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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-173

Filed: 7 January 2020

Cherokee County, Nos. 16 CRS 000396-98

STATE OF NORTH CAROLINA

v.

TIMOTHY GENE MYERS, Defendant.

Appeal by Defendant from judgments entered 22 and 24 August 2018 by Judge Eric L. Levinson in Cherokee County Superior Court. Heard in the Court of Appeals 3 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Stroud, for the State.

Anne Bleyman for Defendant-Appellant.

INMAN, Judge.

Defendant Timothy Gene Myers appeals from judgments entered after a jury found him guilty on two felony counts of carrying a concealed gun. He contends that the trial court erred in denying his motion to dismiss one charge for insufficiency of the evidence and plainly erred in failing to give a special jury instruction in the second charge. After careful review, we hold Defendant has failed to demonstrate error.

I. FACTUAL & PROCEDURAL HISTORY

The record below tends to show the following:

Around 2 A.M. on 5 March 2015, Officer Adam May with the Town of Murphy Police Department was on patrol when he drove past a city-owned water tower on the outskirts of town. Officer May sometimes stopped by the water tower to check for trespassers and had, on occasion, observed drug paraphernalia scattered around the area. This time, Officer May saw an unfamiliar car blocking the gate to the water tower. A passenger, later identified as Defendant, quickly jumped out of the car just as Officer May approached; while Officer May was exiting his cruiser to speak with the car's occupants, Defendant got back into the car. He then climbed out of the car a second time. Officer May also observed a driver moving around inside the car.

Defendant approached Officer May with his hands in his pockets. Officer May instructed Defendant to stop moving and to pull his hands out of his pockets. Defendant complied. They engaged in a brief exchange about why Defendant and the driver were stopped at the water tower, all while the driver continued to move about inside the car. Concerned by the movement inside the car, Officer May asked Defendant to step in front of the car so that he could check on the driver while keeping an eye on Defendant. Defendant did so but put his hands back into his pockets. Officer May quickly told Defendant to pull his hands back out. Defendant complied

but immediately threw something indiscernible into the brush beside the road. A few moments later, Officer May saw Defendant toss a glass pipe under the car.

Defendant's actions caused Officer May to abandon his interest in the driver and return his focus to Defendant. Officer May conducted a protective frisk of Defendant and discovered a white-handled revolver, a set of throwing knives, and two Colt .45 bullets in Defendant's pants. Another police officer, Officer Theodore Parrish, had also just arrived on the scene and, at Officer May's direction, searched the brush beside the road. Officer Parrish found a black revolver there. The two officers detained Defendant and the driver of the vehicle before continuing their search of the area and the car. They found a glass pipe under the car and a pen gun and machete in the passenger compartment.

Defendant was indicted on three felony counts of carrying a concealed gun, one misdemeanor count of carrying a concealed weapon, one misdemeanor count of possessing drug paraphernalia, and one misdemeanor count of resisting a public officer on 11 July 2016. The State later dismissed the drug paraphernalia charge.

Officers May and Parrish testified at trial. On cross-examination, Defendant's counsel asked Officer May to examine the white-handled revolver. Officer May testified that there appeared to be a bullet fragment lodged at the end of its barrel. The cross-examination continued:

[DEFENDANT'S COUNSEL:] . . . [D]oes it look like a piece of a bullet? Pick it up and—

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[OFFICER MAY:] If I had to hazard a guess, that's what I would have to say, but—

[DEFENDANT'S COUNSEL:] Well, I don't want you to have to say. I mean, does it look like a piece of a bullet or not?

[OFFICER MAY:] Just by glancing at it, it looks like it is.

....

Glancing at it, it appears—I would have to say it appears to me that it's possibly a piece or fragment of a bullet, but that's all I can say.

....

[DEFENDANT'S COUNSEL:] Does it appear to be lodged?

[OFFICER MAY:] It appears to be so.

[DEFENDANT'S COUNSEL:] In your opinion as a lay witness, not as an expert, but just what you observed as a police officer with training in firearms and your experience, could that—could that item be fired?

[OFFICER MAY:] Yes, possibly.

[DEFENDANT'S COUNSEL:] In other words, you're telling me that you could put a bullet in the chamber and pull the trigger, and even though that it's got that fragment bullet in the end of the barrel, you're saying that the new bullet would fire through there?

[OFFICER MAY:] There's still always a possibility that the new bullet would dislodge whatever fragment is in the barrel. And that one or either of the projectiles could still come out of the end of the barrel. That's always a possibility.

[DEFENDANT'S COUNSEL:] It's a possibility; is that what you said?

[OFFICER MAY:] Correct. It's a possibility.

At the close of the State's evidence, Defendant moved to dismiss all charges for insufficiency of the evidence. The trial court denied that motion, and denied it a second time when Defendant renewed his motion at the close of all evidence. Defendant's counsel also orally requested a special jury instruction on the white-handled pistol's inoperability as a defense to carrying a concealed gun; that, too, was denied by the trial court. Following instruction and closing argument, the jury returned guilty verdicts on all counts except for the felony charge of carrying a concealed firearm based on the pen gun. Defendant subsequently gave oral notice of appeal during sentencing.

II. ANALYSIS

Defendant argues that the trial court erred in denying his motion to dismiss the charge for carrying a concealed gun in connection with the black revolver recovered from the roadside brush. Defendant also assigns plain error to the trial court's refusal to give the jury the special instruction on inoperability as a defense to carrying a concealed gun in relation to the white-handled revolver. We address each argument in turn.

A. Motion to Dismiss: Black Revolver

We apply a uniform standard of review to a trial court's ruling on a motion to dismiss for insufficiency of the evidence:

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.

If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

State v. Powell, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). We consider the evidence in the light most favorable to the State and draw every reasonable inference in its favor. *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012). Substantial evidence is not limited to direct evidence, and the State may rely on circumstantial evidence to overcome a defendant's motion to dismiss. *Id.*

The essential elements of carrying a concealed weapon are defined in N.C. Gen. Stat. § 14-269(a1), and consist of: "(1) [t]he accused must be off his own premises; (2) he must carry a deadly weapon; [and] (3) the weapon must be concealed about his person." *State v. Best*, 214 N.C. App. 39, 45, 713 S.E.2d 556, 561 (2011) (citation and quotation marks omitted) (second alteration in original). Defendant contends that the State failed to introduce sufficient evidence that he possessed or concealed the black revolver found in the brush. We disagree.

Officer May testified that he saw Defendant remove his hands from his pockets and immediately toss an unknown object into the roadside brush. Both Officers May and Parrish testified that moments later, Officer Parrish found the black revolver in the area identified by Officer May. Additional testimony by Officer May shows that other searches revealed a white-handled revolver and throwing knives in Defendant's pants, as well as a pen gun and machete in the vehicle. Given its recovery at Officer May's direction and the copious other weapons found on Defendant's person and in the car, we hold a reasonable juror could infer that the unknown object Officer May saw Defendant toss into the brush was the black revolver recovered by Officer Parrish. So, the trial court did not err in denying Defendant's motion to dismiss for insufficiency of the evidence.

B. Inoperability Special Jury Instruction: White-Handled Revolver

Defendant concedes on appeal that his trial counsel did not make a written request for a special jury instruction on the inoperability of the white-handled revolver, and that counsel's failure to do so waives review outside of a plain error analysis. *Compare State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997) ("This Court has held that a trial court's ruling denying requested instructions is not error where the defendant fails to submit his request for instructions in writing." (citation omitted)), *with State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) ("[T]he plain error standard of review applies on appeal to unpreserved

instructional or evidentiary error.”). Defendant requests plain error review in his brief, leaving us to determine whether the trial court committed “a fundamental error . . . [that] had a probable impact on the jury’s finding that the defendant was guilty.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted).

No North Carolina statute or appellate decision supports Defendant’s contention that inoperability is a complete defense to carrying a concealed gun. We need not address that issue, because even if it were a complete defense, the trial court’s decision not to offer an instruction on inoperability did not have “a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (citations and quotation marks omitted). Although Officer May testified that there was a bullet fragment lodged in the end of the barrel, he further testified that the gun was still capable of being fired. No other testimony was presented regarding the bullet fragment’s effect on the revolver’s operability. We cannot conclude it likely that the jury, considering that evidence with an instruction on inoperability, would have reached a different verdict. *Cf. State v. Shine*, 173 N.C. App. 699, 706, 619 S.E.2d 895, 899 (2005) (holding a defendant failed to demonstrate plain error when “we d[id] not believe the jury was likely to have reached a different verdict had a special instruction been given” (citation omitted)). Because Defendant has not shown this to

be “the exceptional case” involving plain error, *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted), this argument is overruled.

III. CONCLUSION

We hold that the trial court did not err in denying Defendant’s motion to dismiss the charge of carrying a concealed gun in connection with the black revolver found in the roadside brush, as circumstantial evidence supports a reasonable inference that the revolver was concealed on Defendant’s person at the time Officer May first confronted him. We further hold that Defendant has failed to demonstrate plain error in the trial court’s refusal to issue a special instruction on inoperability as a defense to carrying a concealed gun.

NO ERROR; NO PLAIN ERROR.

Judges DIETZ and BROOK concur.

Report per Rule 30(e).