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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-489

Filed: 18 February 2020

Forsyth County, Nos. 16CRS52126, 16CRS52265, 17CRS182

STATE OF NORTH CAROLINA

v.

REGINALD LOUIS JOHNSON, Defendant.

Appeal by Defendant from judgments entered 27 July 2018 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 21 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Torrey Dixon, for the State.*

*Sarah Holladay for Defendant-Appellant.*

INMAN, Judge.

Reginald Louis Johnson (“Defendant”) appeals his convictions following guilty pleas to three counts of robbery with a dangerous weapon and three counts of second-degree kidnapping, as well as a jury verdict finding of him guilty of attaining violent habitual felon status. Defendant argues that the trial court erred in determining that the crime of armed robbery with a deadly weapon in the state of

Florida was substantially similar to North Carolina's crime of robbery with a dangerous weapon. After careful review, we hold that Defendant has failed to demonstrate error.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

Evidence introduced at trial tends to show the following:

In March of 2016, Defendant robbed two store locations at knifepoint. On 5 March, Defendant held a knife to the throat of a convenience store clerk, forcing her to give him all of the money inside the cash register, approximately \$120. Days later, on 9 March, Defendant robbed a dry-cleaning store by the same method and forced an employee to surrender her wedding band and engagement ring. Defendant fled with the jewelry and an undetermined amount of cash.

On 28 November 2016, Defendant was indicted on three counts of robbery with a dangerous weapon, three counts of second-degree kidnapping, and attaining violent habitual felon status. Superseding indictments stating the same charges were issued on 25 September 2017.

Following witness testimony at trial, outside the presence of the jury, Defendant pled guilty to all of the robbery and kidnapping charges. The trial court heard arguments from counsel regarding whether Defendant's two prior convictions in Florida could be used to establish him as a violent habitual felon. During the hearing, the State submitted certified copies of Defendant's judgments and bills of

information from his 1993 Florida conviction for armed robbery with a deadly weapon and 1995 Florida conviction for attempted first-degree murder with a deadly weapon. The State also provided the Florida statutes used to convict Defendant for those crimes. Although defense counsel argued that the two Florida convictions were not similar enough to any of the relevant North Carolina crimes, the trial court disagreed and concluded that their inclusion qualified Defendant for violent habitual felon status.

The trial court informed the jury the following day of Defendant's plea and that the only remaining issue was Defendant's violent habitual felon charge. The State admitted Defendant's prior convictions into evidence and Defendant himself had admitted to those prior convictions. On 26 July 2018, the jury found Defendant guilty of being a violent habitual felon. The trial court then entered judgment against Defendant, sentencing him to life imprisonment without parole.

Defendant gave oral notice of appeal.

## **II. ANALYSIS**

Defendant argues that the trial court erroneously concluded that the Florida crime of armed robbery with a deadly weapon, Fl. Stat. § 812.13, is substantially similar to the North Carolina crime of robbery with a dangerous weapon, N.C. Gen.

Stat. § 14-87,<sup>1</sup> and could support the charge of having attained violent habitual felon status. We disagree.

Section 14-7.7 of our General Statutes provides that a defendant becomes a violent habitual felon when he “has been convicted of two violent felonies in any federal court, in a court of this or any other state of the United States, or in a combination of these courts.” N.C. Gen. Stat. § 14-7.7(a) (2017). A “violent felony” includes:

- (1) All Class A through E felonies.
- (2) Any repealed or superseded offense substantially equivalent to the offenses listed in subdivision (1).
- (3) *Any offense committed in another jurisdiction substantially similar to the offenses set forth in subdivision (1) or (2).*

*Id.* § 14-7.7(b) (emphasis added).

“Determining whether an out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving the comparison of the elements of the out-of-state offense to those of the North Carolina offense.” *State v. Wright*, 210 N.C. App. 52, 71, 708 S.E.2d 112, 126 (2011) (citation omitted). Questions of law are reviewed *de novo*, meaning we consider the matter anew and substitute our judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

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<sup>1</sup> Defendant does not challenge the trial court’s ruling regarding the use of his prior conviction for attempted murder with a deadly weapon.

Section 812.13 of Florida’s felony robbery statute provides, in relevant part:

(1) “Robbery” means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084.

Fl. Stat. §§ 812.13(1), (2)(a) (1991).<sup>2</sup> A person violates Section 14-87 of North Carolina’s General Statutes for robbery with a dangerous weapon, a Class D felony, when he:

[H]aving in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime[.]

N.C. Gen. Stat. § 14-87(a) (2015).

Defendant argues that the material distinction between Florida’s and North Carolina’s armed robbery statutes lies in the *mens rea* element of the respective

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<sup>2</sup> We compare the out-of-state statute’s version that was in place at the time of a defendant’s conviction. See, e.g., *State v. Morgan*, 164 N.C. App. 298, 309, 595 S.E.2d 804, 812 (2004).

offenses. Unlike North Carolina’s requirement that the offender have the intent to *permanently* deprive the owner, *State v. Davis*, 301 N.C. 394, 397, 271 S.E.2d 263, 264 (1980), Florida merely requires proof of the intent to deprive, either permanently *or temporarily*. Fl. Stat. § 812.13(a); *Daniels v. State*, 587 So.2d 460, 461-62 (Fla. 1991). Defendant contends that, because Florida’s armed robbery statute does not require permanent deprivation, that statute encompasses a broader range of conduct than that of North Carolina’s armed robbery statute, making the two offenses not substantially similar.

Defendant relies on *State v. Sanders*, 367 N.C. 716, 766 S.E.2d 331 (2014), to support his argument. In *Sanders*, our Supreme Court held that Tennessee’s offense of “domestic assault” was not substantially similar to the North Carolina offense of “assault on a female.” *Id.* at 721, 766 S.E.2d at 334. The Supreme Court analyzed each offense’s respective elements and reasoned that multiple actions by a defendant could violate Tennessee’s statute but not North Carolina’s. *Id.* at 720-21, 766 S.E.2d at 333-34. The same held true in the inverse, as the Court discussed that a defendant would not violate the Tennessee statute if “[a] male stranger who assaults a woman on the street could be convicted of ‘assault on a female’ in North Carolina, but could not be convicted of ‘domestic assault’ in Tennessee.” *Id.* at 721, 766 S.E.2d at 334.

Defendant’s reliance on *Sanders* is misplaced. The two statutes at issue here are more comparable to those at issue in our opinion in *State v. Riley*, where we

determined that the federal crime of possession of a firearm by a felon was substantially similar to North Carolina's offense of the same name. 253 N.C. App. 819, 827, 802 S.E.2d 494, 499-500 (2017).

In *Riley*, we discussed “two notable differences between the offenses.” *Id.* at 825, 802 S.E.2d at 499. The first was an additional “jurisdictional element” that required the federal government to prove that a “nexus exists between the firearm and interstate commerce;” resulting in the possibility that a conviction under the federal offense would necessarily violate the North Carolina offense, “but not vice versa.” *Id.* at 825-26, 802 S.E.2d at 499 (citations omitted). The second difference concerned “the persons subject to punishment.” *Id.* at 826, 802 S.E.2d at 499. While the federal crime required the felon to have been previously imprisoned for a term exceeding one year, the North Carolina offense only required that the person be “previously convicted of a felony.” *Id.*

For each dissimilarity, however, *Riley* reasoned that such distinctions were unlikely to matter, as there were only a limited number of factual examples that did not otherwise apply to both the federal and North Carolina offenses. *Id.* at 826-27, 802 S.E.2d at 499. We then concluded: “There may be other hypothetical scenarios which highlight the more nuanced differences between the two offenses. But the subtle distinctions do not override the almost inescapable conclusion that both

offenses criminalize essentially the same conduct—the possession of firearms by disqualified felons.” *Id.* at 827, 802 S.E.2d at 500.

*Riley*’s rationale holds true in our case. We emphasize that two statutes need not make a perfect pair, but only must be substantially similar. *Id.* Unlike the multiple distinctions between the two statutes in *Sanders*, the only discernable difference between Florida’s and North Carolina’s robbery statutes is their respective intent requirements. Defendant posits the hypothetical that, if a defendant forcibly takes a person’s cell phone and makes a phone call, then returns the phone, he would have violated Florida’s armed robbery statute, but not North Carolina’s. However, this scenario is far too speculative and attenuated to render the two statutes not substantially similar. Much like in *Riley*, both the Florida and North Carolina robbery statutes applicable here prohibit the same conduct—the intentional unauthorized taking of a victim’s property through the use or threat of a dangerous weapon.

### **III. CONCLUSION**

For the foregoing reasons, we hold that Defendant has failed to demonstrate error as to the trial court’s determination that Fl. Stat. § 812.13, Florida’s armed robbery statute, was substantially similar to the North Carolina robbery statute, N.C. Gen. Stat. § 14-87.

NO ERROR.



STATE V. JOHNSON

*Opinion of the Court*

Judges DIETZ and TYSON concur.

Report per Rule 30(e).