IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-198

No. COA19-1136

Filed 4 May 2021

Mecklenburg County, Nos. 16 CRS 246385-86

STATE OF NORTH CAROLINA

v.

JUSTIN ERIC HOOD

Appeal by defendant from judgment entered 12 March 2019 by Judge Carla Archie in Superior Court, Mecklenburg County. Heard in the Court of Appeals 26 January 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant.

STROUD, Chief Judge.

¶ 1 Defendant appeals from his conviction for first degree murder and possession of a firearm by a convicted felon. Defendant argues the trial court erred by instructing the jury on flight when there was no evidence he took steps to avoid apprehension. While the trial court erred by giving an instruction on flight not supported by the evidence, considering the substantial evidence against Defendant,

he has failed to demonstrate that this error was prejudicial.

I. Background

¶ 2 At trial, the State's evidence tended to show that on the night of 14 December 2016, Defendant was staying at the apartment of a friend, Dequilar Moore and his girlfriend, Ashley Hagar. Ms. Hagar went to sleep around 9:30 PM, and Defendant and Moore stayed up. Moore owned a gold Chevrolet Impala. Later that night, two men matching Moore's and Defendant's descriptions attempted to rob two women at gunpoint. After learning the women had no money, one of the men hit one of the women in the head with a shotgun, and the men left in a Chevy Impala.

¶ 3 The same night around 1:00 AM, a citizen approached an officer with the Charlotte Mecklenburg Police Department and told him of the attempted robbery and assault. The officer located the woman who had been hit; she declined medical treatment but gave a statement about the incident. Later that night, the women observed the same men in the same vehicle driving around their hotel. One of the women called 911 around 2:30 AM to report the license plate of the vehicle, and during a subsequent call to 911 she heard a shotgun firing three times.

¶ 4 Around 2:40 AM, Tyshawn Calhoun was shot three times at point blank range. A few minutes later, an Uber driver called 911 after seeing Mr. Calhoun's body in the road near the hotel. Officers who responded found that Mr. Calhoun was missing one shoe and his pants, and they found a black work glove near his body. Police could not

locate any eyewitnesses to the shooting.

¶ 5 After staying overnight at Mr. Moore's apartment, at about 7:00 AM, Defendant asked Ms. Hager and Mr. Moore for a ride to see his probation officer in Gaston County. Defendant checked in with his probation officer at 8:35 AM, and then Ms. Hager dropped him off at his work. Mr. Moore returned home but left later that day in the Impala and was stopped by police. The officers found a shotgun in the vehicle. They also found a shoe matching the one found on Mr. Calhoun near trash containers outside Ms. Hager's and Mr. Moore's apartment. A glove matching the glove found near Mr. Calhoun's body was found under the couch in the apartment. Defendant was indicted and arrested on charges of murder and possession of firearm by a felon.

¶ 6 Defendant's case was tried at the 4 March 2019 Criminal Session of Superior Court, Mecklenburg County. The State presented evidence regarding the events noted above; evidence regarding the descriptions and identification of Mr. Moore and Defendant; and text communications between Mr. Moore and Defendant which tend to indicate that Defendant needed money and sought Mr. Moore's assistance with an assault rifle to get some money. The State also presented DNA evidence from samples taken from inside the black work glove found near Mr. Calhoun's body, the matching black work glove found under the couch, and the floor mat of Mr. Moore's Impala. The DNA from the black glove found at the scene of the shooting matched

only Defendant, not Mr. Moore or Mr. Calhoun. The DNA from the matching glove found under the couch had a mixture from three people, but this included a "complete major profile" matching Defendant. DNA from the shoe found in the trash near the apartment matched Mr. Calhoun. In addition, another pair of gloves was found on the driver's seat of the Impala. Both gloves had a mixture of DNA, but one glove had Mr. Moore's DNA, and the other had Defendant's DNA. The trigger guard of the shotgun also had a mixture of DNA from three people, but Mr. Moore's DNA was a partial major profile. Also, the State presented evidence of Mr. Calhoun's blood found on Mr. Moore's shoe and on the floor mat of the driver's side of the Impala. A mixture of DNA was also found on the inside passenger side door pull of the Impala, but this DNA included a "partial major DNA profile" match with Defendant.

¶ 7 At the charge conference the State requested an instruction on flight be given, and Defendant's counsel objected to the request. The trial court instructed the jury as follows regarding flight:

> The State contends and the Defendant denies that the Defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the Defendant's guilt. Further, this circumstance has no bearing on the question of whether the Defendant acted with premeditation and deliberation . Therefore, it is not to be considered by you as evidence of premeditation or deliberation.

Following deliberation, the jury returned verdicts of guilty of first degree murder and possession of a firearm by a felon. Defendant was sentenced to life imprisonment without parole, and he gave notice of appeal in court.

II. Instruction on Flight

¶ 8 Defendant argues "the trial court erred by instructing the jury on flight over the Defendant's objection when there was no evidence that Defendant Justin Hood took steps to avoid apprehension."

A. Standard of Review

> The question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. The standard of review set forth by this Court for reviewing jury instructions is as follows:
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> > This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] . . . Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. McGee, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014) (alterations in original) (citation omitted) (quoting *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005)).

B. Analysis

¶ 9 In *State v. Holland*, this Court addressed whether there was evidence to give an instruction on flight where "defendant left the crime scene with his accomplices and drove to the home of one of the accomplices." 161 N.C. App. 326, 330, 588 S.E.2d 32, 36 (2003).

> A trial judge may instruct a jury on a defendant's flight if "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension."
>
> In the present case, the evidence presented, even in the light most favorable to the State, shows that defendant left the crime scene with his accomplices and drove to the home of one of the accomplices. Following this, defendant was driven to a girlfriend's residence. There is no evidence that he went there to avoid apprehension. Visiting a friend at their residence is not an act that, by itself, raises a reasonable inference that defendant was attempting to avoid apprehension. Therefore, it was error for the trial court to instruct the jury on flight. However, in light of the remaining evidence in this case, including the identification of defendant as the perpetrator of the crimes charged, the error in instructing the jury on flight was harmless. Thus, we conclude that defendant received a trial free of prejudicial error.

Id. (citations omitted).

¶ 10 Based on several cases, the State contends that some of the evidence in this case supports a flight instruction. Specifically, the State argues that Defendant and Mr. Moore "were in such a rush to flee that they stripped Mr. Calhoun of his pants to

take with them" so they could check for a wallet in the pants later; that Defendant was in "such a rush to flee" he left his glove at the scene; that Defendant was "not found with Mr. Calhoun a very short time later" when the body was discovered; and that Defendant had failed to provide medical assistance to Mr. Calhoun. Although each of these facts may be similar to a fact in a case cited by the State, the evidence of the cases upon which the State relies for these factors was not comparable to this case. In each of those cases, there was also evidence the defendant "took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991) ("Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.").

¶ 11 In *State v. Parks*, a witness reported that after attacking the victim, the defendant "took off running" and "bouncers chased after [Defendant] and tackled him to the ground." 264 N.C. App. 112, 118, 824 S.E.2d 881, 886 (2019) (alteration in original). In *State v. Taylor*, also cited by the State, the defendant immediately left the crime scene, drove his accomplice to a hospital, lied to hospital staff about how his accomplice had been shot, and then gave a false statement to police. 362 N.C. 514, 522-23, 669 S.E.2d 239, 251 (2008). And if evidence that the defendant left the scene of a crime were sufficient evidence to support an instruction on flight, the instruction would be proper in essentially every case where the defendant is not

apprehended immediately at the scene. But it is well established that "[m]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight." *Thompson*, 328 N.C. at 490, 402 S.E.2d at 392.

¶ 12 Here, as in *Holland*, 161 N.C. App. 326, 588 S.E.2d 32, there is no evidence that Defendant took any steps to avoid apprehension. Although the evidence shows that the decedent's pants and a shoe were removed before the body was discovered, these facts alone do not support an instruction on flight. Although Defendant did leave the scene of the shooting, the next morning he checked in with his probation officer before going to work. Accordingly, the trial court erred by giving an instruction on flight as it was not supported by the evidence. However, given the substantial evidence in this case, Defendant has failed to demonstrate that this error in the jury instructions was prejudicial.

III. Conclusion

¶ 13 Because there was no evidence that Defendant took any steps to avoid apprehension, we conclude the trial court erred by instructing the jury on flight. However, because of the substantial evidence presented in this case, we conclude Defendant suffered no prejudice by the unsupported instruction on flight.

NO PREJUDICIAL ERROR.

Judges ZACHARY and GORE concur.

Report per Rule 30(e).