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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1145

Filed: 6 October 2020

New Hanover County, Nos. 18 CRS 3656, 54552

STATE OF NORTH CAROLINA

v.

JASON EUGENE BOLTON

Appeal by defendant from judgment entered 7 June 2019 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles Whitehead, for the State.

Wake Forest University School of Law Appellate Advocacy Clinic, by John J. Korzen, for defendant.

ARROWOOD, Judge.

Jason Eugene Bolton (“defendant”) appeals from judgments entered upon his conviction for attempted robbery with a firearm, assault with a deadly weapon inflicting serious injury, and possession of a firearm by a felon, arguing that the trial

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court erred in denying defendant's motion to dismiss for insufficient evidence. For the following reasons, we hold that the defendant received a fair trial free of error.

I. Background

On 23 February 2018, a New Hanover County grand jury indicted defendant for attempted robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon, stemming from an event that occurred on 5 August 2017.

The matter came on for trial on 3 June 2019 in New Hanover County Superior Court, the Honorable John E. Nobles, Jr. presiding. The State's evidence tended to show as follows.

On 5 August 2017, at approximately 4:00 a.m., Wilmington police officer William Rose ("Officer Rose") responded to a 911 call that there was a multiple gunshot victim at the Hampton Inn on 17th Street. Upon arriving at the scene, Officer Rose spoke with the gunshot victim, Daniel Trackwell ("Trackwell"), but was unable to gather much information regarding the suspect because Trackwell was in shock. Officers Kyle Petrone ("Officer Petrone") and Brendon McInerney ("Officer McInerney") arrived at the scene and marked several items as potential evidence, including "four or five" spent shell casings, one live round of .380 caliber ammunition, a flashlight, a baseball cap, and "what looked like blood spots on the pavement." When it began raining, Officer McInerney used latex gloves and a paper bag to collect

the live round and baseball cap to preserve any DNA evidence, but failed to collect the flashlight because he “didn’t think to take it,” and was “more concerned about the hat[.]” The baseball cap, a Houston Texans hat, was found towards the rear of the truck, in “the flower bed[.]”

At trial, Trackwell testified that on the night before the incident, he had parked his pickup truck in “the back of the parking lot of the hotel . . . where less cars were parked.” After a night of bar hopping with his friend, Trackwell went to sleep in the backseat of his truck around 2:30 a.m. Trackwell testified that at approximately 4:00 a.m., he was awakened by a “guy with a gun” pulling him out of his vehicle. Trackwell described the assailant as a Caucasian man wearing a “ball cap,” with a scruffy “three-day beard,” and a thick Southern accent. The assailant pointed a handgun at Trackwell and said “[g]ive me your wallet. I’m not playing. Don’t think I won’t shoot you.” Trackwell got out of the truck and told the assailant that he would get his wallet, and Trackwell then “decided to go for the gun . . . based off of being in the Marine Corps,” and his “fight or flight response[.]”

During the struggle for the gun, Trackwell was shot three times: once right below the heart, once on the bottom of the left side of his ribcage, and once below the knee cap on his left leg. As Trackwell fought the assailant, Trackwell “slammed him into the side of [Trackwell’s] truck denting [his] truck and doing everything [he] could to get on top of [the assailant].” After Trackwell was shot, the assailant left the

parking lot, and Trackwell placed his belongings in his truck because he “knew [he] was going to take a hospital ride and didn’t want [his] personal property getting lost.” Trackwell walked across the parking lot to the main desk of the Hampton Inn, where the hotel clerk called 911. Trackwell was then taken to the hospital.

While Trackwell recovered from his injuries in the hospital, Detective Robert Ferencak (“Detective Ferencak”) spoke with Trackwell to gather information about the attack and the assailant. In addition to the previously referenced description, Trackwell told Detective Ferencak that the assailant “weighed between 185 and 200 pounds,” “was kind of fat,” and “appeared to be missing teeth by the way his lips were curved into his mouth.”

After Trackwell was released from the hospital, he participated in several follow-up conversations with law enforcement, to provide additional details regarding the attack and to identify the assailant. On 19 September 2017, officers showed Trackwell three photo lineups, with eight photos in each lineup. Each of the three lineups included one photo of individuals suspected in other local robberies. Neither contained a photo of the defendant. Trackwell identified one randomly included lineup photo “saying that could be him[.]” On 28 September 2017, officers conducted a second review of mugshots on a computer, during which Trackwell identified three individuals as possible perpetrators. Trackwell did not affirmatively identify defendant as the assailant during the investigation or trial.

The North Carolina State Bureau of Investigation performed DNA testing on the Houston Texans hat recovered from the scene by swabbing the inner band of the hat for skin cells. The DNA testing produced a partial DNA profile with a mixture of three contributors. The partial major DNA profile was consistent with a DNA profile obtained from defendant, and the minor DNA profile was inconclusive “due to complexity and/or insufficient quality of recovered DNA.” The forensic expert responsible for conducting the DNA analysis testified that due to inconsistencies in skin cell transfer, it was not possible to determine who had worn the hat last.

After defendant had been identified as a major contributor to the DNA profile, Detective Ferencak searched for defendant’s name on Facebook. Detective Ferencak noted three photographs from defendant’s Facebook profile. In one of the photographs, which was posted to Facebook on 2 March 2017, defendant was pictured wearing a Houston Texans hat of the same color, make, and model as was recovered at the scene of the crime. Another photograph, posted on 18 June 2017, showed defendant with a female friend wearing the Houston Texans hat. Defendant was clean-shaven in the Facebook photos, and did not appear to be missing any teeth. During the same period of investigation, Detective Ferencak obtained defendant’s mug shot photo by entering defendant’s name and date of birth in the department’s record management system.

Although a gun was not recovered from the scene, Detective Ferencak determined that a .380 Ruger pistol stolen from a home one block away from the assault “might [have been] involved.” The gun was recovered in a vice search of a drug house on 30 July 2018, approximately one year after the incident. Ballistic testing results on the gun were inconclusive.

Before trial, defendant moved to exclude the Facebook photos under Rule 403 and contended that the State was unable to lay a foundation as to whether the photos depicted defendant on the dates listed on the photos or even accurately depicted defendant. After that motion was denied, defendant renewed the objection to admission of the Facebook photos at trial and was overruled. Defendant also objected to the admission of a jailhouse phone call recording of defendant speaking with his mother, which the State argued was relevant to show that defendant had a “Carolina accent.” The trial court overruled the objection. At the close of the State’s evidence, defendant moved to dismiss due to the ground of insufficient evidence, contending “there [had] been no identification of [defendant] in this case by [Trackwell] or anyone else.” Defendant renewed his motion to dismiss after he presented his evidence at trial.

At the conclusion of the trial, the jury convicted defendant of attempted robbery with a firearm, assault with a deadly weapon inflicting serious injury, and possession of a firearm by a felon.

For assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon, the trial court sentenced defendant to 38 to 58 months of incarceration and imposed court costs of \$352.50. For attempted robbery with a firearm, defendant was sentenced to a term of 82 to 111 months of incarceration and imposed court costs and attorney's fees of \$3,757.50. The trial court ordered the sentences to be served consecutively. Defendant timely noted his appeal.

II. Discussion

A. Motion to Dismiss for Insufficient Evidence

In ruling on a motion to dismiss, “the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.” *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citation omitted). Substantial evidence is defined by the North Carolina Supreme Court as “evidence which a reasonable mind could accept as adequate to support a conclusion.” *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citing *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). In reviewing the trial court's decision on appeal, the evidence must be viewed “in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

In order to be submitted to the jury for determination of defendant's guilt, the evidence "need only give rise to a reasonable inference of guilt." *State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) (citing *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988)). This is true regardless of whether the evidence is direct or circumstantial. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). If the court decides that a reasonable inference of the 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 them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation and emphasis omitted).

When ruling on a motion to dismiss, the only question for the trial court is whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982) (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971)). 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, the motion to dismiss must be allowed. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citing *State v. Poole*, 285 N.C. 108, 203 S.E.2d 786 (1974)).

In considering circumstantial evidence, a jury may properly make inferences on inferences in determining the facts constituting the elements of the crime. *State*

v. Childress, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987). Making inferences which naturally arise from a fact proven by circumstantial evidence “is the way people often reason in everyday life.” *Id.*

In this case, viewing the evidence in the light most favorable to the State and giving the State the benefit of all reasonable inferences, there is sufficient evidence for a reasonable mind to draw the conclusion that each essential element of the crime was committed, and that defendant was the perpetrator. The victim described the assailant as a Caucasian male, between 185-200 pounds, shorter than six feet tall, and wearing a ball cap. The victim also described his struggle with the assailant, in which he slammed the assailant into the side of his truck near the rear wheel and climbed on top of the assailant in an attempt to “stomp him down.” Defendant matches each of the aforementioned physical characteristics, and a Houston Texans hat that contained his DNA was found directly behind the victim’s truck, adjacent to spent shell casings and other pieces of evidence. Based on the direct and circumstantial evidence, the trial court properly determined that there was sufficient evidence to submit the case to the jury. Accordingly, the defendant’s motion to dismiss for insufficient evidence was properly denied.

B. Admission of Facebook Photos and Jailhouse Recording

Defendant next contends that the trial court erred by admitting the Facebook photos and jailhouse phone recording, asserting prejudicial error under Rule 403 and

insufficient authentication under Rule 901. We discuss each assignment of error in turn.

1. Rule 403

Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2019). Unfair prejudice has been defined as “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). Whether the use of photographic evidence is more probative than prejudicial lies within the discretion of the trial court. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citing *State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979)). Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *Id.* (citing *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985)).

Defendant argues that the trial court abused their discretion, and that admission of the Facebook photos and jailhouse phone recording had an undue tendency to suggest a decision on an emotional basis. We disagree. The Facebook photos were relevant in illustrating Detective Ferencak’s testimony, and their

probative value was not outweighed by the danger of unfair prejudice. Similarly, the jailhouse phone recording was relevant to the victim's testimony describing the assailant, in addition to illustrating Detective Ferencak's testimony. Accordingly, we hold that the trial court did not abuse its discretion in admitting the Facebook photos and jailhouse phone recording.

2. Rule 901

A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo*. *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011). The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. N.C. Gen. Stat. § 8C-1, Rule 901(a) (2019). Photographs are admissible for illustrative purposes if they fairly and accurately illustrate the subject of a witness's testimony. *State v. Alston*, 91 N.C. App. 707, 713, 373 S.E.2d 306, 311 (1988). Rule 901 does not require the proponent of evidence to conclusively prove that tendered documents or electronic evidence is definitively a record, only that the evidence is relevant for the jury to conclude that it is authentic. *Crawley*, 217 N.C. App. at 516, 719 S.E.2d at 637. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, may be authenticated by opinion based upon hearing the

voice at any time under circumstances connecting it with the alleged speaker. N.C. Gen. Stat. § 8C-1, Rule 901(b)(5).

Defendant argues that the Facebook photos were not properly authenticated because the trial court made no findings that defendant had actually posted the photos on Facebook. We disagree. The Facebook photos were introduced to illustrate the testimony of Detective Ferencak as he described his investigation. This presents sufficient evidence to support a finding that the Facebook photos were in fact what the proponent claimed.

Defendant's argument regarding the jailhouse phone recording is similarly without merit. Detective Ferencak testified that he had spoken with defendant on several occasions and was familiar with defendant's voice and southern accent. Accordingly, the jailhouse phone recording was properly authenticated under Rule 901.

III. Conclusion

For the reasons stated above, we hold that the State has offered sufficient evidence to survive a motion to dismiss for insufficient evidence. We further find the trial court did not abuse its discretion in allowing the admission of the defendant's Facebook photos and jailhouse phone recording.

NO ERROR.

Judges BRYANT and ZACHARY concur.

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Report per Rule 30(e).