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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-160

Filed 15 October 2024

Person County, No. 22 CRS 50145

STATE OF NORTH CAROLINA

v.

JAMES THOMAS KEETER, JR.

Appeal by defendant from judgment entered 15 September 2023 by Judge Cynthia K. Sturges in Superior Court, Person County. Heard in the Court of Appeals 25 September 2024.

*Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant.*

ARROWOOD, Judge.

James Thomas Keeter, Jr. (“defendant”) appeals from judgment entered on 15 September 2023 upon his conviction of possession of a firearm by a felon. On appeal, defendant argues the trial court erred by: (1) denying defendant’s motion to dismiss for insufficiency of the evidence; (2) charging the jury with inconsistent

instructions on whether the doorbell camera video was illustrative or substantive evidence; and (3) failing to intervene in the State's closing argument urging the jury to credit its key witness's conflicting prior statement instead of her testimony at trial. For the following reasons, we find defendant received a fair trial free from prejudicial error.

I. Background

The evidence at trial tended to show the following:

Maria Davis ("Ms. Davis") lived at 1665 Billy Hicks Road with her husband and three children. On the morning of 3 February 2022, Ms. Davis heard a knock on the front door of the home at around 7:00 a.m. The family had a Swan doorbell camera that produced black and white videos of activity that happens in front of the home. When Ms. Davis heard the knock on the door, she decided to check the doorbell camera to see who was outside. Upon checking the camera, Ms. Davis saw a man banging on her front door and observed him placing what appeared to be a rifle behind him to try and hide it. Ms. Davis did not recognize the man in the video and decided to call the police because she had three children in the house at the time.

Following the call to the police, several law enforcement officers arrived at Ms. Davis's home in response to the call. Detective Kevin Morris ("Detective Morris") was the lead investigator. Because Ms. Davis stated that the subject who knocked on the door appeared to have a firearm on him, several deputies responded to the scene. Upon arriving at the Davis's home, Detective Morris asked Mr. and Ms. Davis what

STATE V. KEETER

*Opinion of the Court*

happened and if he could watch the video produced by the doorbell camera. Detective Morris did not recognize the individual on the video when he first viewed it on 3 February 2022, however other law enforcement officers who were present at the scene were able to identify the man in the video as defendant. Detective Morris obtained a copy of the video footage from Ms. Davis via email.

Officer Johnny Clark (“Officer Clark”) also responded to Ms. Davis’s phone call regarding the incident. When Officer Clark viewed the video footage from the doorbell camera, he was able to recognize the person on the video as defendant. After viewing the video, Officer Clark circulated through the area in search of defendant. Neither Officer Clark nor the other police officers on the scene were able to locate either the rifle or defendant on 3 February 2022. During his search of the area, Officer Clark went to a nearby home owned by Tammy Cothran (“Ms. Cothran”) because he had received similar calls in the past at her address. Officer Clark spoke to Ms. Cothran and discovered that defendant had come to the Davis’s home from Ms. Cothran’s home and Ms. Cothran’s description of his clothing matched what was on the video.

During trial, Ms. Cothran testified that on the day of the incident at the Davis’s home, there was a .22 rifle that belonged to her son that she kept in the basement of her home. Ms. Cothran stated that defendant knew she kept the rifle in the house. She stated that although she remembers the defendant had possession of her son’s rifle, she cannot recall if it was on the day of the incident at the Davis’s house.

STATE V. KEETER

*Opinion of the Court*

However, she was able to testify that he had taken the gun from her home at some point and she had asked him to return the gun to her, which he did. Officer Clark testified that when he spoke to Ms. Cothran on the day of the incident, Ms. Cothran stated that defendant was agitated because he believed there was a gun in the house. According to Officer Clark, Ms. Cothran indicated she went and found the .22 rifle that belonged to her son and gave it to defendant to hold to make him feel safer in her home. Ms. Cothran also stated that she had asked defendant where the rifle was located and he stated he had hidden it.

Another responding investigator, Jimmy Wilborn (“Investigator Wilborn”), was also able to immediately identify the person on the doorbell camera footage as defendant. As part of the investigation, the district attorney’s office asked Investigator Wilborn to reach out to Ms. Cothran around July 2023 to determine if she had any documentation on the firearm at issue. When Investigator Wilborn spoke to Ms. Cothran, she revealed that defendant had brought the firearm back to her sometime after law enforcement was at her residence in 2022, but failed to give a specific date of when the firearm was returned to her. Specifically, Ms. Cothran testified that defendant left the gun outside her home in the front carport. Later, Ms. Cothran and her brother Ricky Cothran testified that Ms. Cothran was being evicted from her home around May 2022, and gave the rifle to her brother, Ricky Cothran to keep. Mr. Cothran kept the rifle with him until Investigator Wilborn came to collect it for this investigation in July 2023.

STATE V. KEETER

*Opinion of the Court*

Prior to closing arguments, the trial court reviewed the proposed jury instructions with both parties. When discussing with the parties whether the jury instruction regarding the doorbell camera video should indicate that the video should be viewed as illustrative or substantive evidence, the State said it should be viewed substantively and defense counsel did not object. However, the trial court also discussed whether it should give instructions on both substantive and illustrative evidence. When it was brought to the trial court's attention that the instructions were contradictory, the trial court asked defendant's counsel if he objected to taking out the instruction instructing the jury to consider the video only as illustrative. Defense counsel agreed that the instruction could be removed. However, when the trial court ultimately read the jury instructions out to the jury, it read both instructions. No objection or request to change the dual instruction was forthcoming at the final opportunity to request corrections to the instruction as given.

During closing arguments, the State discussed testimony from several witnesses from the trial. This included discussing statements Ms. Cothran made to Officer Clark that were presented only for impeachment purposes. Defense counsel never objected to these statements during closing arguments. After deliberation, a jury found defendant guilty of possession of a firearm by a convicted felon. The trial court sentenced defendant to 16 to 29 months in prison. Defendant gave oral notice of appeal in open court at the close of the trial.

II. Discussion

On appeal, defendant contends the trial court erred by (1) denying defendant's motion to dismiss for insufficiency of the evidence, (2) charging the jury with inconsistent instructions on whether the doorbell camera video was illustrative or substantive evidence, and (3) failing to intervene in the State's closing argument urging the jury to credit its key witness's conflicting prior statement instead of her testimony at trial. We address each argument in turn.

A. Motion to Dismiss

Defendant first contends the trial court erred by denying defendant's motion to dismiss for insufficiency of the evidence. We disagree.

This "Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62 (2007) (cleaned up). "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 (2000) (cleaned up).

Substantial evidence exists if there "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 (1980) (citations omitted). "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 (1994).

Furthermore, “the trial court is limited [s]olely to the function of determining whether a reasonable inference of the defendant’s guilt of the crime charged [m]ay be drawn from the evidence.” *State v. Smith*, 40 N.C. App. 72, 78–79 (1979). If the trial court determines that there is a reasonable inference of the defendant’s guilt, it must deny the motion to dismiss. *See id.* at 79.

In North Carolina, “[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm.” N.C.G.S. § 14-415.1(a) (2023). Based on this statute, there are two elements for possession of a firearm by a felon: “(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm.” *State v. Mitchell*, 224 N.C. App. 171, 176 (2012) (cleaned up).

Here, there is no dispute that defendant was previously convicted of a felony. However, defendant argues that the State did not provide sufficient evidence that he possessed a firearm because the State failed to meet its burden to show that the rifle in the doorbell video footage was indeed a firearm. However, during the trial, testimony from both Ms. Cothran and Ricky Cothran, Ms. Cothran’s brother, identified the gun as a firearm and Ms. Cothran also testified that defendant had possession of the gun at some point in 2022. Specifically, Ms. Cothran testified that she gave defendant the gun to have when he showed up at her home agitated. Furthermore, Ms. Cothran told other law enforcement officials and testified during trial that she knows defendant left her home with the gun and was the one to give

the rifle back to her after it was taken from her home. Finally, defendant himself told Ms. Cothran that he had the gun and had hidden it somewhere.

This evidence, viewed in the light most favorable to the State, is sufficient to support a reasonable inference that defendant had possession of the gun in question. The testimony from Ms. Cothran shows defendant had the gun until he returned it to Ms. Cothran. This directly contradicts defendant's argument that the only two people who testified to seeing defendant with the gun were law enforcement officers who based their conclusions off the doorbell camera video that was shown to the jury. This evidence offered by Ms. Cothran, Officer Clark, and Officer Wilborn, together with the video footage from the doorbell camera, was sufficient to permit the jury to determine defendant possessed a firearm. Therefore, the trial court did not err in denying defendant's motion to dismiss.

B. Jury Instructions

Next, defendant argues that the trial court erred by charging the jury with inconsistent instructions on whether the doorbell camera video was illustrative or substantive evidence, coupled with written instructions that differed from the charge. We disagree.

“When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection.” *State v. Richardson*, 270 N.C. App. 149, 153 (2020). When a defendant has properly preserved a challenge to jury instructions, this Court reviews

the trial court's decisions regarding jury instructions de novo. *See id.* at 152. On appeal, a defendant is required to show that the challenged jury instructions were erroneous and that such error prejudiced the defendant. *Id.* An error is prejudicial if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443.

Here, the trial court erred in giving jury instructions that deviated from what the parties agreed to during the charge conference. During the charge conference, it was agreed that the only instruction that should be given with regards to the doorbell camera video was that the video should be viewed substantively. However, during the jury charge, the trial court instructed the jury that they may view the video both as substantive evidence and illustrative evidence. Although defense counsel did not object to either the instruction given during the charge conference or the instruction given at trial, because the instructions differed, the error was preserved.

Although the issue was preserved, defendant must show that they were prejudiced in some way based on the instruction given. Here, as detailed above, there is substantial evidence of each element of the defendant's crime. Furthermore, when the video was admitted into evidence at trial, defendant made no objections to the admission and never asked for a limiting instruction that the video should only be viewed illustratively. In addition, defendant agreed that the video tape was received as substantive evidence, the error in giving the illustrative instruction was contrary

to the State's position, not the defendant, therefore the error accreted to defendant's favor, not his detriment.

Defendant's counsel never objected to the illustrative evidence instruction. Rather, the State was the party that requested that only the substantive evidence instruction be given. Furthermore, testimony from several of the officers who responded to the scene and Ms. Cothran provided evidence of the defendant's guilt apart from the video obtained by the doorbell camera. Defendant does not provide any concrete showing of how he was prejudiced. Had the requested jury instruction that was agreed to during the charge conference been given, the video would have been viewed substantively by the jury and would have supported the guilty verdict regardless. Accordingly, we find that although the objection was preserved for the erroneous instruction, the erroneous instruction was harmless error.

C. Closing Arguments

Finally, defendant argues that the trial court erred by failing to intervene in the State's closing arguments. Specifically, defendant contends that the trial court's failure to intervene *ex mero motu* when the State argued in its closing arguments that the jurors should rely on certain statements from Ms. Cothran made to the officer when he initially interviewed her and not on those that were inconsistently made during her testimony. We disagree.

Attorneys are granted wide latitude for jury arguments. *See State v. Allen*, 360 N.C. 297, 306 (2006). "The standard of review for assessing alleged improper closing

arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.” *State v. Jones*, 355 N.C. 117, 133 (2002) (cleaned up).

In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

*Id.* For the remarks to constitute reversible error, the prosecutor’s remarks must be both improper and prejudicial. *Id.* at 107–08.

Here, in its closing arguments, the State said, “We don’t know exactly whatever happened at 1459 Billy Hicks Road, but we do know that Mr. Keeter was there and that’s according to what Tammy Cothran said. He was there and he left with the gun. That’s what she told Sergeant Clark.” Although these statements seek to assert Ms. Cothran’s statements to Officer Clark as facts, these statements are not grossly improper as to constitute prejudicial error. Ms. Cothran also testified to her personal knowledge that defendant at one point in time had the gun. Furthermore, the trial court, in stating the jury instructions, did instruct the jurors to not consider these inconsistent statements as evidence of the truth of what was said, but rather only for deciding whether or not to believe the witness’s testimony. This argument was not

STATE V. KEETER

*Opinion of the Court*

so improper as to require the court to intervene, therefore defendant has failed to show error.

III. Conclusion

For the foregoing reasons, we find the defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges CARPENTER and STADING concur.

Report per Rule 30(e).