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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-244

Filed: 15 December 2020

Bertie County, Nos. 18 CRS 50453–55, 50457

STATE OF NORTH CAROLINA

v.

ELLIOT LEE GRIMES

Appeal by defendant from judgments entered 10 October 2019 by Judge J. Carlton Cole in Bertie County Superior Court. Heard in the Court of Appeals 20 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Nathan D. Childs, for the State.

Sean P. Vitrano for defendant.

DIETZ, Judge.

Defendant Elliot Lee Grimes appeals multiple criminal judgments all stemming from a violent armed robbery of an elderly man in his home. Grimes contends that there was insufficient evidence to support the kidnapping charge because the movement of the victim was inherent in the robbery; that there was insufficient evidence to support the charge of possession of a firearm by a felon

because any evidence of possession was too speculative; that the State failed to give notice of its intent to argue an aggravating factor at sentencing; and that there are several clerical errors in the judgments.

We reject all of Grimes’s substantive arguments. There was ample, separate evidence of kidnapping, including Grimes and the other assailants dragging the elderly victim into another room during the robbery and dropping a massive safe on his legs. Likewise, there was ample evidence of constructive possession of the stolen firearms because they were stored in the trunk of a car owned and driven by Grimes. Finally, the State supplemented the record with evidence of the necessary notice of aggravating factors and Grimes has not disputed that supplemental evidence. We therefore find no reversible error in the trial court’s judgments. We agree that there are several clerical errors in some of the judgments and we remand for the trial court to correct those clerical errors.

Facts and Procedural History

In 2018, 95-year-old Timothy Bazemore was home alone at night. Bazemore heard knocking at his door and a woman calling his name “as if somebody was after her.” Bazemore opened the door and two men pushed inside, grabbed Bazemore by the arms, and carried him to his bedroom where he kept a safe and several firearms in the closet. One of the two men was armed with a gun. The men ordered Bazemore to open the safe. When Bazemore refused, the men dragged him away from the closet.

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A woman then held Bazemore at gunpoint in the bedroom while the two men dragged the safe out of the house. As they dragged the safe across Bazemore's bedroom, they dropped the corner of the massive safe onto Bazemore's legs. The assailants also stole four long guns from Bazemore's home before they fled. They left Bazemore helpless on the floor of his home, unable to stand or walk. Bazemore managed to crawl to a phone and call his son for help.

Investigating officers later responded to a landowner who found some of Bazemore's guns in a ditch on his property. A trail camera on the property photographed two individuals that investigators recognized as Brittany VanHorn and Jarkeese Rascoe. The officers also identified a white Toyota from the photographs. That car was registered to Defendant Elliot Lee Grimes. Some photographs showed a large object resembling the stolen safe hanging out of the rear passenger door of Grimes's car. Another photograph showed Rascoe attempting to open the safe while Grimes was looking into the trunk of his car.

VanHorn later gave a statement to law enforcement implicating herself, Rascoe, and Grimes in the armed robbery at Bazemore's home. VanHorn explained that they stole the safe and guns from Bazemore's home and put the safe in the rear of Grimes's car and the guns in the trunk.

The State ultimately charged Grimes with multiple offenses including burglary, robbery with a dangerous weapon, second degree kidnapping, and

possession of a firearm by a felon. The jury convicted Grimes of all charges. The jury also found the existence of an aggravating sentencing factor based on Bazemore's old age.

The trial court sentenced Grimes to consecutive sentences of 121 to 158 months in prison for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon, 121 to 158 months for first degree burglary, 48 to 70 months for second degree kidnapping, 14 to 26 months for larceny of a firearm and safecracking, and 19 to 32 months for possession of a firearm by a felon. All of the sentences imposed, except the sentence for possession of a firearm by a felon, were at the top of the aggravated range based on the aggravating factor found by the jury. Grimes appealed.

Analysis

I. Motion to dismiss second degree kidnapping charge

Grimes first argues that the trial court erred by denying his motion to dismiss the second degree kidnapping charge. Grimes argues that the State's evidence "showed only a mere technical asportation of the victim inherent in the armed robbery" and was insufficient to show "a restraint or removal of the victim separate from that inherent in the robbery."

"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). "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 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "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).

To obtain a conviction for second-degree kidnapping "the State is required to prove that a defendant (1) confined, restrained, or removed from one place to another any other person, (2) unlawfully, (3) without consent, and (4) for one of the statutorily enumerated purposes." *State v. China*, 370 N.C. 627, 633, 811 S.E.2d 145, 149 (2018).

The "removal" element of kidnapping must be "an asportation that is not an inherent part of the commission of another felony such as armed robbery." *State v. Roberts*, 176 N.C. App. 159, 165, 625 S.E.2d 846, 851 (2006). Thus, in a case like this one in which the victim initially is moved as a necessary part of the robbery, the kidnapping charge requires proof of a separate removal. *Id.*

But, importantly, there is no requirement that this separate movement be a particular distance. *State v. Boyce*, 361 N.C. 670, 675, 651 S.E.2d 879, 883 (2007). Likewise, this separate asportation “need not be, itself, substantial in time.” *China*, 370 N.C. at 634, 811 S.E.2d at 149–50. “The key question is whether the victim is exposed to greater danger than that inherent in the armed robbery itself or subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.” *State v. McNeil*, 155 N.C. App. 540, 544–45, 574 S.E.2d 145, 148 (2002).

An unpublished decision from this Court dealt with a situation strikingly similar to this case. *State v. Pauley*, 200 N.C. App. 436, 683 S.E.2d 790, 2009 WL 3351408, at *8 (2009) (unpublished). In *Pauley*, the perpetrators entered a pawn shop and told the manager to drop to the floor. The perpetrators later instructed the victim to move to a safe twelve feet away and open it. Finally, after discovering there was no money in the safe, the perpetrators ordered the victim to move back to a processing room and again lie on the floor. *Id.*

This Court reasoned that “we believe that the act of moving [the victim] to the safe for the purpose of ascertaining whether it contained any money was an integral part of the armed robbery.” *Id.* “On the other hand, the act of returning [the victim] to the processing room and requiring him to lie on the floor after the discovery that there was no money in the safe did nothing to facilitate the commission of a robbery with a dangerous weapon.” *Id.* Thus, we concluded, the victim’s “removal from the

safe to another part of the processing room was a separate and distinct event from the robbery with a dangerous weapon” that was sufficient to support the kidnapping charge. *Id.*

We find our reasoning in *Pauley* persuasive. Here, the perpetrators first carried Bazemore from his door to the safe located in his bedroom closet, with the purpose of forcing Bazemore to open the safe at gunpoint so that they could take the contents. After Bazemore refused to open the safe, the perpetrators then dragged him away from the safe to his bedroom floor, where one assailant held him at gunpoint while the others stole the safe and other items from the home.

As Grimes argues, the asportation to the safe was a necessary part of the robbery because “Bazemore was the only person with the combination to the safe.” So that movement does not support the kidnapping charge. But then, after Bazemore refused to unlock the safe, the assailants dragged Bazemore away to the bedroom. Nothing in the record indicates that dragging Bazemore into the bedroom was necessary to remove the locked safe from the closet. More importantly, after dragging Bazemore to the bedroom, the perpetrators dropped the corner of the massive safe—which weighed 500 or 600 pounds—onto Bazemore’s legs. Bazemore was unable to walk and was forced to crawl to a nearby phone to call for help.

Simply put, the State’s evidence shows that Grimes needlessly dragged a 95-year-old man across the floor and then dropped a heavy safe on his legs to ensure that

Grimes safely could flee before the elderly man could contact the authorities. This is ample evidence that Grimes placed Bazemore “in greater danger than is inherent” in the robbery, exposed Bazemore to “the kind of danger and abuse that the kidnapping statute was designed to prevent,” and increased “the victim’s helplessness and vulnerability.” *State v. Simpson*, 187 N.C. App. 424, 432, 653 S.E.2d 249, 254 (2007). Accordingly, the trial court did not err by denying Grimes’s motion to dismiss the kidnapping charge.

II. Motion to dismiss the charge of possession of a firearm by a felon

Grimes next argues that the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon. Specifically, Grimes contends that the State failed to present sufficient evidence of his actual or constructive possession of the firearms stolen from Bazemore’s home.

As explained above, we review the trial court’s denial of a motion to dismiss *de novo*, examining whether there is substantial evidence of each essential element of the charged offense. *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

“Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. “If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant’s guilt may be drawn from the circumstances.” *Id.* If so, then the charge must be sent

to the jury. *Id.*

“The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm.” *State v. Floyd*, 369 N.C. 329, 333, 794 S.E.2d 460, 463 (2016); N.C. Gen. Stat. § 14-415.1(a). Here, Grimes challenges only the second element, concerning possession. “Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.” *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted). Possession can be, and often is, proven by circumstantial evidence. *State v. Marshall*, 206 N.C. App. 580, 583, 696 S.E.2d 894, 897 (2010).

Here, there is no direct evidence that Grimes had possession of the stolen firearms. The State relied on the theory of constructive possession based on evidence that the guns were in the trunk of his car after the robbery. The State’s evidence showed that, after kidnapping and robbing Bazemore, the assailants stowed the guns in the trunk of Grimes’s car. Grimes then drove the group away from the scene of the robbery. The State also presented photographs taken the night of the robbery, showing Grimes examining the contents of the trunk of his car, where the guns were stowed, while others attempted to force open the stolen safe. From this evidence, the

jury reasonably could infer that Grimes was aware of the presence of the guns in his trunk and had the ability to control their disposition. *State v. Wirt*, 263 N.C. App. 370, 376, 822 S.E.2d 668, 672 (2018); *see also State v. Best*, 214 N.C. App. 39, 46–47, 713 S.E.2d 556, 562 (2011).

Nevertheless, Grimes contends that this evidence is insufficient because it shows only his mere “awareness of the presence” of the guns in the trunk of his car. Grimes argues that the State also was required to show “other incriminating circumstances” before there was a permissible inference of his constructive possession of those guns.

This Court rejected that argument in prior cases, holding that a defendant’s “status as the driver” and his “dominion and control” over the vehicle alone were sufficient to create a reasonable inference of constructive possession of items in that vehicle. *Wirt*, 263 N.C. App. at 376, 822 S.E.2d at 672; *see also State v. Mitchell*, 224 N.C. App. 171, 177–78, 735 S.E.2d 438, 443–44 (2012); *Best*, 214 N.C. App. at 46–47, 713 S.E.2d at 562. Thus, the requirement of showing “other incriminating evidence” linking the defendant to the stolen item is not necessary when the defendant is the owner and driver of the vehicle and the stolen item is located in the trunk of the vehicle. *See Alston*, 131 N.C. App. at 519, 508 S.E.2d at 319. But, in any event, there were other incriminating circumstances here, including the evidence that Grimes was focused on the stolen guns in his trunk while others involved in the robbery attempted

to open the safe. The jury reasonably could infer from these facts that once the guns were in the trunk of Grimes's car, they were in his exclusive possession and control. *See Wirt*, 263 N.C. App. at 376, 822 S.E.2d at 672. Accordingly, the trial court did not err in denying Grimes's motion to dismiss the charge of possession of a firearm by a felon.

III. Notice of aggravating factor

Grimes next argues that the trial court erred by finding the existence of an aggravating factor based on the victim's age because the State failed to provide the mandatory statutory notice of intent to pursue that aggravating factor.

Grimes's argument is premised on the statutory mandate that the State "must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors . . . at least 30 days before trial" unless the defendant waives the right to receive that notice. N.C. Gen. Stat. § 15A-1340.16(a6). The record on appeal at the time Grimes filed his opening brief contained neither the required notice from the State nor a waiver of the right to receive that notice.

But in a Rule 9(b)(5) supplement to the record, the State submitted a form document entitled "Notice of Intention to Use Aggravating Factors or Prior Record Level Points N.C.G.S. 15A-1340.16." That form lists Grimes's name in the caption as well as the file numbers for the cases at issue in this appeal. On the form, under the statement that the "State of North Carolina intends to prove the existence of the

following aggravating factors,” the State checked several boxes for applicable aggravating factors, including the box for the factor that the victim “was very young, or very old, or mentally or physically infirm, or handicapped.” The State included an affidavit from a custodian of records, indicating that the notice form was released electronically to Grimes’s trial counsel along with other discovery documents on 25 March 2019, and that Grimes’s counsel downloaded the file of discovery documents including the notice form on 14 April 2019, far more than thirty days before trial.

Through this supplement to the record, the State has shown that it provided written notice of its intent to prove the aggravating factor found by the jury well in advance of the statutory 30-day notice requirement. N.C. Gen. Stat. § 15A-1340.16(a6); *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011). Grimes did not respond to the supplement or challenge its contents. Accordingly, we reject Grimes’s argument and hold that the trial court did not err in finding the aggravating factor and imposing aggravated-range sentences on that basis.

IV. Clerical errors in judgments

Finally, Grimes asserts that there are clerical errors in some of his judgment forms that require remand for correction. Specifically, Grimes contends that the trial court erroneously checked Box 7 on the judgment forms in Nos. 18 CRS 50453–55, indicating “that the defendant committed the felony by using, displaying, or threatening the use or display of a firearm or deadly weapon and actually possessed

the firearm or weapon about his or her person” and that this finding “is based on the jury’s determination of this issue beyond a reasonable doubt.” Additionally, Grimes argues that the trial court failed to check Box 2 on the forms to indicate that it “finds the Determination of aggravating and mitigating factors on the attached AOC-CR-605” and failed to enter corresponding AOC-CR-605 forms indicating its finding of the applicable aggravating factor concerning the victim’s old age.

A clerical error is defined as “an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008). “When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.” *Id.* Checking incorrect boxes for sentencing factors on judgment forms, which are inconsistent with the trial court’s actual findings, is “an obvious clerical error.” *State v. Gell*, 351 N.C. 192, 218, 524 S.E.2d 332, 349 (2000).

The State does not dispute that these clerical errors exist and, upon reviewing the record, we agree. We also cannot determine with certainty that these clerical errors could have no conceivable collateral consequences for Grimes in the future, and thus cannot conclude that they are harmless. Accordingly, we remand these

judgments for correction of the clerical errors so that the record will “speak the truth.”

Smith, 188 N.C. App. at 845, 656 S.E.2d at 696.

On remand, the trial court should correct the judgment forms by unchecking Box 7, checking Box 2, and entering the corresponding AOC-CR-605 forms to reflect its finding of the aggravating factor found by the jury.

Conclusion

We find no substantive errors in the trial court’s judgments but remand the judgments in File Nos. 18 CRS 50453–55 for the limited purpose of correcting the clerical errors described in this opinion.

NO ERROR; REMAND FOR CORRECTION OF CLERICAL ERRORS.

Judges BRYANT and HAMPSON concur.

Report per Rule 30(e).