NO. COA01-1550

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 99 CRS 51306

TERRENCE LABRON OGLESBY

Appeal by defendant from judgment entered 16 February 2001 by Judge Timothy L. Patti in District Court, Mecklenburg County. Heard in the Court of Appeals 26 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth J. Weese, for the State.

J. Clark Fischer for defendant-appellant.

WYNN, Judge.

Defendant Terrence Labron Oglesby presents two issues on appeal from his conviction of robbery of an American Legion Post with a dangerous weapon: (1) Did the trial court err by allowing the State to present unrelated evidence of misconduct by the defendant?, and (2) did the trial court err by aggravating defendant's sentence based on a finding that defendant joined with others in committing the robbery when allegedly acting in concert was a basis for his robbery conviction? We answer both issues, no, and thereby uphold defendant's conviction and sentence of

imprisonment for a minimum term of 129 months and a maximum term of 164 months.

Defendant first argues on appeal that the trial court erred in allowing the State's witness Clyde Sanders to testify about a prior incident in which defendant had brandished a gun at him. Sanders, who identified defendant as one of the robbers of the American Legion Post, testified that he had known defendant for five years before the robbery. He stated that hard feelings had developed between them when they competed for the affections of Sander's girlfriend, Tonya Huntley. Sanders described his conflict with defendant regarding Huntley, as follows:

> [SANDERS]: [Defendant] was fighting with me and whatnot, he used to try to, you know squash the beef . . . . You know, chill, whatnot.
>
> [PROSECUTOR]: When you squash the beef, what do you mean by that?
>
> [SANDERS]: Let's start over and be friends.
>
> [PROSECUTOR]: Okay. And were you willing to do that?
>
> [SANDERS]: No, ma'am.
>
> [PROSECUTOR]: Why was that?
>
> [SANDERS]: Just because of the simple fact he done pull out a gun on me, whatnot.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Just a minute. Objection overruled.
>
> [PROSECUTOR]: You can continue.
>
> [SANDERS]: He done pulled out a gun on me, maybe once or twice. I mean, I done shot at him, but he never knew, and I taught him how

> to steal cars.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Members of the jury, disregard the last answer of the witness. Do not consider it in your deliberations.

Although the trial court did strike Sanders' response that included a reference to stealing cars, defendant's assignment of error concerns Sanders' initial claim that defendant "pulled out a gun on [him]" which was allowed into evidence over his objection.

Evidence is relevant if it has "'any logical tendency, however slight, to prove a fact in issue,'" *State v. Bell*, 311 N.C. 131, 144, 316 S.E.2d 611, 618 (1984) (quoting 1 Brandis on North Carolina Evidence § 77 (1982)). Although relevant evidence is generally admissible under N.C.R. Evid. 402, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2001). A trial court's decision to admit evidence under Rule 403 will not be grounds for relief on appeal unless it is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993), *cert. denied*, 510 U.S. 948, 126 L. Ed.2d 341 (1994). Moreover, to show prejudice arising from an evidentiary ruling under Rule 403, "defendant must persuade this Court that had the trial court not admitted the [evidence], a different outcome likely would have been reached." *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (2002) (citing N.C. Gen. Stat. § 15A-1443(a) (1999)).

In this case, while Sanders' testimony recounting his personal familiarity with defendant did tend to support the accuracy of his eyewitness identification, his claim that defendant had once pulled a gun on him added little in this regard. Having already testified that he and defendant had lived in the same apartment complex where they vied for Huntley's affections, Sanders had established more than ample basis to demonstrate his ability to recognize defendant by sight. Given the obvious risk of prejudice arising from evidence associating defendant with improper gunplay, we believe this portion of Sanders' testimony should have been stricken. Nonetheless, this error does not require a new trial for defendant because Sanders' brief remark was insignificant in the context of the State's proffer and was so peripheral to its case as to create no possibility of prejudice under N.C. Gen. Stat. § 15A-1443(a). In light of compelling evidence presented by other witnesses of defendant's identity as the gunman in the robbery, "defendant has failed to show that this evidence so inflamed the jury as to affect the outcome of the trial." *State v. Bell*, 311 N.C. 131, 144, 316 S.E.2d 611, 618 (1984).

Defendant next argues the trial court erred in finding as an aggravating factor that "defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." N.C. Gen. Stat. § 15A-1340.16(d)(2) (2001). Defendant argues that this factor to enhance his sentence was improper because the State also relied on the theory of acting in concert to establish his guilt for the offense. Defendant

contends that the evidence of concerted action was thus used both to convict him of the crime and to aggravate his sentence in violation of N.C. Gen. Stat. § 15A-1340.16(e) (2001).

Under N.C. Gen. Stat. § 15A-1340.16(e), "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation." As we have previously stated, "It is error for an aggravating factor to be based on circumstances which are part of the essence of a crime." *State v. Hughes*, 136 N.C. App. 92, 99, 524 S.E.2d 63, 67 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000). However, our Supreme Court has recognized that many of the aggravating factors in N.C. Gen. Stat. § 15A-1340.16(d) contemplate at least some duplication of proof between the aggravating factor and the offense itself without violating the proscription in N.C. Gen. Stat. § 15A-1340.16(e). *See State v. Cinema Blue of Charlotte, Inc.*, 98 N.C. App. 628, 634, 392 S.E.2d 136, 139-40, *appeal dismissed and disc. review denied*, 327 N.C. 142, 394 S.E.2d 181 (1990), *cert. denied*, 498 U.S. 1083, 112 L. Ed.2d 1042 (1991); *see also State v. Bruton*, 344 N.C. 381, 393-94, 474 S.E.2d 336, 345 (1996).

We find no error here. "The elements of robbery with a dangerous weapon are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim." *State v. Jarrett*, 137 N.C. App. 256, 262, 527 S.E.2d 693, 697 (2000) *review denied*, 352 N.C. 152, 544 S.E.2d 233 (2000). Obviously, the

act of "join[ing] with more than one other person in committing the offense" is not an element of robbery with a dangerous weapon. Moreover, the State's evidence tended to show that defendant brandished the gun while an associate collected the money. These facts reflect that defendant and a single accomplice performed all the essential elements of the offense. By contrast, the aggravating factor found by the trial court required a showing that defendant joined with "*more* than one other person" to commit the crime. N.C. Gen. Stat. § 15A-1340.16(d)(2) (emphasis added). Thus, the evidence that defendant "joined with *more* than one other person" was not "necessary to prove an element of the offense" in this case, even under the theory of concerted action. This assignment of error is without merit.

No prejudicial error.

Judges MCGEE and CAMPBELL concur.

Report per Rule 30(e).