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NO. COA01-361

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v.

DAVID MARTIN BEASLEY YOUNG

Buncombe County
Nos. 97 CRS 50521
97 CRS 7061-62
99 CRS 2319-20

Appeal by defendant from judgment entered 4 May 1999 by Judge Steve A. Balog in Buncombe County Superior Court. Heard in the Court of Appeals 24 January 2002.

*Attorney General Roy A. Cooper, by Special Deputy Attorney General, James Peeler Smith, for the State.*

*William D. Auman for defendant-appellant.*

TIMMONS-GOODSON, Judge.

David Martin Beasley Young ("defendant") appeals his convictions of first-degree murder, possession with intent to sell and deliver a counterfeit controlled substance, and conspiracy to sell a counterfeit controlled substance. For the reasons discussed herein, we hold that defendant received a trial, free from prejudicial error.

The State's evidence tended to show the following: On 8 January 1997, defendant, Christopher Davis ("Davis") and Davis' cousin, Tommy Davis ("Tommy"), arrived at Pisgah View Apartments, an apartment complex located in Asheville, North Carolina. As the

three men walked through the complex, they were approached by a man driving a blue car. The man inquired as to whether they were interested in renting the car. Davis agreed to exchange drugs for the car. When the transaction was completed, the three men drove to the lower level of the complex. At this time, Charles Welch ("Welch") and Thomas Winsell, Jr. ("Winsell") entered the lower level of the complex and pulled their vehicle alongside Davis, defendant and Tommy. Defendant and Tommy approached the passenger side where Welch was located, as Davis walked towards the front of the car. Defendant and Davis began aggressively competing for a drug sale, each possessing substances that appeared to be crack cocaine. Welch indicated that he wished to taste the substance, because he had previously been "ripped off." When he tasted the substance, Welch stated that it was no good. Defendant and Tommy insisted that Welch pay for the drugs, however, Welch refused.

When an argument ensued, Davis pulled a gun out of his pocket and pointed it directly at Winsell stating, "Don't worry about the driver. If he moves, I've got him." Defendant reached into the passenger side of the vehicle, attempting to "rip a one-hundred dollar bill out of [Welch's] hand." Welch got angry, jumped out of the car, and began to approach defendant and Tommy. He passed the two men and began to walk towards Davis. Davis then fired three to four shots at Welch. One of the bullets struck Welch in the head, killing him. After the incident, Winsell sped off in his vehicle as defendant, Davis and Tommy fled the scene, leaving Welch, still conscious, dying on the ground. A chemical analysis

of the substance found on Welch’s body, revealed a composition of wax and starch, combined to look like crack cocaine.

After the incident, Davis returned to the home of Latrisha Gilliam (“Gilliam”), who lived in Pisgah View Apartments. He told Dia Johnson and Catrice White, two friends of Gilliam, that he killed Welch. Some time later, defendant arrived at Gilliam’s apartment. At the apartment, Davis and defendant played cards, listened to music and talked about the incident. The two men later decided to spend the night at Gilliam’s apartment.

Defendant left the apartment the next morning to buy cigarettes, but did not return. Detectives Mike Downing and Eric Lauffer (“Detective Lauffer”) of the Asheville Police Department arrived at Gilliam’s apartment, having received information that Davis may have spent the night there. With Gilliam’s permission, the detectives searched the apartment, and discovered a gun and drugs hidden under a mattress. Davis was arrested and questioned about the events of the prior evening. Detective Lauffer questioned Dia Johnson about the incident. She indicated that earlier that day, defendant and Davis were playing Russian Roulette with a gun in her trailer. She further stated that the gun belonged to defendant and was in his possession when the two left for Pisgah View Apartments on the night in question.

On 9 January 1997, Detective Lauffer contacted defendant and asked him to come to the police station for questioning. Defendant arrived with his uncle and father. During the interview, defendant stated that “he was there at Pisgah View Apartments and wanted to

tell the truth" about what happened on 8 January 1997. However, after speaking with his uncle, defendant declined to make any further statements and requested an attorney.

After rejecting a plea offer from the State that included dismissal of his first-degree murder charge, defendant was tried capitally. At the conclusion of the State's evidence, the trial court dismissed the charge of first-degree kidnapping. The jury subsequently found defendant guilty of first-degree murder under the felony murder rule, attempted armed robbery, possession with intent to sell and deliver a counterfeit controlled substance, sale of a counterfeit controlled substance, and conspiracy to sell a counterfeit controlled substance. The trial court arrested judgment on the attempted robbery charge and the sale or delivery of a counterfeit controlled substance charge and sentenced defendant to life imprisonment without parole on the remaining charges. Defendant now appeals.

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In the first assignment of error, defendant contends that the trial court erred in holding unrecorded bench conferences during the course of the trial, thereby violating his confrontation rights pursuant to the United States and North Carolina Constitutions. We disagree.

Our Supreme Court has repeatedly held that a defendant's constitutional right "to be present at all stages of his capital trial is not violated when, with defendant present in the courtroom, the trial court conducts bench conferences, even though

unrecorded, with counsel for both parties." *State v. Buchanan*, 330 N.C. 202, 223, 410 S.E.2d 832, 845 (1991). The Court has so held because, "bench conferences typically concern legal matters with which an accused is likely unfamiliar and incapable of rendering meaningful assistance." *Id.* "The defendant's presence in the courtroom allows him to 'observe the context of each conference,' and the presence of counsel at the bench conference provides the defendant with 'constructive knowledge of all that transpired.'" *State v. Blakeney*, 352 N.C. 287, 306, 531 S.E.2d 799, 813-14, (2000) (quoting *Buchanan*, 330 N.C. at 223, 410 S.E.2d at 844), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). "The burden is on the defendant to show the usefulness of his presence in order to prove a violation of his right to presence." *State v. Speller,* 345 N.C. 600, 605, 481 S.E.2d 284, 286 (1997).

A review of the transcript in the instant case reveals that defendant was represented by counsel during each of the four challenged bench conferences. Defendant was further "in a position to observe the context of the conferences and to inquire of his attorneys as to the nature and substance of each one." *See Speller*, 345 N.C. at 605, 481 S.E.2d at 286. It can be reasonably inferred from the transcript that two of the bench conferences were based on objections made by the parties in order to argue their respective positions. The third conference was requested by defense counsel to call the court's attention to the fact that it was time to take a lunch break. The fourth conference was called by the court so that both parties could be informed of the

procedure the court would use in instructing the jury. Based on these facts, defendant has failed to demonstrate that the bench conferences implicated his constitutional rights and this assignment of error is overruled.

In his second assignment of error, defendant contends that the trial court erred by admitting his statement to investigating officers. We disagree.

The Fourth Amendment requires that a defendant's statement be voluntary and "'the product of an essentially free and unconstrained choice by its maker,'" in order for it to be admissible. *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (quoting *Schneckcloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973)). The voluntariness of a defendant's confession is determined by viewing the "totality of the circumstances." *State v. Corley*, 310 N.C. 40, 47, 311 S.E.2d 540, 545 (1984). Factors to be considered in determining whether a confession was voluntary include:

> whether the defendant was in custody, whether he was deceived, whether his Miranda rights were honored, . . . the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the [defendant] with the criminal justice system, and the mental condition of the [defendant].

*Hardy*, 339 N.C. at 222, 451 S.E.2d at 608. The State has the burden of proving by a preponderance of the evidence and examined in the totality of circumstances, that the statement was voluntary. *State v. Campbell*, 133 N.C. App. 531, 537, 515 S.E.2d 732, 737,

*disc. review denied*, 351 N.C. 111, 540 S.E.2d 370 (1999). "Findings of fact made by a trial judge following a *voir dire* hearing on the voluntariness of a confession are conclusive upon this Court if the findings are supported by competent evidence in the record." *State v. Jackson*, 308 N.C. 549, 569, 304 S.E.2d 134, 145 (1983), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989).

In the instant case, defendant challenges the admissibility of his statement to Detective Lauffer wherein he admitted that "he was there at Pisgah View Apartments and wanted to tell the truth." We conclude that based on the totality of circumstances, defendant's statement was voluntary. Defendant agreed to come to the police station for questioning at the request of Detective Lauffer. Defendant was accompanied by his father and uncle. Defendant was not handcuffed nor restrained in any manner and was free to leave at any time. His statement was made after he was afforded his *Miranda* rights and before any questioning began. There is nothing in the record to suggest that the officers made any promises or made any suggestions of hope. Once defendant declined to make any further statements without the presence of an attorney, the interview terminated. Even though the officers read defendant his *Miranda* rights, the trial court found that they were not required to do so because defendant was not in custody. The trial court further found and concluded as a matter of law that "the statement was voluntary." We hold that competent evidence supports this conclusion and this assignment of error is therefore overruled.

Defendant next assigns error to the trial court's denial of

his motion to dismiss the charges of first-degree murder, possession of counterfeit controlled substance with intent to sell and deliver, and conspiracy to sell counterfeit controlled substances. We disagree.

"In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged has been presented, and that defendant was the perpetrator of the offense." *State v. Carr*, 122 N.C. App. 369, 371-372, 470 S.E.2d 70, 72 (1996). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *State v. Rogers*, 109 N.C. App. 491, 504, 428 S.E.2d 220, 228 (1993), *disc. review denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert denied*, 511 U.S. 1008, 128 L. Ed. 2d 54 (1994)(citations omitted). "If the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979). All the evidence, whether direct or circumstantial, is to be considered in the light most favorable to the State, with the State being entitled to every reasonable inference to be drawn from the evidence. *Carr,* 122 N.C. App. at 372, 470 S.E.2d at 72.

Defendant argues that there was insufficient evidence to submit the charge of possession of counterfeit controlled substance with intent to sell and deliver and conspiracy to sell counterfeit

controlled substances. We disagree.

In the instant case, the trial court charged the jury on a theory of acting in concert as to all of the above-stated offenses. The doctrine of acting in concert provides that where:

> "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

*State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (quoting *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971)), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). "A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." *State v. Gaines,* 345 N.C. 647, 675-76, 483 S.E.2d 396, 413, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997).

In order to obtain a conviction of possession with intent to sell and deliver a counterfeit controlled substance under N.C. Gen. Stat. § 90-95(a)(2), the State must prove "(1) that defendant possessed a counterfeit controlled substance, and (2) that defendant intended to 'sell or deliver' the counterfeit controlled substance." *State v. Swinson*,___ N.C. App. ___, 562 S.E.2d 608 (2002); *see* N.C. Gen. Stat. § 90-95 (a)(2) (2001); *see also* N.C. Gen. Stat. § 90-87 (6)(b)(2001)(providing that a counterfeit controlled substance is any substance intentionally misrepresented as a controlled substance). There is no requirement that a jury

find that defendant's possession was with the intent to both sell and deliver the counterfeit controlled substance. *See State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985), *reversed in part by State v. Morgan*, 329 N.C. 654, 406 S.E.2d 833 (1991). The jury must only find that the possession was with the intent to sell or deliver, and if found, the crime is proved. *Id.*

In the instant case, there was substantial evidence presented that defendant possessed a counterfeit controlled substance with the intent to sell. The evidence, taken in the light most favorable to the State, reveals that defendant, Davis, and Tommy stood in the Pisgah View Apartments, each awaiting a drug sale. Defendant and Tommy approached Winsell's vehicle, competing for a drug sale, each possessing a counterfeit controlled substance. Defendant and Tommy stood at the passenger side of the vehicle, attempting to sell drugs, representing the substance to be crack cocaine. Welch took the counterfeit rock from them, tasted it, and determined that it was "no good." A chemical analysis of the substance later revealed a composition of wax and starch combined to resemble crack cocaine. Clearly, a reasonable jury could find that defendant possessed the counterfeit controlled substance with the intent to sell.

Defendant further contends that there was insufficient evidence that he conspired to sell or assist in the sale of the counterfeit controlled substance and therefore, the trial court erred in denying his motion to dismiss. We disagree.

"A criminal conspiracy is an agreement between two or more

people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). In a prosecution for conspiracy, "the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice" to withstand defendant's motion to dismiss. *Id.* The existence of a conspiracy may be established by circumstantial evidence or "established by a number of indefinite acts, each of which, standing alone, might have little weight, but taken collectively, they point unerringly to the existence of a conspiracy." *State v. Abernathy*, 295 N.C. 147, 165, 244 S.E.2d 373, 384 (1978).

In the instant case, as noted above, the evidence is sufficient to support a finding that defendant conspired with Davis and Tommy to sell counterfeit crack cocaine. The evidence revealed that defendant and Tommy, each possessing a counterfeit controlled substance, stood at the passenger side of Welch's vehicle competing for a drug sale. Defendant then reached inside of the vehicle attempting to "rip" a one-hundred dollar bill from Welch, as Davis held a pistol to the driver. Based upon this evidence, a jury could reasonably infer that defendant conspired with Davis and Tommy to sell a counterfeit controlled substance.

We further note that the evidence supported defendant's conviction of first-degree murder. Defendant was convicted of first-degree felony murder based on the underlying felony of attempted armed robbery and sale of a counterfeit controlled substance. Felony murder occurs when "[a] murder . . . [is]

committed in the perpetration or attempted perpetration of any . . . robbery . . . or other felony committed or attempted with the use of a deadly weapon." N.C. Gen. Stat. § 14-17 (2001). "When a defendant is convicted of first-degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony . . . this latter conviction merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested." *State v. Moore*, 339 N.C. 456, 468, 451 S.E.2d 232, 238 (1994).

The elements of attempted armed robbery include:

> "(1) the unlawful . . . attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened." "[T]he temporal order of the threat or use of a dangerous weapon and the taking is immaterial." Rather, there must be a continuous transaction in which the threat or use of the dangerous weapon and the taking are "so joined in time and circumstances as to be inseparable."

*State v. Barnes*, 125 N.C. App. 75, 78, 479 S.E.2d 236, 238, *affirmed*, 347 N.C. 350, 492 S.E.2d 355 (1997) (citations omitted). In the instant case, there was substantial evidence tending to show that defendant acted in concert in the commission of attempted armed robbery. The evidence was undisputed that when Davis drew a pistol on Welch, defendant reached into Welch's vehicle, attempting to "rip" a one-hundred dollar bill. Further, substantial evidence was presented that defendant acted in concert with Davis and Tommy in the commission of selling a counterfeit controlled substance. Because there was substantial evidence

supporting either of the underlying theories, the trial court did not err in failing to dismiss the charge of first-degree murder. Accordingly, this assignment of error is overruled.

In his last assignment of error, defendant contends that his trial counsel rendered ineffective assistance during the course of his trial in violation of his state and federal constitutional rights. This argument is without merit.

"A defendant's right to counsel includes the right to effective assistance of counsel." *State v. Grooms*, 353 N.C. 50, 64, 540 S.E.2d 713, 722 (2000), *cert. denied*, ___ U.S. ___, 151 S.E.2d 54 (2001). "In order to establish ineffective assistance of counsel, a defendant must establish (1) that his attorney's performance fell below an objective standard of reasonableness; and (2) that the defendant was prejudiced by his attorney's performance to the extent there exists a reasonable probability that the result of the trial would have been different absent the error." *State v. Skipper*, 146 N.C. App. 532, 537-38, 553 S.E.2d 690, 694 (2001).

In the present case, defendant has failed to argue that his counsel's performance fell below an objective standard of reasonableness or that his counsel's errors in representation were such that the result of defendant's trial would have been different in their absence. A review of the transcript reveals that defendant was represented by two attorneys at trial and both were zealous in defending defendant's case and participated actively in all phases of the trial. Defendant cites one instance of allegedly ineffective assistance that occurred during closing arguments to

the jury when defense counsel dropped clothing taken from the deceased on the floor, indicating that the victim's clothing, which had been introduced into evidence by the State, "proved nothing."

While we note that the tactic may have been "distasteful" as argued by the State, it did not render counsel's performance ineffective as to deny defendant a fair trial. This assignment of error is overruled.

Accordingly, we hold that defendant received a trial, free from prejudicial error.

No error.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).