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NO. COA01-538

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Wake County
Nos. 98 CRS 107849
98 CRS 107850
99 CRS 31524

RONALD EUGENE WILT,
Defendant-appellant.

Appeal by defendant from judgment entered 29 September 1999 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 25 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Brian L. Blankenship, for the State.

Aguirre Law Office, by Bridgett Britt Aguirre, for defendant-appellant.

BRYANT, Judge.

On 23 October 1998, defendant entered a NationsBank in Raleigh on a warm day wearing a black knit cap pulled down over his head, large sunglasses and a nylon jacket. He handed the teller a note stating:

> I have a bomb that can level this bank. All you have to do is act like this is a transaction and keep calm. Please do not push any alarms or act nervous. No blue packs. Keep enough money for one more transaction because that is the time I need to get away. You have three minutes. By the time I go you can tell someone. I have a police monitor and a remote for the bomb, so don't screw up or we will all go. I don't want to hurt anyone.

The teller gave defendant $2740.

On 4 December 1998 defendant walked down the driveway and into the BB&T bank off Creedmoor Road in Raleigh. According to a teller, the defendant "acted very nervous" looking around while standing at a workstation and scribbling something. When the teller inquired whether he needed the date, defendant mumbled unintelligibly. The teller noticed a bulge under defendant's jacket, and saw what she thought was the handle of a gun. The teller became suspicious and attracted the attention of a customer service representative. When the representative asked defendant if he needed help, he exited the bank, stating that he left his checkbook in the car. A few minutes later the teller and customer service representative saw defendant walking down the driveway toward the bank before he disappeared. At approximately the same time, a police officer patrolling the area in a marked car observed defendant walk toward the bank wearing a pair of large sunglasses and pulling up the hood of his thick, black sweat shirt. The temperature was in the 70s. The police officer thought defendant saw him because defendant then walked away from the front of the bank, "milled around" the side of the building for a few minutes, then walked away from the bank. The officer approached defendant, searched him for weapons and found a .9 mm handgun in defendant's "right back side." The gun was unloaded and did not have a clip in it but was later determined to be operable. Defendant had an empty laundry bag in his front jacket pocket and an envelope containing a note stating:

> I have a bomb that will blow us up if you do wrong things. Just hand me the money, no blue packs. The bomb is in the bank. I have a remote. All I need to do is push a button. You need to give me four minutes when I leave then you can do what you need to do. DON'T PLAY WITH ME! I don't want to hart [sic] anybody. You just stay cool.

Defendant was arrested and subsequently indicted on common-law robbery relating to the 23 October 1998 NationsBank robbery and attempted robbery with a dangerous weapon relating to the 4 December 1998 incident at BB&T. Defendant was also indicted on one count of possession of a firearm by a felon. The case came on for trial by jury on 28 September 1999 and ended on 29 September 1999. The jury returned verdicts of guilty of common-law robbery, attempted common-law robbery and possession of a firearm by a felon. Defendant was sentenced to terms of 10 to 12 months for attempted common-law robbery, 20 to 24 months for common-law robbery and 15 to 18 months for possession of a firearm by a felon. Defendant gave written notice of appeal to this Court on 6 October 1999.

Defendant raises three assignments of error: 1) whether the trial court erred in allowing joinder of the charge of possession of a firearm by a felon; 2) whether the trial court erred in failing to dismiss the charge of possession of a firearm by a felon because the firearm was inoperable; and 3) whether the trial court erred in failing to dismiss the charge of attempted common-law robbery upon defendant's motion to dismiss for insufficient evidence.

I.

Defendant first argues that the trial court erred when it allowed joinder of the possession of a firearm by a felon charge with the common-law robbery and attempted common-law robbery charges. Defendant argues that the 23 October 1998 robbery and 4 December 1998 attempted robbery could rationally be considered as a series of acts or transactions constituting parts of a single scheme or plan, but the possession of the firearm can not be so considered. We disagree.

Defendant cites only to N.C.G.S. § 15A-926, which states: "Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C.G.S. § 15A-926 (2001). Therefore, under the statute,

> a two-step analysis is required for all joinder inquiries. First, the two offenses must have some sort of transactional connection. Whether such a connection exists is a question of law, fully reviewable on appeal. If such a connection exists, consideration then must be given as to "whether the accused can receive a fair hearing on more than one charge at the same trial," i.e., whether consolidation "hinders or deprives the accused of his ability to present his defense." This second part is addressed to the sound discretion of the trial judge and is not reviewable on appeal absent a manifest abuse of that discretion.

State v. Montford, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250 (holding that both steps satisfied) (citations omitted), *cert.*

denied, 353 N.C. 275, 546 S.E.2d 386 (2000).

We first consider whether the offenses were transactionally related. In *State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981), defendant and another man entered a bank in Wilmington, North Carolina, shot one customer and exited taking money and checks, and using a stolen pickup truck to flee the scene. A couple of months later, while conducting surveillance of another stolen pickup truck, police observed three males with their faces covered retrieving the truck. Police chased the occupants but they eluded capture.

The defendant was subsequently arrested and indicted for armed robbery of a bank, larceny and conspiracy to commit a robbery of a second bank. The State moved to consolidate the charges on the grounds that the pickup trucks were stolen to be used for transportation to and from the robberies. *Id.* at 127, 282 S.E.2d at 452. The trial court allowed the consolidation. *Id.* The conspiracy charge was dismissed. The defendant was convicted of felonious larceny of an automobile and robbery with a dangerous weapon. On appeal, the defendant argued that the trial court erred in consolidating the charges. Our Supreme Court held that the trial court did not abuse its discretion in consolidating the charges because there was a transactional link between the offenses, namely "a single scheme to commit bank robberies . . . ." *Id.* at 127, 282 S.E.2d at 453.

In the instant case, defendant was indicted on one count each of possession of a firearm by a felon, common-law robbery and

attempted robbery with a dangerous weapon. Defendant concedes that the robbery and attempted robbery could "rationally be considered as a series of acts or transactions connected together as a part of a single plan . . . ," but argues that the possession of a firearm by a felon charge is unrelated. We disagree with defendant's assertion that the possession of a firearm by a felon charge is unrelated. The robbery and attempted robbery occurred only six weeks apart. In each case, defendant used or was prepared to use a note instructing bank employees to give him money and threatening to detonate a bomb if the employees did not cooperate with him. Further, in the attempted robbery of BB&T, defendant carried a firearm in his pocket as well as the note regarding a bomb. In fact, defendant was initially charged with attempted robbery with a dangerous weapon due to his possession of the gun during acts committed while attempting to rob the BB&T. We therefore conclude that there was a transactional link between the offenses in that there existed a single scheme to commit bank robberies by threatening the use of weapons.

We next examine whether joinder prevented defendant from receiving a fair trial. We conclude that it did not. Defendant offers no authority in support of his "argument" that he was prejudiced by joinder of the charges, and we find no indication in the record that defendant was prejudiced. Defendant fails to show that his status as a convicted felon and his possession of a handgun during his attempted bank robbery prejudiced his ability to present a defense or to otherwise receive a fair trial. Moreover,

defendant has failed to show that the trial court abused its discretion in allowing joinder. Therefore, this assignment of error is overruled.

II.

Defendant next argues that the trial court erred in failing to dismiss the possession of a firearm by a felon charge upon testimony that the firearm was inoperable. Specifically, defendant argues that it is uncontroverted that the gun would not fire without a clip in it, and that inoperability is an affirmative defense. We disagree.

A convicted felon may not own or possess a handgun or other firearm. N.C.G.S. § 14-415.1 (2001). Defendant cites to *State v. Jackson*, 139 N.C. App. 721, 535 S.E.2d 48 (2000), *rev'd in part by* 353 N.C. 495, 546 S.E.2d 570 (2001), for the proposition that inoperability constitutes an affirmative defense to possession of a firearm by a felon. *Jackson*, 139 N.C. App. at 726, 535 S.E.2d at 51. This Court's decision in *Jackson*, however, was reversed by our Supreme Court before defendant filed his brief. *See State v. Jackson*, 353 N.C. 495, 546 S.E.2d 570 (2001), *rev'g in part*, 139 N.C. App. 721, 535 S.E.2d 48 (2000). In reversing this Court, our Supreme Court held that "inoperability of a 'handgun or other firearm' is not an affirmative defense to a charge of possession of a firearm by a felon under N.C.G.S. § 14-415.1." *Id.* at 503, 546 S.E.2d at 575. In reaching that holding, the Court stated,

> We do not agree with the illogical conclusion that our legislature intended that a felon who is in possession of an unloaded firearm is not in violation of the prohibition of possession

> of firearms by felons. "'It begs reason to assume that our Legislature intended to allow convicted felons to possess firearms so long as they are unloaded, or so long as they are temporarily in disrepair, or so long as they are temporarily disassembled, or so long as for any other reason they are not immediately operable.'"

Id. at 502, 546 S.E.2d at 574 (quoting *State v. Padilla*, 978 P.2d 1113, 1115 (Wash. Ct. App. (1999)). In accord with the Supreme Court opinion in *Jackson*, we hold that inoperability of a firearm is not an affirmative defense to a charge of possession of a firearm by a felon. Therefore, we overrule this assignment of error.

III.

In his third assignment of error, defendant argues that the trial court erred when it failed to dismiss the attempted common-law robbery charge upon defendant's motion to dismiss for insufficient evidence. Specifically, defendant argues that the State's evidence did not show that defendant's conduct went beyond mere preparation to commit common-law robbery. We disagree.

"'Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.'" *State v. Hoover*, 14 N.C. App. 154, 156, 187 S.E.2d 453, 454 (1972) (quoting *State v. Stewart*, 255 N.C. 571, 122 S.E.2d 355 (1961)). "'An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission.'" *State v. Bailey*, 4 N.C. App. 407, 412, 167 S.E.2d 24, 27 (1969) (quoting *State v. Surles*, 230

N.C. 272, 52 S.E.2d 880 (1949)). An overt act "'need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.'" *State v. Miller*, 344 N.C. 658, 668, 477 S.E.2d 915, 921 (1996) (quoting *State v. Price*, 280 N.C. 154, 184 S.E.2d 866 (1971)).

As to this assignment of error, defendant challenges the sufficiency of the evidence only as to the 4 December 1998 attempted common law robbery. Defendant cites to *State v. Jacobs*, 31 N.C. App. 582, 230 S.E.2d 550 (1976), in support of his argument that he did not attempt to rob the bank. In *Jacobs*, the defendant entered a hardware store. When the proprietor asked what he wanted the defendant stared at her. When she asked again, the defendant either pulled up his coat or the proprietor saw a pistol sticking out of his pants. When she screamed for help, the defendant ran out the door and rapidly walked away. The defendant was arrested for attempted armed robbery. At trial, the defendant testified that he entered the hardware store to purchase bullets for the pistol. The defendant further testified that he walked away when he realized he did not have enough money. The defendant was convicted and appealed.

This Court concluded that the evidence merely placed the defendant in the hardware store with a pistol in his belt. The defendant did not have an accomplice, did not indicate or threaten

that he would use the gun, and did not demand any money or other property. The *Jacob's* Court stated that

> [t]he evidence raises a suspicion that defendant may have intended to commit a robbery or other crime but falls short of showing an overt act in furtherance of an intent to rob. If the evidence is only sufficient to raise a suspicion or conjecture as to whether the offense charged was committed, the motion for nonsuit should be allowed even though the suspicion so aroused is strong.

Id. at 584, 230 S.E.2d at 551-52.

Jacobs is distinguishable. In the instant case the State's evidence did more then raise a strong suspicion that defendant intended to commit a robbery. The State's evidence tended to show the following. On 4 December 1998, defendant entered the bank and went to a workstation where he acted "very nervous" and created suspicion among bank personnel, particularly when a teller thought she saw a gun in his pocket. When defendant was approached to see if he needed help, defendant said he left his checkbook in the car and immediately exited the bank. In fact, a subsequent search of defendant and his vehicle revealed that he did not have any checks or other banking materials. A few minutes after he left, bank employees again saw defendant walking down the driveway toward the bank before he suddenly disappeared. At approximately the same time, a police officer patrolling the area in a marked car observed defendant walk toward the bank wearing a pair of large sunglasses and pulling up the hood of his thick, black sweat shirt. It was a warm day. The officer surmised that defendant must have seen him because defendant walked away from the front of the bank, "milled

around" the side of the building for a few minutes, then walked away from the bank. Defendant was then stopped and searched and found to have an unloaded .9 mm handgun in his waist belt, a laundry bag in his front jacket pocket, and a computer-generated note (which demanded money with "no blue packs" and threatened to detonate a bomb) in an envelope in defendant's right front pocket. It is very clear that defendant's actions were more than mere preparation and that the purpose of his actions in and around the bank was to commit a robbery. We therefore conclude that this evidence was sufficient to show that on 4 December 1998 defendant attempted to commit common-law robbery of the BB&T bank. Accordingly, this assignment of error is overruled.

Based on the foregoing, we find no error.

NO ERROR.

Judges EAGLES and HUDSON concur.

Report per rule 30(e).