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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-684

Filed: 21 April 2020

Cleveland County, No. 17 CRS 55237-38; 17 CRS 55084

STATE OF NORTH CAROLINA

v.

CHE GEORGE STOKES

Appeal by defendant from judgment entered 14 December 2018 by Judge Todd Pomeroy in Cleveland County Superior Court. Heard in the Court of Appeals 1 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley, for the State.*

*Warren D. Hynson for defendant-appellant.*

TYSON, Judge.

Che George Stokes (“Defendant”) appeals from judgments entered upon the jury’s verdicts finding him guilty of attempted robbery with a dangerous weapon, felonious breaking and entering, and possession of a firearm by a felon. We find no prejudicial error.

I. Background

Franklin Stroud and Defendant spoke on 8 October 2017. Stroud testified the two men talked about committing a robbery. Defendant told Stroud he “knew where a robbery was at and [asked] was I down for it.” Stroud declined.

Stroud met with Defendant again at a store later that day. Stroud got into Defendant’s car. A third man, who Stroud did not know, was also inside the car. The other man was identified as a friend of Defendant’s. Stroud testified, “that’s when we came down to actually doing the robbery.” Stroud testified it was Defendant’s idea to “take marijuana” from a residential apartment at an address he knew.

Defendant drove the three men to an apartment on Baker Drive, in the Juniper Terrace area of Shelby. None of the men spoke while on the way there. Defendant picked out the residence when they arrived, but he never went inside. Stroud and Defendant’s friend exited the car. The third man handed a handgun to Stroud.

Defendant had driven to Gabriel Jennings’s residence. Jennings, with his cousin, James Roberts, and his friend, Chris Williams, were cooking and watching football at his residence on 8 October 2017. Stroud testified he did not know any of the people who lived at the residence.

Stroud entered the residence without knocking and stood in the middle of the living room. He kept the gun inside of his jacket pocket. Jennings caught Defendant’s friend at the door and held him outside. Stroud repeatedly asked Jennings and his guests, “Are you guys good? Are you guys straight?”

Neither Jennings nor his guests understood what Stroud meant. Jennings testified Stroud never asked for or demanded any drugs, money, or property. Jennings also testified he had never sold marijuana to anyone from his residence. Stroud testified he did not ask the men in the apartment for marijuana or any other property.

Stroud and Defendant's friend left the residence and returned to Defendant's car. Stroud gave the gun back to Defendant's friend and said, "they ain't got it so let's go." The three men debated whether to leave or not for ten to twenty minutes. Stroud said he and Defendant agreed, but Defendant's friend did not. Defendant's friend said, "that's some bulls--t. I ain't come down here for nothing." Defendant's friend left the car and Stroud followed with the gun. Defendant remained in the car.

When Williams saw the two men walking back to the residence, he told Roberts to lock the front door, which Roberts did. Stroud and Defendant's friend knocked on the locked door while Roberts asked them what they wanted through a window. Roberts saw the men start walking away. Then, he saw Stroud shake his head and turn back towards the residence.

Stroud kicked in the door and fired his gun. Roberts fell to the floor. Stroud and Defendant's friend both ran away from the residence. Williams fired a shot back at them. No one was hit.

STATE V. STOKES

*Opinion of the Court*

Jennings, Roberts, and Williams provided written witness statements at the Cleveland County Sheriff's Office that afternoon. None of the men reported having any property demanded or taken away from them.

Stroud was detained and interviewed by Detective Stroupe later that day. He originally and repeatedly was dishonest with the detective, "basically trying to cover up what happened." Detective Stroupe testified Stroud provided "at least three, possibly four" variations of the same story with different details. Stroud eventually told a version of what Detective Stroupe believed to be a truthful account of the incident.

Detective Stroupe obtained warrants for Stroud's and Defendant's arrest. Defendant's friend, the unidentified third participant, had not been identified or charged by the time of Defendant's trial. Stroud testified for the State as part of his guilty plea agreement.

Defendant was charged with conspiracy to commit robbery with a dangerous weapon, attempted robbery with a dangerous weapon, felonious breaking and entering, possession of a firearm by a felon, and attaining the status of habitual felon. Defendant admitted and pled guilty to attaining the status of habitual felon. The jury's verdict acquitted Defendant of conspiracy to commit robbery with a dangerous weapon but convicted him of the remaining charges.

## STATE V. STOKES

### *Opinion of the Court*

The trial court consolidated the convictions, elevated the attempted armed robbery conviction from a Class D to a Class C felony, due to Defendant's status as a habitual felon, and entered a sentence in the mitigated range of an active term of 96 to 128 months in prison. Defendant gave notice of appeal in open court.

Defendant also filed a motion for appropriate relief ("MAR") to challenge the prior record level under which he was sentenced, pursuant to N.C. Gen. Stat §§ 15A-1415(b)(8) and 15A-1418 (2019).

### II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

### III. Issues

Defendant argues the trial court erred in denying his motion to dismiss the charge of attempted robbery with a dangerous weapon for insufficiency of the evidence. Defendant also asserts the trial court erred in denying his motion to dismiss the charge of possession of a firearm for insufficient evidence of Defendant actually or constructively possessing a firearm. Lastly, Defendant asserts in his MAR he was erroneously sentenced at the incorrect prior record level.

### IV. Motions to Dismiss

#### A. Standard of Review

## STATE V. STOKES

### *Opinion of the Court*

“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 (citation omitted), *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) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

### B. Analysis

Defendant argues the trial court erred in denying his motion to dismiss the charge of attempted robbery, even under a theory of aiding and abetting, because there is no evidence of an attempted robbery committed by Defendant or any other person. Defendant also argues the trial court erred in denying his motion to dismiss the charge of possession of a firearm by a felon under the doctrine of acting in concert. Defendant does not challenge his convictions for felonious breaking and entering or attaining the status of habitual felon.

*1. Attempted Robbery*

Defendant was convicted of attempted robbery with a dangerous weapon under the theory of aiding and abetting his friend and Stroud. Defendant does not challenge the theory of aiding and abetting to establish his culpability in this case, but instead argues insufficient evidence exists of an attempted robbery at all.

The essential elements of the crime of attempted robbery with a dangerous weapon are: (1) the unlawful *attempted taking* of personal property from another; (2) the possession, use or threatened use of a firearm or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim.

*State v. Johnson*, 208 N.C. App. 443, 446, 702 S.E.2d 547, 550 (2010) (emphasis original) (citation omitted), *disc. review denied*, 365 N.C. 84, 706 S.E.2d 247 (2011).

Defendant cites *State v. McDowell*, 329 N.C. 363, 389-90, 407 S.E.2d 200, 214-15 (1991), to argue a conviction for armed robbery cannot stand without a taking or attempted taking of property, even when the evidence shows a defendant stating his possible interest or intent in committing a robbery, then subsequently harms or even kills another person. *McDowell* is distinguishable from this case.

In *McDowell*, the Court addressed the sufficiency of evidence of the defendant's intent to commit armed robbery and stated, "the evidence of defendant's intent . . . [was] insufficient" because contradictory testimony suggested Defendant either "stated, '[h]e was going to get him some money even if he had to burn somebody,'" or "stated he was going to 'burn' somebody but said nothing about robbery." *Id.* The

victim's purse was also left undisturbed next to where she sat when she was shot and killed, further defeating the State's attempt to infer an intent to commit armed robbery. *Id.* at 390, 497 S.E.2d at 215.

Other cases Defendant cites also concern insufficient evidence of intent to commit armed robbery. In *Johnson*, "[t]he State [did] not contend that any statement was made or overt act undertaken on the night in question from which intent to commit a taking could be inferred." *Johnson*, 208 N.C. App. at 447, 702 S.E.2d at 550. In *State v. Evans*, 279 N.C. 447, 454-55, 183 S.E.2d 540, 545-46 (1971), our Supreme Court similarly found the totality of the State's evidence undercut any assertion that the defendants had possessed the intent to commit armed robbery.

The issue here is not a lack of sufficient evidence of Defendant's intent to commit armed robbery. Stroud's testimony establishes Defendant presented the idea to "take marijuana" from a residence that he knew. Defendant drove to and identified the residence for his friend and Stroud to approach and rob. After Stroud and his friend entered and left the residence, the three men debated for ten to twenty minutes whether to return to the residence. Defendant waited for the men to return to the car each time. Viewed in the light most favorable to the State, sufficient evidence of intent to commit armed robbery was introduced.

Rather than intent, this case is about whether substantial evidence exists to show an "*attempted taking*" occurred. *Johnson*, 208 N.C. App. at 446, 702 S.E.2d at



550 (emphasis original). “The two elements of an attempt to commit a crime are: first, the intent to commit the substantive offense; and, second, *an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense.*” *State v. Smith*, 300 N.C. 71, 79, 265 S.E.2d 164, 169-70 (1980) (emphasis supplied) (citations omitted).

In *Smith*, the attempted robbery was interrupted before the defendant made any demands for money or property. *Id.* at 80, 265 S.E.2d at 170. Our Supreme Court nevertheless found overt acts were committed in furtherance of the defendant’s intent to commit the robbery, when he pulled his gun, pointed it at the store owner, and ordered the owner to move away from the counter. *Id.* The Court in *Smith* found substantial evidence of each essential element of the crime of attempted armed robbery existed on those facts, even without stated demands for or taking away money or property. *Id.*

In the present case, Stroud entered and walked inside of Jennings’ residence uninvited and repeatedly asked, “Are you guys good? Are you guys straight?” Detective Stroupe testified, from his knowledge and experience with controlled purchases of illicit narcotics, those questions essentially asked and meant, “Hey, do you have some dope?” After debating whether to return to the residence, Stroud kicked in Jennings’ locked door and fired his gun inside the residence. As in *Smith*,

these overt acts were for the purpose of committing the armed robbery and went beyond mere preparation. *Id.* at 79, 265 S.E.2d at 170.

Viewed in the light most favorable to the State, substantial evidence of each element of attempted robbery exists. Substantial evidence also exists of Defendant perpetrating that offense, under a theory of aiding and abetting. The trial court did not err in denying Defendant's motion to dismiss the charge of attempted robbery. Defendant's argument is overruled.

*2. Possession of a Firearm by a Felon*

Defendant argues the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon because insufficient evidence showed he ever actually or constructively possessed the firearm. At trial, the State argued constructive possession of the firearm could be imputed onto Defendant under either the doctrines of acting in concert or aiding and abetting. The trial court declined to instruct the jury on acting in concert to possess the firearm, but it did instruct the jury on aiding and abetting.

Defendant raises this issue on appeal to preserve it for future proceedings pending the outcome of *State v. Collington*, No. 290PA15-2, currently pending before our Supreme Court. Defendant asserts the outcome in *Collington* could bear on this particular issue. *See State v. Collington*, 259 N.C. App. 127, 143, 814 S.E.2d 874, 887 (finding "defendant's argument that acting in concert is not an appropriate theory

upon which to base a conviction of possession of a firearm by a felon” to be persuasive), *disc. review allowed*, 371 N.C. 792, 820 S.E.2d 812 (2018).

Defendant does not make any argument in his brief in support of this issue, other than citing *Collington* and invoking preservation of the issue of acting in concert for future proceedings pending *Collington*’s outcome. “Issues not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned.” N.C. R. App. P. 28(b)(6). We conclude Defendant abandoned this issue on appeal.

#### V. Motion for Appropriate Relief

Defendant also argues his sentence as a prior record level VI offender was erroneous. Defendant acknowledges his counsel and the State stipulated he was a prior record level VI for the purposes of sentencing. Defendant’s MAR asserts the stipulated-to prior record level worksheet erroneously double counts and lists a South Carolina conviction that does not exist.

Defendant’s prior record level worksheet includes two South Carolina convictions classified as Class I felonies: one listed as “POSSESSION INTENT TO DISTRIBUTE [sic] COCAINE,” file number 03599; and the other listed as “MFG/POSS SCH I OR II W INT TO DIST 1ST,” file number 89GS2304338. Defendant has provided evidence in the appendix to his MAR that tends to show he was never convicted of the latter offense. Defendant asserts “MFG/POSS SCH I OR

II W INT TO DIST 1ST” may be a label once anomalously applied in his South Carolina criminal record to the Possession with Intent to Distribute Cocaine conviction, file number 03599. This asserted error, if one conviction were to be removed, would account for the difference between Defendant attaining prior record level VI instead of prior record level V.

A. Standard of Review

“This Court applies a harmless error analysis to improper calculations of prior record level points.” *State v. Harris*, 255 N.C. App. 653, 663, 805 S.E.2d 729, 736 (2017) (citations omitted). This Court repeatedly has held that an erroneous record level calculation does not prejudice the defendant if the trial court’s sentence is within the appropriate sentencing range at the correct record level. *See, e.g., id.* (citations omitted).

B. Analysis

The trial court determined Defendant would be sentenced for the three consolidated offenses as a Class C felon on account of his habitual felon status. The trial court then assigned to Defendant an active sentence of a minimum of 96 months, in the mitigated range for a Class C felony with a prior record level VI. That minimum sentence, 96 months, is also within the mitigated range for a Class C felony with a prior record level V. *See* N.C. Gen. Stat. § 15A-1340.17(c), (e) (2019).

Presuming a single South Carolina conviction for felonious possession with intent to distribute cocaine was erroneously counted twice in Defendant's prior record level worksheet, and that a prior record level V rather than prior record level VI is correct, Defendant cannot show any prejudice. The sentence he received was within the mitigated range at either prior record level V or VI. *See Harris*, 255 N.C. App. at 663, 805 S.E.2d at 736. Defendant's MAR is denied.

VI. Conclusion

Viewed in the light most favorable to the State, substantial evidence exists of each essential element of attempted robbery, and of Defendant being the perpetrator of attempted robbery under a theory of aiding and abetting. Defendant, his friend, and Stroud formed and possessed the requisite intent to commit armed robbery.

Stroud committed overt acts in furtherance of that intent, completing the attempt to commit armed robbery. *See Smith*, 300 N.C. at 79, 265 S.E.2d at 170. The trial court did not err by denying Defendant's motion to dismiss that charge.

Defendant failed to assert any argument in his brief on the issue of the denial of his motion to dismiss the charge of possession of a firearm by a felon. This argument is abandoned. *See N.C. R. App. P. 28(b)(6)*.

Presuming the trial court erroneously sentenced Defendant at prior record level VI rather than V, any asserted error was harmless. *See Harris*, 255 N.C. App.

STATE V. STOKES

*Opinion of the Court*

at 663, 805 S.E.2d at 736. Defendant received a mitigated-range sentence within both prior record levels. His MAR is denied.

Defendant received a fair trial, free from prejudicial errors he preserved or argued. We find no error in the jury's verdicts or in the judgments entered thereon to award a new trial or prejudice to remand for resentencing. *It is so ordered.*

NO ERROR.

Judges ZACHARY and BROOK concur.

Report per Rule 30(e).