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NO. COA01-401

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v.

DELMAR LEE WEST,
Defendant

Carteret County
Nos. 99 CRS 9998
99 CRS 9999

Appeal by defendant from consolidated judgment entered 1 November 2000 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 24 January 2002.

Attorney General Roy Cooper, by Associate Attorney General Alexandra M. Hightower, for the State.

James Q. Wallace, III for the defendant.

BRYANT, Judge.

Defendant Delmar Lee West was found guilty of attempted robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon following a jury trial held at the 30 October 2000 criminal session of Carteret County Superior Court with the Honorable Benjamin G. Alford presiding. The trial court consolidated the cases for sentencing. Defendant was sentenced to an active term of 84 - 110 months. On 1 November 2000, defendant gave notice of appeal in open court and filed a written notice of appeal on 9 November 2000.

I.

First, defendant argues that the trial court erred in denying his motion in limine to prohibit the admission of evidence concerning his involvement in a prior robbery. We find the genuine issue to be whether evidence of the prior robbery was properly admitted at trial. See *State v. Gaither*, ___ N.C. App. ___, 559 S.E.2d 212 (2002).

[W]hen a party purports to appeal the granting or denying of a motion *in limine* following the entry of a final judgment, the issue on appeal is not actually whether the granting or denying of the motion *in limine* was error, as that issue is not appealable, but instead, "whether the evidentiary rulings of the trial court, made during the trial, are error."

Id. at ___, 559 S.E.2d at 215-216 (citation omitted). As to the genuine issue, we find no error.

We first note that a trial court's ruling on a motion in limine is preliminary in nature and is subject to change depending on the actual evidence introduced at trial. See *id.* at ___, 559 S.E.2d at 215. The grant or denial of a motion in limine is not appealable. See *id.* at ___, 559 S.E.2d at 215-216. Therefore, when a motion in limine has been denied and when the contested evidence has been presented at trial, it is incumbent upon the party contesting admission of the evidence to renew his objection at trial to preserve the issue for appellate review. See *State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48 (2000), *disc. review denied*, 352 N.C. 594, 544 S.E.2d 792 (2000). The transcript in the instant case reflects that at trial, defendant renewed his objection to the admission of evidence concerning the prior robbery

(which objection was overruled); thus the issue of whether evidence of the prior robbery was properly admitted at trial has been properly preserved for appellate review.

N.C.R. Evid. 404(b) reads in pertinent part:

(b) *Other crimes, wrongs, or acts.* — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

At a pretrial hearing concerning the prior robbery, the State presented evidence in the form of Thomas Person's testimony, that in 1994, defendant and Person were involved in the robbery of a business named Flatwood Outfitters. Person testified that he and defendant were the perpetrators of the robbery at issue in the instant case. Person further testified that in both robberies, he and defendant wore masks, used weapons, and that both robberies occurred at night. In denying defendant's motion in limine to suppress evidence of the 1994 Flatwood Outfitters robbery, the trial court stated, "The State is offering the evidence . . . for the purpose of showing intent, preparation, plan, identity and/or *modus operandi*." At trial, the State again introduced Person's testimony concerning the prior robbery.

Defendant argues that for the evidence of the prior robbery to be admissible as Rule 404(b) evidence, evidence of "the past and current crime must be 'so related to each other that proof of one . . .' tends to prove the crime charged and to connect the accused

with its commission." Further, defendant argues that when evidence of prior crimes is offered for identity purposes, the trial court must use rigid scrutiny in determining whether to admit this evidence.

In *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), our Supreme Court articulated that when admitting Rule 404(b) evidence, the similarities in the past and present crime must support a reasonable inference that the same person committed both crimes. The *Stager* Court went further to state that there must be some unusual facts or particularly similar acts that would indicate that the same person committed both crimes.

In the 1994 Flatwood Outfitters robbery and the instant case, evidence was presented at trial that there was more than one perpetrator involved in the robbery. Thomas Person had been found to be one of the perpetrators in both of the robberies. Defendant had been found to be one of the perpetrators in the 1994 robbery. Person testified at trial that defendant was the second perpetrator in the robbery involved in the instant case. Evidence was presented at trial that in both robberies, the perpetrators wore masks, used a weapon, enlisted the help of a third perpetrator or co-conspirator, used a getaway car, the robberies occurred after dark, and that businesses were robbed.

We find that there existed sufficient similarities between the past and present robberies, for evidence of the past robbery to be admitted pursuant to Rule 404(b). Therefore, this assignment of error is overruled.

II.

Second, defendant argues that there exists insufficient evidence that he was the second perpetrator of the crimes charged. Therefore, he argues that the trial court erred in denying his motion to dismiss at the close of the State's evidence. We disagree.

"In reviewing a motion to dismiss, 'the trial court is to determine 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[] being the perpetrator of the offense.'" *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001), *aff'd as modified*, 355 N.C. 266, 559 S.E.2d 788 (2002) (citation omitted). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (citation omitted).

Defendant argues that because Person gave conflicting accounts of whether defendant was the second perpetrator, Person's testimony should be discounted as lacking credibility. Defendant argues that Person's testimony was the only evidence of the identity of the second perpetrator, and because that testimony was incredulous, insufficient evidence exists to show that defendant was the second perpetrator of the attempted robbery. We disagree.

Generally, it is the province of the jury to resolve conflicts in testimony and to determine the weight to be given to a witness's statement. See *Thomson v. Thomas*, 271 N.C. 450, 455, 156 S.E.2d 850, 853 (1967). However, upon consideration of a motion to dismiss, the trial court is to consider all of the evidence, giving the State the benefit of all reasonable inferences and resolving conflicts of evidence in the State's favor. See *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455.

The evidence in the instant case shows that on 11 October 1999, two persons wearing masks attempted to rob the RuckerJohn's restaurant in Emerald Isle, North Carolina. One of the perpetrators was carrying a weapon, which was later said to be a BB gun. After attempting to rob the business, the two persons fled the scene, without taking any money or other property from the restaurant or restaurant staff. Thomas Person was subsequently arrested and pled guilty to the attempted armed robbery with a dangerous weapon of RuckerJohn's. At trial in the instant case, Person testified that defendant was in fact the second perpetrator of the attempted robbery of RuckerJohn's; notwithstanding that Person had testified at his federal probation violation proceeding that defendant was not involved in the attempted robbery of RuckerJohn's.

Person had known defendant since they attended junior high school. Person and defendant lived together prior to the RuckerJohn's incident. In addition, Person and defendant served

time together in a federal prison for their involvement in the 1994 Flatwood Outfitters robbery.

Two eyewitnesses (victims in the RuckerJohn's robbery) testified that there were two perpetrators, even though they could not positively identify defendant as one of the perpetrators. Although Person's testimony was the main identity evidence presented by the State, the credibility of Person's testimony is to be determined by the jury, and does not undermine whether sufficient evidence exists to defeat a motion to dismiss.

We conclude that sufficient evidence was presented from which a jury could find that defendant was the second perpetrator. Therefore, this assignment of error is overruled.

III.

Third, defendant reincorporates his argument from section II and argues that the trial court erred in denying his motion to dismiss at the close of all the evidence. For the reasons stated in section II, we overrule this assignment of error.

IV.

Fourth, defendant argues that the trial court erred in refusing to submit to the jury his proposed instruction regarding prior crimes. We disagree.

In *State v. Barton*, the Supreme Court of North Carolina held that a "trial court is not required to frame its [jury] instructions with any greater particularity than is necessary [for a] jury to understand and apply the law. . . ." *State v. Barton*, 335 N.C. 696, 703, 441 S.E.2d 295, 298 (1994) (citation omitted).

Therefore, it is only necessary for the trial court to give instructions so complete and with enough precision as to allow the jury to apply the law to the facts as they find them to be. See *State v. Mustafa*, 113 N.C. App. 240, 244, 437 S.E.2d 906, 908 (1994).

In our case, the trial court provided the following jury instruction as relates to evidence of defendant's involvement in a prior robbery:

Evidence has been received tending to show that at an earlier time the defendant committed robbery with a firearm while utilizing a mask to cover his face. This evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed, and that there existed in the mind of the defendant a plan, scheme or system or design involving the crime charged in this case.

Defendant proposed to add the following language to the above stated jury charge: "The evidence should only be considered to the extent, if any, that there are some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes."

Defendant argues that in light of the fact that Person's testimony was the only evidence offered to show the identity of the second perpetrator, it was error for the trial court to omit the proposed language. Moreover, defendant argues that "giving the requested instruction would have prevented the jury from finding that the Defendant acted in conformity with bad acts from the earlier robbery." We disagree.

We hold that the trial court's jury charge was sufficient: 1) to inform the jury of their duty to determine whether the evidence of the prior robbery helped to establish the identity of the second perpetrator in the instant case, and 2) to help the jury determine whether there existed a common scheme or plan. Therefore, we overrule this assignment of error.

v.

Fifth, defendant argues that the trial court erred in refusing to submit to the jury his proposed instruction regarding witnesses with immunity (i.e., Thomas Person). We disagree.

The trial court instructed the jury as follows:

There is evidence which tends to show that a witness was testifying under an agreement with the prosecutor for a recommendation for sentence concession in exchange for his testimony. If you find that he testified in whole or in part for this reason, you should examine his testimony with great care and caution in deciding whether or not to believe it. If after doing so you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

We first note that there is no evidence to indicate that Person was testifying under a grant of immunity; but rather was testifying pursuant to a sentence concession agreement. Specifically, the district attorney stipulated that it would not oppose a motion for appropriate relief for a reduction in his sentence if he testified truthfully at trial. Notwithstanding, we find that this jury charge was both in conformity with the related pattern jury instruction and was sufficient to inform the jury as

to its duty to weigh the credibility of Person's testimony. Therefore, we overrule this assignment of error.

VI.

Sixth, defendant argues that the trial court erred in denying his motion to set aside the verdict as to attempted robbery with a dangerous weapon. Specifically, defendant argues that evidence was introduced that the weapon used was in fact a BB gun. As no evidence was introduced supporting the conclusion that the BB gun could fire, defendant argues there exists insufficient evidence of one element of attempted robbery with a dangerous weapon – that the victim's life was in danger or threatened. Defendant argues that the trial court therefore erred in denying his motion to set aside the verdict of attempted robbery with a dangerous weapon. We disagree.

A person is guilty of attempted robbery with a dangerous weapon if that person, having in his possession or with the use or threatened use of any weapon, takes substantial steps beyond preparation to unlawfully take personal property from another at any time, whereby the life of the other person is endangered or threatened. See N.C.G.S. § 14-87(a) (2001). In addition, this Court held in *State v. Wiggins* that when a defendant uses a dangerous weapon in the commission of a robbery, absent evidence to the contrary, there attaches the presumption that the victim's life was in fact endangered or threatened. *State v. Wiggins*, 78 N.C. App. 405, 408, 337 S.E.2d 198, 199-200 (1985). When there is evidence tending to show that the weapon used was not a dangerous

weapon, however, the mandatory presumption disappears and the jury may infer that the weapon used was in fact dangerous. *State v. Wilson*, 121 N.C. App. 720, 725, 468 S.E.2d 475, 479 (1996).

In *State v. Fleming*, 148 N.C. App. 16, 557 S.E.2d 560 (2001), this Court addressed whether a BB gun may be considered a dangerous weapon pursuant to N.C.G.S. § 14-87(a). In reaching its decision, the *Fleming* Court stated that it was vacating defendant's conviction for two reasons: 1) the record did not contain "evidence to support the jury's finding that the instrument was a dangerous weapon;" and 2) the jury was not properly instructed "with a definition of a dangerous weapon." *Id.* at 26, 557 S.E.2d at 566. The *Fleming* Court held that "[t]he absence of both these requirements compels us to vacate defendant's conviction of robbery with a dangerous weapon and remand the case to the trial court for resentencing on the lesser included offense of common law robbery." *Id.* at 26, 557 S.E.2d at 566.

In the instant case, defendant has not contended that the jury was improperly instructed on the definition of a dangerous weapon. We do note, however, that the trial court provided the following instruction, defining a dangerous weapon: "A dangerous weapon is a weapon which is likely to cause death or serious bodily injury."

Turning to the evidence presented at trial, the actual BB gun used in the attempted robbery was not found, but the State introduced in evidence a similar air pistol for illustrative purposes. Investigator Chris Cox testified that he had grown up around BB guns and was familiar with guns in general. The

prosecutor asked Investigator Cox, "And would you be willing, knowing what you know about guns and weapons, to put a BB in there and put it to the back of your head and fire it?" Investigator Cox testified, "No, I would not Because I could seriously hurt myself and possibly maybe kill me."

Unlike in *Fleming*, the State in the instant case, presented positive evidence of the capability of a air pistol (similar to the BB gun used in the instant attempted robbery) to cause death or serious bodily injury. Accordingly, this assignment of error is overruled.

VII.

Lastly, defendant argues that the trial court erred in allowing the trial to continue as to the conspiracy charge because the indictment was legally insufficient as a matter of law. Specifically, defendant states that the indictment charged that defendant "did conspire with Thomas Edward Person to commit the felony of attempted robbery with a dangerous weapon" Defendant argues that a person cannot conspire to commit an attempt crime. Therefore, defendant argues that he is entitled to either a new trial or dismissal of the conspiracy charge. We disagree.

"The primary purpose of an indictment . . . is to furnish the accused [with] such a description of the charge against him as will enable him to prepare his defense and also protect him from a further or additional prosecution for the same criminal act." *Blakeney v. State*, 2 N.C. App. 312, 315, 163 S.E.2d 69, 72 (1968) (citations omitted). In the instant case, defendant was charged

with conspiracy to commit attempted robbery with a dangerous weapon, but the trial court instructed the jury as to the charge of conspiracy to commit robbery with a dangerous weapon. Defendant was found guilty of conspiracy to commit robbery with a dangerous weapon.

The gist of the charge is conspiring to commit an unlawful act. See, e.g., *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995) ("criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means"). The remainder of the indictment language serves to put defendant on notice as to what incident the indictment is referencing, and allows defendant to prepare a defense accordingly.

Defendant cites *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000), for the proposition that it is legally impossible for someone to conspire to commit an attempt crime. The Supreme Court of North Carolina held in *Coble* that it was legally impossible for someone to attempt to commit second degree murder because attempt is a specific intent crime and second degree murder is a general intent crime.

In the instant case, attempted robbery with a dangerous weapon is a specific intent crime. Unlike in *Coble*, we do not have presented here, the legal impossibility of finding defendant guilty of having the specific intent to commit a general intent crime. Therefore, we find the holding in *Coble* to be inapplicable to our case facts and disagree with defendant in this regard. This assignment of error is overruled.

NO ERROR.

Judges MARTIN and TIMMONS-GOODSON concur.

Report per 30(e).