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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-991

Filed 17 September 2024

Nash County, Nos. 21 CRS 53377, 53378

STATE OF NORTH CAROLINA

v.

MICHAEL BRANDON JONES and DAVIS GRAHAM

Appeal by defendants from judgments entered 18 July 2022 by Judge Alma Hinton in Superior Court, Nash County. Heard in the Court of Appeals 28 August 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Asher P. Spiller, for the State.*

*Anne Bleyman for defendant-appellant Jones.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant Graham.*

ARROWOOD, Judge.

Michael Brandon Jones (“defendant Jones”) and Davis Graham (“defendant Graham”) (together “defendants”) appeal from judgments entered on 18 July 2022. On appeal, defendants argue the trial court erred by (1) failing to instruct the jury on

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a lesser included offense, (2) denying their motions to dismiss for insufficient evidence, (3) denying them last closing arguments, and (4) sentencing them based on aggravated factors that were unsupported by the evidence. For the following reasons, we find no error.

I. Background

On 11 November 2021, William Kent (“Mr. Kent”), defendant Graham, and defendant Jones got into defendant Jones’s gold Tahoe truck and drove to a convenience store. Defendant Jones was driving the vehicle, defendant Graham was in the passenger seat, and Mr. Kent was in the backseat on the passenger side of the truck. The three stopped at a house owned by Mark Boykin (“Mr. Boykin”) on their way back to defendant Jones’s house, and defendant Jones stated he was going to stop and look at a trailer on the property. Defendant Jones backed the truck up to a trailer, got out, and hooked the trailer to the truck. When he tried to pull off, the trailer did not move because it was chained to other items.

Mr. Boykin operated a mechanic’s garage approximately 100 feet from his home. That night, Mr. Boykin walked from his home to the garage to turn off a machine, and he saw a vehicle on his land that was not supposed to be there.

The facts surrounding the events that followed were contested at trial. Mr. Boykin stated that he approached the truck with a pistol in his hand and demanded defendant Jones get on the ground. Mr. Boykin testified that the other two men ran

from behind the truck and jumped into the truck, but Mr. Kent testified that he and defendant Graham were in the truck when Mr. Boykin approached.

Mr. Boykin tried to call 911, but he realized he left his phone in his house. After trying to access different phones in defendant Jones's truck, Mr. Boykin could not call the police. He removed the keys from the ignition and put them in his pocket, then proceeded to blow the truck's horn to get someone's attention. Mr. Boykin's wife heard the horn and went outside to investigate, and she saw the vehicle across the street.

Mr. Boykin testified that defendant Graham reached for something, and Mr. Boykin put the gun to defendant Jones's head and pulled the trigger. The gun clicked, and defendant Jones tackled Mr. Boykin. Defendant Jones and Mr. Boykin scuffled on the ground, and defendant Jones shouted, "I can't get the gun out of his hand." Defendant Graham and Mr. Kent got out of the truck, and Mr. Boykin testified defendant Graham started kicking him in the head, stomping on him, and stabbing him. Mr. Kent testified that when the two men got out of the truck, they unhooked the trailer from the truck, jumped back in the vehicle, and all three drove away.

Mr. Boykin testified he passed out while defendant Graham was attacking him, and he later woke up in the hospital. Mr. Boykin testified he suffered from a crushed carotid artery, an aneurysm, a broken jaw and broken teeth, and cuts on his face and head, among other injuries. He did not recall speaking to law enforcement

immediately following the incident. Law enforcement did not recover Mr. Boykin's pistol on the property or anywhere else.

Defendants were indicted by grand jury on 14 March 2022 of assault with a deadly weapon with intent to kill inflicting serious injury, larceny of a firearm, and attempted larceny. Defendants also were given notice of the following aggravating factors: (1) joining with more than one other person in committing the offense and was not charged with committing a conspiracy; (2) the victim was very old; and (3) the offense involved an attempted taking of property of great monetary value. Defendant Jones also received notice of the aggravating factor of inducing others to participate in the commission of the offense.

Following a trial, a jury convicted defendants with assault with a deadly weapon inflicting serious injury, larceny of a firearm, and attempted larceny. The jury also found defendants guilty of all aggravating factors. The trial court sentenced defendants to consecutive terms of 41 to 62 months' imprisonment for the assault with a deadly weapon conviction and 12 to 24 months' imprisonment for the larceny of a firearm and attempted larceny convictions that were consolidated. Both defendants gave oral notice of appeal in open court.

## II. Discussion

On appeal, defendants argue the trial court erred by (1) failing to instruct the jury on a lesser included offense, (2) denying their motions to dismiss for insufficient evidence, (3) denying them last closing arguments, and (4) sentencing them based on

aggravated factors that were unsupported by the evidence. We address each argument in turn.

A. Jury Instructions

Defendants argue that the trial court erred in rejecting their request to instruct the jury on the lesser-included offense of misdemeanor assault inflicting serious injury. We disagree.

We review challenges to a trial court's decision not to give a lesser-included offense instruction de novo. *State v. Huckabee*, 278 N.C. App. 558, 561 (2021) (cleaned up).

“When any evidence presented at trial would permit the jury to convict defendant of the lesser included offense, the trial court must instruct the jury regarding that lesser included offense.” *State v. Tillery*, 186 N.C. App. 447, 449 (2007) (quoting *State v. Whitaker*, 316 N.C. 515, 520 (1986)). “The trial court may refrain from submitting the lesser offense to the jury only where the ‘evidence is clear and positive as to each element of the offense charged’ and no evidence supports a lesser-included offense.” *State v. Lawrence*, 352 N.C. 1, 19 (2000) (quoting *State v. Peacock*, 313 N.C. 554, 558 (1985)).

“The elements of assault with a deadly weapon inflicting serious injury are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death.” *State v. Uvalle*, 151 N.C. App. 446, 453 (2002) (citations and internal quotation marks omitted). Here, the evidence is clear as to each element. Mr. Boykin

testified that defendant Jones tackled him to the ground, wrestled with him, and hit him. Mr. Boykin also testified that defendant Graham got out of the vehicle and began to kick, stomp, and stab his head. Clearly, there was an assault that did not result in death.

As defendants acknowledge, “hands and fists may be considered deadly weapons[.]” *State v. Rogers*, 153 N.C. App. 203, 211 (2002), *disc. review denied*, 357 N.C. 168 (2003). “The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself.” *State v. Palmer*, 293 N.C. 633, 642–43 (1977) (quoting *State v. Smith*, 187 N.C. 469, 470 (1924)). Defendants used their hands and feet in a deadly manner here—Mr. Boykin suffered a crushed carotid artery, an aneurysm, a broken jaw, multiple cuts, and broken teeth. The State presented evidence of Mr. Boykin’s serious injuries, demonstrating the deadly nature in which defendants used their hands and feet, and this evidence is “clear and positive” that defendants used a deadly weapon in their assault of Mr. Boykin causing serious injury. There is no evidence to contradict any of these elements. Thus, the trial court did not err by refraining to submit an instruction for the lesser included offense of assault inflicting serious injury.

B. Motions to Dismiss

1. Standard of Review

This Court reviews the denial of a motion to dismiss for insufficient evidence de novo. *State v. Bagley*, 183 N.C. App. 514, 523 (2007) (citations omitted). We must consider “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.” *State v. Summey*, 228 N.C. App. 730, 733 (2013) (citations and internal quotation marks omitted). “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78–79 (1980)). When ruling on a defendant’s motion to dismiss, trial courts “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.” *Id.* (citations and internal quotation marks omitted).

2. Larceny of Firearm

Defendants argue the trial court erred in denying their motions to dismiss the larceny of firearm charge because the State could not prove they stole Mr. Boykin’s gun. We disagree.

The essential elements of larceny are that a defendant (1) took the property of another, (2) carried it away, (3) without the owner’s consent, and (4) had the intent to deprive the owner of their property permanently. *State v. Sisk*, 285 N.C. App. 637, 641 (2022) (cleaned up).

Mr. Boykin testified that after defendant Jones tackled him, he had “such a grip on the gun . . . that [his] fingers at the hospital turned black.” Defendant Jones called to the other men in the car to help him, shouting, “I can’t get the gun out of his hand.” After the scuffle on the ground, the men got into their car and drove away. Law enforcement did not find Mr. Boykin’s gun at the scene or at any point thereafter. From this evidence, viewed in the light most favorable to the State, the jury reasonably could conclude that defendant Jones attempted and succeeded in removing Mr. Boykin’s firearm from his possession without Mr. Boykin’s consent given that defendant Jones voiced his intent to take the gun from Mr. Boykin’s hand. Because the gun was not found at the scene, a jury also reasonably could infer that defendants took the gun with them when they drove away. There was thus substantial evidence of each element of larceny of a firearm, and the trial court did not err in denying defendants’ motions to dismiss.

3. Fair Market Value of Trailer

Defendants also challenge the trial court’s denial of their motions to dismiss the attempted felony larceny of the trailer because the State did not prove the trailer exceeded the minimum required value. Again, we disagree.

Defendants were charged with attempted felony larceny for attempting to steal property valued in excess of \$1,000.00. *See* N.C.G.S. § 14-72(a) (2023). “Value” in this context means the item’s fair market value, which is “the item’s reasonable



selling price at the time and place of the theft, and in the condition in which it was when stolen.” *State v. Redman*, 224 N.C. App. 363, 366 (2012).

Donnie Boykin, Mr. Boykin’s brother, testified that the cost of a new trailer “to replace” the trailer defendants attempted to steal was between \$12,000.00 and \$14,000.00. The State did not present additional evidence of the trailer’s value at the time of the attempted theft. However, in the light most favorable to the State, the jury reasonably could conclude from the evidence of the cost of a new trailer, more than \$10,000.00 greater than the minimum value required by statute, that the trailer’s value exceeded the \$1,000.00 threshold required to prove felony attempted larceny. The trial court did not err in denying defendants’ motions to dismiss.

C. Last Closing Argument

Defendants further contend the trial court erred by denying them the opportunity of the last closing arguments. We disagree.

“When a defendant does not present any evidence during the guilt-innocence phase, he is entitled to both the first and the last closing arguments.” *State v. Diaz*, 155 N.C. App. 307, 317 (2002) (citing *State v. Taylor*, 289 N.C. 223 (1976)). However, “when there are several defendants and one of them elects to offer evidence, the right to open and conclude the arguments belongs to the State.” *Taylor*, 289 N.C. App. at 231.

To determine whether a party offered evidence, we consider “whether a party has offered it as substantive evidence or so that the jury may examine it and

determine whether it illustrates, corroborates, or impeaches the testimony of a witness.” *State v. Hall*, 57 N.C. App. 561, 564 (1982). “If the party shows [the item] to a witness to refresh his recollection, it has not been offered into evidence.” *Id.*

During the State’s examination of Officer Devin Denton (“Officer Denton”), who first responded to the scene, Officer Denton stated Mr. Boykin told him he was “jumped by three Black men” and “thrown to the ground and kicked by three subjects[.]” On cross-examination, defendant Graham’s counsel asked Officer Denton, “[D]idn’t [Mr. Boykin] say [he had one man down on the ground with his gun and two in the vehicle] on your body cam?” Officer Denton responded, “I can’t recall right offhand.” Defendant Graham’s counsel then told the trial court he wanted to submit a video to the jury “to rebut something [Officer Denton] just said about the three kicking [Mr. Boykin.]” Defendant Graham’s counsel stated “I understand what I’m giving up to do that. . . . I will lose my last closing.” The trial court deemed the footage “Defense Exhibit 1.”

Defendants argue that defendant Graham’s presentation of the body camera footage to Officer Denton did not constitute offering the video into evidence. They contend that because Officer Denton stated he could not “recall right offhand” what Mr. Boykin said on the body camera footage, defendant Graham’s counsel offered the video merely to refresh Officer Denton’s recollection. However, defendant Graham’s counsel specifically told the trial court he wanted to present the footage “to rebut” Officer Denton’s testimony that Mr. Boykin consistently told him the three men

kicked him. Even though defendant Graham’s counsel presented the footage asking if the video would refresh Officer Denton’s recollection, the true purpose of the introduction of the body camera footage was to contradict Officer Denton’s testimony that three men kicked Mr. Boykin to show that his client was not involved. The clearly substantive purpose for the video to impeach Officer Denton’s testimony constituted the introduction of evidence by defendant Graham, and thus, both defendants lost the right to last closing arguments. Therefore, the trial court did not err in denying defendants the last closing argument.

D. Aggravating Factors

Defendants also contend the evidence presented was insufficient to support the jury’s finding of aggravated factors. On appeal, we consider “whether the sentence is supported by evidence introduced at the trial and sentencing hearing.” *State v. Deese*, 127 N.C. App. 536, 540 (1997) (cleaned up).

1. Age

We first consider whether the evidence supports the jury’s finding the aggravating factor that Mr. Boykin was “very old.” A victim’s age can be used as an aggravating factor in sentencing when “the victim’s age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized.” *State v. Hines*, 314 N.C. 522, 525 (1985). The primary concern this factor addresses is vulnerability—whether a

victim's age leaves them vulnerable to the commission of the crime against them or unlikely to effectively defend themselves. *See Deese*, 127 N.C. App. at 540; *see also Hines*, 314 N.C. at 526.

“A jury’s determination of the aggravating factor that the victim was very old requires consideration of facts and circumstances that existed before or during the crime[.]” *State v. Saunders*, 239 N.C. App. 434, 437 (2015). Here, the jury was presented with testimony of the events from Mr. Boykin, who testified that he was 59 years old on the day of the incident and that he is “a little, bitty guy.” He also testified that he ran an auto garage, where he “used to do big stuff” but had “slowed down a little bit” before the incident. The jury also heard Mr. Boykin’s testimony recounting the attack and describing the injuries he suffered as a result of the incident. The State also presented evidence from Officer Denton that defendants were able to “take advantage” of Mr. Boykin and that Mr. Boykin stated he was “blindsided” by the attack.

“The jury’s role is to weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the evidence proves or fails to prove.” *State v. Moore*, 366 N.C. 100, 108 (2012) (citations omitted). “It is not the role of our Court to sit in place of the jury and impose our interpretation of the evidence.” *State v. Teesateskie*, 278 N.C. App. 779, 784 (2021) (citing *Moore*, 366 N.C. at 108). The jury was in the best position to observe Mr. Boykin on the witness stand and, based on the evidence presented, make the determination whether

to find the aggravating factor. Accordingly, sufficient evidence supports the jury's finding the aggravated factor that the victim was very old.

2. Great Monetary Value

Finally, we consider whether the evidence supports the jury's finding the aggravating factor that the trailer was an item of great monetary value.

"Other decisions by our Supreme Court and this Court consistently have held that great monetary value included amounts of approximately three thousand dollars." *State v. Pender*, 176 N.C. App. 688, 695 (2006) (holding trial court's finding that the taking of property valued at \$1,300.00 and \$700.00 was of great monetary value was not supported by the evidence); *see, e.g., State v. Thompson*, 314 N.C. 618, 623–24, (1985) (\$3,177.40).

Based on our discussion above, the evidence of a similar trailer's value at approximately \$12,000.00 to \$14,000.00 is sufficient to support the conclusion that the offense involved the taking of property of great monetary value. Although there was no evidence of the fair market value of the trailer, the jury reasonably could have concluded that the fair market value exceeded well over \$3,000.00 based on the price of a new trailer. The trial court thus did not err in sentencing defendants based on this aggravating factor.

III. Conclusion

For all the foregoing reasons, we hold the trial court committed no error.

NO ERROR.

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Judges COLLINS and WOOD concur.

Report per Rule 30(e).