IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-382

No. COA20-524

Filed 20 July 2021

Columbus County, No. 17CRS052734-35

STATE OF NORTH CAROLINA

v.

WILLIAM MATTHEW FORTNEY, Defendant.

Appeal by Defendant from judgments entered 29 October 2019 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 28 April 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Kenzie M. Rakes, for the State.

Warren D. Hynson for the Defendant.

DILLON, Judge.

¶ 1 William M. Fortney ("Defendant") appeals from judgments finding him guilty of first-degree murder and robbery with a dangerous weapon.

I. Background

¶ 2 The evidence at trial tended to show as follows: Defendant and his girlfriend, Ms. Hitchcock, lived together in Oklahoma. They decided to sell their vehicle and

buy bus tickets to visit Myrtle Beach. On the way, they met Mr. Long ("the victim"). The victim agreed to give Defendant and his girlfriend a ride from Myrtle Beach to the victim's North Carolina home, where he allowed them to stay for about two weeks.

¶ 3 On or about 13 September 2017, the victim informed Defendant and his girlfriend that they needed to leave his home and he dropped their belongings off at a motel they had rented. Defendant told others that Defendant was angry at the victim for taking his money to use for bills and food because Defendant wanted to get back to Oklahoma.

¶ 4 Three days later, on 16 September 2017, Defendant and his girlfriend started walking to the victim's house after consuming whiskey. On the way, Defendant stopped to purchase some black duct tape. When the couple approached the victim's house, Defendant ran inside. Defendant's girlfriend entered the home to find Defendant and the victim fighting on the floor. The victim had a pocketknife. Defendant's girlfriend was aware that the victim owned a .38 gun, and she began to look for it, leaving the scene of the fight.

¶ 5 Defendant's girlfriend returned to the living room to find the victim sitting on the couch and the Defendant standing in the kitchen. She told the victim to stand up, and he complied. When the victim stood up, she realized that he was sitting on his gun, then she took the gun from the victim. Next, the victim was shot twice in the head, however, the evidence at trial did not establish who shot the victim.

Thereafter, Defendant and his girlfriend drove away with the victim's vehicle.

¶ 6 Defendant was indicted by a grand jury for first-degree murder and robbery with a dangerous weapon. Defendant's girlfriend agreed to testify against Defendant at trial in exchange for pleading guilty to second-degree murder and robbery with a dangerous weapon. The State ended its direct examination of Defendant's girlfriend early after she first testified that Defendant never had the pocketknife in his hand during the fight, and then was "sure at some point he had it in his hand."

¶ 7 Following a jury trial, Defendant was convicted of both charges. The trial court denied Defendant's motion to set aside the jury's verdict. Defendant timely appealed.

II. Analysis

¶ 8 Defendant makes several arguments on appeal. We address each in turn.

A. Jury Instruction on Acting in Concert

¶ 9 Defendant argues that the trial court erred or plainly erred in instructing the jury that it could convict Defendant of first-degree or second-degree murder and robbery with a dangerous weapon on the theory of acting in concert when the evidence failed to support this instruction. We disagree.

¶ 10 "Assignments of error challenging the trial court's decision regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). It would be error for a trial judge to give a jury instruction that is not supported by the evidence produced at trial. *State v. Campos*,

248 N.C. App. 393, 397, 789 S.E.2d 492, 495 (2016).

¶ 11 Our Supreme Court has stated that acting in concert means acting "pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979).

> [T]hat this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading towards the crimes' commission. . . . It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

Id. at 356-57, 255 S.E.2d at 395.

¶ 12 In this case, Defendant purchased duct tape from a store as he and his girlfriend walked to the victim's house. Defendant ran inside the victim's house before his girlfriend, who found him fighting with the victim upon entering the residence. Defendant had made previous statements that he needed money from the victim to return to Oklahoma. The State presented sufficient evidence at trial that Defendant and his girlfriend went to the victim's house with a common plan or purpose to rob the victim. The instruction was proper for the charge of robbery with a dangerous weapon as it was supported by the evidence produced at trial.

¶ 13 The action of murdering the victim may have been committed during the

natural course of the robbery. The acting in concert instruction was also proper for the charge of first- or second-degree murder, as "the defendant [need not] share the intent or purpose to commit the *particular* crime actually committed." *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (emphasis added). As long as Defendant and his girlfriend had a common plan or scheme to rob the victim, the jury instruction of acting in concert was also proper for the murder charges.

¶ 14 Therefore, we conclude that the trial court did not err in giving the acting in concert jury instructions.

B. Motion to Dismiss First-Degree Murder Charge

¶ 15 Defendant also argues that the trial court erroneously denied Defendant's motion to dismiss when there was insufficient evidence of premeditation and deliberation to support a conviction of first-degree murder. We disagree.

¶ 16 We review a trial court's denial of a motion to dismiss *de novo*. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). When ruling on a motion to dismiss, the trial court must determine: "whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and the evidence must be

considered in the light most favorable to the State. *Id.* at 67, 296 S.E.2d at 652.

¶ 17 First-degree murder, codified at N.C. Gen. Stat. § 14-17 (2017), is the "unlawful killing of a human being with malice, premeditation and deliberation." *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991). "Premeditation and deliberation generally must be established by circumstantial evidence, because they ordinarily are not susceptible to proof by direct evidence." *Id.* at 238, 400 S.E.2d at 62 (internal quotation marks and citation omitted). Premeditation and deliberation can be inferred from the following elements:

> (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Id. at 238, 400 S.E.2d at 62.

¶ 18 Here, at least four elements help establish premeditation and deliberation when the evidence is considered in the light most favorable to the State. There was no evidence that the victim provoked Defendant; in fact, Defendant and his girlfriend sought out the victim in his home. Defendant purchased duct tape on the way to the victim's home and ran into the victim's home before his girlfriend. Defendant had made statements prior to the murder that he was angry with the victim for kicking

him out of the house and that he needed his money to make his way back to Oklahoma.

¶ 19 Defendant argues that the victim was killed in a quarrel because Defendant and the victim had been fighting on the floor with a knife. Therefore, Defendant concludes, the murder could not have occurred in a "cool state of blood" sufficient to constitute premeditation and deliberation. *See Vause*, 328 N.C. at 238, 400 S.E.2d at 62. However, Defendant's girlfriend testified that Defendant and the victim had stopped fighting when she returned from looking for the victim's gun. After reviewing the evidence in the light most favorable to the State, we conclude that the State presented substantial evidence of each essential element of first-degree murder. Therefore, the trial court correctly denied Defendant's motion to dismiss.

C. Motion to Dismiss Robbery with a Dangerous Weapon Charge

¶ 20 Finally, Defendant argues that the trial court erred when it denied Defendant's motion to dismiss the charge of robbery with a dangerous weapon and instructed the jury it could convict Defendant of felony murder on the predicate felony of robbery with a dangerous weapon. We disagree.

¶ 21 We review this assignment of error under the same standard as Defendant's second assignment of error.

¶ 22 The crime of robbery with a dangerous weapon, codified at N.C. Gen. Stat. § 14-87(a), is "(1) the unlawful taking or attempt to take personal property from the

person or in the presence of another (2) by the use of threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Richardson*, 342 N.C. 772, 784, 467 S.E.2d 685, 692 (1996).

¶ 23 The offense of robbery with a dangerous weapon is sufficient to support a conviction of felony murder where "the jury may reasonably infer that the killing and the taking of the victim's property were part of one continuous chain of events." *State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 553 (1992). For example, in *State v. Handy*, the evidence showed that the defendant was "low on cash and could not afford to rent an apartment" and had "discussed robbing [the victim] before going to [the victim's] hotel room." *Id*. at 530, 419 S.E.2d at 553. The defendant immediately took money from the victim's wallet after he murdered him. *Id*. at 530, 419 S.E.2d at 553. Our Supreme Court concluded that the State had presented sufficient evidence of the charge of felony murder based on robbery with a dangerous weapon. *Id*. at 530, 419 S.E.2d at 553.

¶ 24 Here, Defendant argues that his case is not a "continuous chain of events" factual scenario. His version of events is that the murder was a totally separate action from the car theft, which was an opportunistic afterthought. However, in reviewing the denial of a motion to dismiss, we must view the evidence in the light most favorable to the State. Using this standard, the evidence showed that the robbery of the victim's vehicle was part of "one continuous chain of events" with the

victim's murder. *See Handy*, 331 N.C. at 529, 419 S.E.2d at 553. The facts suggesting that the armed robbery was part of a continuous chain of events are that: (1) Defendant told others that he was angry with the victim for kicking him out of the house after accepting money for bills; (2) Defendant and his girlfriend were broke and needed money to return to Oklahoma; and (3) Defendant and his girlfriend took the victim's vehicle immediately after murdering the victim.

¶ 25 We conclude that the State presented sufficient evidence of robbery with a dangerous weapon. Therefore, it was not error for the trial court to instruct the jury that it could convict Defendant of felony murder on the predicate felony of robbery with a dangerous weapon.

III. Conclusion

¶ 26 We conclude that Defendant received a fair trial, free from reversible error.

NO ERROR.

Judges ARROWOOD and WOOD concur.

Report per Rule 30(e).