could get out and run. Hinton and Defendant were subsequently apprehended by police and taken to the police station. Hinton testified that while at the police station, he noticed Defendant had a cut on his hand. At trial, the State introduced photographs of several cuts on Defendant's hands.

The State also presented testimony from numerous witnesses that Defendant had been seen wearing a pair of Converse shoes. Moreover, Spence Chamberlain, Jr., a narcotics officer with the Durham County Sheriff's Department, testified that he went to Defendant's brother's house at approximately 11:30 a.m. on 26 September 2007 to bring Defendant's brother some clothes and shoes. Investigator Chamberlain stated he saw Defendant wearing a pair of red and white Converse shoes at that time, and he gave Defendant a pair of black Air Force 1 tennis shoes.

Defendant was charged with first-degree murder of Charles Davis and robbery with a dangerous weapon. The jury found Defendant guilty of first-degree murder on the basis of the felony murder rule and found him guilty of robbery with a dangerous weapon. The robbery with a dangerous weapon conviction was merged with the first-degree murder conviction, and the trial court sentenced Defendant to life imprisonment without parole. Defendant appeals from this judgment.

II. Motion to Dismiss

Defendant's only argument on appeal is that the trial court erred by denying his motion to dismiss at the close of all the evidence because there was insufficient evidence that Defendant was the perpetrator of the robbery and Mr. Davis' murder. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351

N.C. 373, 378, 526 S.E.2d 451, 455 (quotation omitted), *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Id.* at 378-79, 526 S.E.2d at 455 (citations omitted). Furthermore,

[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of 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 379, 526 S.E.2d at 455 (citations and quotation marks omitted) (emphasis omitted).

Here, the State relied on the doctrine of recent possession to prove Defendant committed robbery with a dangerous weapon, the felony that served as the basis for his conviction of first-degree murder pursuant to the felony murder rule. The definition of first-degree murder includes "[a] murder . . .

which shall be committed in the perpetration or attempted perpetration of any . . . robbery . . . committed or attempted with the use of a deadly weapon[.]” N.C. Gen. Stat. § 14-17 (2011). The doctrine of recent possession is a rule of law that “allows the jury to infer that the possessor of the stolen property is guilty of its taking.” *State v. Reid*, 151 N.C. App. 379, 382, 565 S.E.2d 747, 750 (citation omitted), *appeal dismissed, disc. review denied*, 356 N.C. 622, 575 S.E.2d 522 (2002). The doctrine of recent possession applies if the State can prove three things:

(1) that the property was stolen; (2) that the defendant had possession of this stolen property, possession being that he is aware of its presence and has, either by himself or together with others, both the power and intent to control its disposition or use; and (3) that the defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly.

Id. (quotation and quotation marks omitted).

In this case, although the majority of the evidence against Defendant was circumstantial, we conclude it was sufficient evidence from which the trial court could draw a reasonable inference of Defendant’s guilt. *See id.* Specifically, the State presented the following evidence to the trial court:

Investigator Chamberlain saw Defendant wearing a pair of Converse tennis shoes on the morning of 26 September 2007 and other witnesses also testified they had seen Defendant wearing Converse shoes; a bloody shoe impression taken from the Davis home had a "Converse" logo in the impression; Mr. Davis' car was not seen in his driveway after approximately 5:30 p.m. on 26 September 2007; Hinton saw Defendant with Mr. Davis' car around 8:00 p.m. on that same day and drove Defendant to R.J.'s home where other witnesses saw Defendant and Hinton with Mr. Davis' car; Defendant tried to sell Mr. Davis' car to R.J. and Wahome; Defendant told Wahome that he had robbed and killed someone; there was evidence of a struggle at the Davis home and Defendant had cuts on his hands; and Defendant was found in possession of Mr. Davis' car the morning after his murder.

Viewing this evidence in the light most favorable to the State, we hold the evidence was sufficient to withstand Defendant's motion to dismiss and to send the issue to the jury. Accordingly, the trial court did not err by denying Defendant's motion to dismiss.

NO ERROR.

Judges ELMORE and GEER concur.

Report per Rule 30(e).