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NO. COA02-179

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 99 CRS 49536
99 CRS 49539

TIJUAN MICHAEL WILSON,
Defendant

Appeal by defendant from judgments entered 13 July 2001 by Judge Lindsay R. Davis, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 29 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

William D. Spence for defendant-appellant.

BRYANT, Judge.

Defendant Tjuan Michael Wilson appeals his convictions for first-degree murder and robbery with a dangerous weapon.

The State's evidence tended to show the following: On 23 October 1999, defendant and his friends Cornell Davis, Quarlton Dean, and Kentrell McIntyre were gathered on the grounds of the Forest Ridge apartment complex in Winston-Salem, North Carolina. Rodney Deon Mills approached defendant and the others wishing to purchase marijuana. Defendant and his three friends led Mills behind one of the apartment buildings, took his money, and

assaulted him. As Mills fled, Davis shot him in the back. Mills subsequently died as a result. After the jury found defendant guilty of first-degree (felony) murder and robbery with a dangerous weapon, the trial court arrested judgment on the robbery conviction and sentenced defendant to life without the possibility of parole.

On appeal, defendant argues that the trial court erred: I) in allowing the State to impeach and ask leading questions of its own witness; II) denying his motion to dismiss; III) in not intervening *ex mero motu* in the State's closing argument; IV) in failing to instruct the jury on the lesser-included offense of Common Law Robbery; V) in failing to properly instruct the jury as to the "mere presence" doctrine; and VI) in failing to dismiss the case based upon an unconstitutional, short-form first-degree murder indictment.

I.

Defendant argues that the trial court improperly allowed the State to ask leading questions of and impeach Quarlton Dean. Dean testified for the State pursuant to a plea agreement. According to Dean, after Mills was led around one of the apartment buildings, Davis pulled out a gun, pointed it at Mills, and said "give it up." Dean testified that Mills then dropped his money and turned, at which time Davis fired a shot. The prosecutor then began to question Dean concerning whether he was part of the plan to rob Mills, to which Dean answered no and further stated there was no

plan. In response, the prosecutor asked, "You mean all of this just happened out of the clear blue sky?" Dean answered yes, and the prosecutor began to question Dean about a prior statement.

Upon defendant's objection, the trial court excused the jury, allowed the State to tender Dean as a hostile witness, and subsequently allowed the State to question him in front of the jury concerning a prior statement to the prosecutor. During that examination, Dean affirmed that in his prior statement, he told the prosecutor that he, defendant, and the others "bum rushed" Mills and that during the incident, defendant and McIntyre surrounded Mills, standing on both sides of him. Dean also affirmed that he had several opportunities to tell police what actually happened, but on those occasions he "stonewalled them" because he did not want to be known as a "snitch." Dean denied that he was doing the same during his direct examination. On cross-examination, Dean admitted that a statement he made to a law enforcement officer two days after the shooting, in which he stated that he was at the apartment complex across a parking lot from the shooting, was not true.

Rule 607 of the North Carolina Rules of Evidence provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." N.C.G.S. § 8C-1, Rule 607 (2001). Furthermore, Rule 611(c) allows a hostile witness to be interrogated by leading questions. N.C.G.S. § 8C-1, Rule 611(c) (2001). Given these evidentiary rules, the superior court clearly had the authority to accept the State's witness, Dean, as a hostile

witness, and thus permit the State to ask him leading questions. The trial court's ruling on this evidentiary issue is reversible only upon a finding of an abuse of discretion. *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d. 55, 59 (1986).

Defendant relies on *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989), to argue that the trial court erred in allowing the State to use Dean's prior inconsistent statement for impeachment purposes. According to defendant the trial court erred in admitting Dean's prior statement because, under *Hunt*, impeachment by a prior inconsistent statement cannot be used to bring into evidence a statement that otherwise would not have been admitted. *Id.* at 348, 378 S.E.2d at 757.

First, we disagree with defendant's application of the holding in *Hunt*. In *Hunt*, the State's hostile witness denied giving a particular prior inconsistent statement, and the State presented the substance of the prior statement through the testimony of another witness. The *Hunt* Court noted that, as with any cross-examination, "extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern matters collateral to the issues," including "testimony contradicting a witness's denial that he made a prior statement when that testimony purports to reiterate the substance of the statement." *Id.* (citations omitted). These are simply not the circumstances presented by the present case. Dean never denied and in fact admitted making the prior statement. See *State v. Riccard*, 142 N.C. App. 298, 542 S.E.2d 320 (distinguishing *Hunt* and holding

that State's impeachment of its own witness is proper where the witness either admitted making prior statement or testified that he did not remember making prior statement), *cert. denied*, 353 N.C. 530, 549 S.E.2d 864 (2001); *State v. Wilson*, 135 N.C. App. 504, 506-07, 521 S.E.2d 263, 264-65 (1999) (holding same where witnesses admitted making statements). Nor did the prosecutor introduce extrinsic evidence of Dean's prior statement.

More relevant to the argument raised by defendant is the *Hunt* Court's examination of "the difficulty with which a jury distinguishes between impeachment and substantive evidence." *Hunt*, 324 N.C. at 349, 378 S.E.2d at 757. The *Hunt* Court recognized that "unsworn prior statements are not hearsay when not offered for their truth." *Id.* However, given the possibility of jury confusion inherent in the admission of such statements, the Court was compelled to follow "the 'overwhelming weight of [federal] authority' with regard to the use of the identical Fed. R. Evid. 607" *Id.* (alteration in original) (citation omitted). As such, our Supreme Court found that the trial court abuses its discretion in allowing the State to call a witness where the State knows his testimony will be useless, just to "'introduce hearsay evidence against the defendant in the hope that the jury would miss [or ignore] the subtle distinction between impeachment and substantive evidence[.]'" *Id.* at 349-50, 378 S.E.2d at 758 (quoting *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984)).

Here again, the circumstances addressed in *Hunt* are not present in the instant case. Given that Dean was testifying pursuant to a plea agreement and further given his prior statement to the prosecutor indicating that the robbery involved the entire group, including defendant, there was no indication that the prosecutor attempted to create a subterfuge to introduce otherwise inadmissible evidence. In fact, as noted *supra*, when presented with the impeaching evidence, defendant affirmed that he had indeed made the prior statement. Under these circumstances, we cannot conclude that the trial court abused its discretion in allowing the prosecutor to lead and impeach his own witness with the prior inconsistent statement. Defendant's assignment of error is overruled.

II.

Next, defendant argues that the trial court erred in failing to grant his motion to dismiss made at the close of all the evidence. Specifically, defendant contends that the State presented insufficient evidence that he acted together with McIntyre, Davis or anyone else with the common purpose to rob or murder Mills. We disagree.

A trial court should deny a defendant's motion to dismiss if there is substantial evidence: 1) of each essential element of the charged offense, and 2) of the defendant's being the perpetrator of the crime. *State v. Cockerham*, 129 N.C. App. 221, 223, 497 S.E.2d 831, 832 (1998). Substantial evidence 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, 265 S.E.2d 164, 169 (1980) (citations omitted). In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975).

To prove that a defendant is guilty of robbery with a dangerous weapon, the State must show: 1) an unlawful taking of or 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. N.C.G.S. § 14-87(a) (2001). Under the "acting in concert" doctrine, where a person is present at a crime scene and the evidence sufficiently shows that he acted together with another performing the acts necessary to commit a crime, that person is guilty as a principal. *State v. Lea*, 126 N.C. App. 440, 447, 485 S.E.2d 874, 878 (1997).

We find that the State presented substantial evidence that defendant participated in Mills' robbery. Aaron Stone, a resident of the apartment complex, testified for the State that earlier in the evening of the shooting, defendant, McIntyre, and Davis were gathered outside the complex with a gun, during which time McIntyre fired a shot. This evidence tends to show that defendant knew one of his cohorts had a gun some time prior to the robbery. Dean testified that defendant was standing around Mills as Davis pointed the gun and asked Mills to drop his money, after which McIntyre and defendant assaulted Mills. According to Stone, defendant and

others formed a "little circle" around Mills, after which defendant, McIntyre, and Davis then "jumped on [Mills]" and a struggle ensued. Given the above-noted testimony, we find that the State's evidence was sufficient for the jury to find defendant guilty of robbery with a dangerous weapon.

Defendant also contends that there was insufficient evidence to find him guilty of first-degree murder. Specifically, defendant argues that just because he was present at and perhaps even sympathetic to the murder, he was not guilty based on the "mere presence" doctrine. The "mere presence" doctrine provides that where a defendant is present "at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense." *State v. Sanders*, 288 N.C. 285, 290, 218 S.E.2d 352, 357 (1975).

As noted above, the evidence indicates that defendant actively participated in the robbery and therefore was not "merely present" at the crime scene. Furthermore, not only is a person "acting in concert" punished as if he were the principal, that person is further "guilty of any other crime committed by the [principal] in pursuance of the common purpose . . . or [was] a natural or probable consequence thereof." *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971) (finding no error in recitation of jury instruction as to "acting in concert" doctrine), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972).

Robbery with a dangerous weapon is an authorized predicate felony for first-degree murder based on the felony murder rule. N.C.G.S. § 14-17 (2001).

A killing is committed in the perpetration or attempted perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.

State v. Hutchins, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981) (citing *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972)). Therefore, to prove the defendant committed first-degree murder under the felony murder rule, the State need only prove that the predicate felony and murder were part of a continuous chain of events and "occur[red] in a time frame that can be perceived as a single transaction." *State v. Thomas*, 329 N.C. 423, 434-35, 407 S.E.2d 141, 149 (1991).

In the case *sub judice*, Dean testified that after Mills dropped his money, he turned slightly and was shot by Davis. Stone similarly testified that twenty to thirty seconds passed between when McIntyre first hit Mills and the fatal gunshot. Given the evidence indicating a short time-frame and continuous chain of events between the robbery and murder, we find that there was sufficient evidence to find defendant guilty of first-degree murder under the felony murder doctrine. Accordingly, defendant's contention that the trial court should have granted his motion to dismiss is without merit.

III.

Defendant next argues that the trial court erred in not intervening *ex mero motu* during portions of the State's closing argument in which the prosecutor commented on the credibility of State's witness, Quarlton Dean and defense witness, Rufus Green. During closing arguments, the prosecutor argued the following as to Dean:

What I submit [Quarlton Dean] did was downplay his involvement in this crime which he did from the very beginning. Is that such a shock to you that when Detective Craven went to see him for the first time he stonewalled him? My gosh, the president of the United States has stonewalled things. Does it surprise you that somebody who participated in a crime denied any involvement in that crime in the beginning? Well this defendant did to the eyewitness. Said I didn't have nothing to do with it.

Testifying for defendant, Rufus Green claimed to have seen the robbery in question while driving away from the apartment complex. Green testified that after McIntyre hit Mills, the victim walked toward defendant, who "backed off, . . . about three steps, . . . [like he didn't] want nothing to do with it . . . with his hands open." Green did not report the incident to the police and later visited defendant in jail.

In referencing Green's testimony, the State told the jury during its closing argument, "[I]f you believe [Green's] testimony, which I submit is manufactured, then you have to consider why did they go to that extreme to manufacture that testimony? . . . [T]hey

went to the extremes to manufacture that testimony because this defendant was doing exactly what the State's witness said he was doing." Defendant did not object to either of the above portions of the State's closing argument.

When a defendant challenges on appeal the substance of the State's closing argument not objected to at trial, he must show that the remarks were so *grossly improper* that the trial court should have intervened *ex mero motu*. *State v. Call*, 349 N.C. 382, 419-20, 508 S.E.2d 496, 519 (1998). To prove that an argument is grossly improper, defendant must establish "that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 45, 506 S.E.2d 455, 467 (1998) (citation omitted).

While we do not necessarily condone the prosecutor's statements, we do not find them so grossly improper as to require the trial court to intervene *ex mero motu*. Concerning the prosecution's argument as to Dean, attacking his credibility was entirely proper given that he was impeached, admitted to lying, and defendant's own attorney attacked his credibility during her closing argument. Furthermore, Dean himself admitted to "stonewalling" law enforcement in his direct testimony. Our Supreme Court has recently held that similar references, by a prosecutor to a high-profile crime in another state, did not warrant the trial court's *ex mero motu* intervention. *State v. Robinson*, 355 N.C. 320, 339, 561 S.E.2d 245, 257 ("We do not believe that the prosecutor's zealous advocacy and hyperbolic

statements merited the trial court's intervention."), *cert. denied*, ___ U.S. ___, ___ L. Ed. 2d ___ (2002).

Further, the prosecution's reference to Green's testimony as "manufactured" by Green and defendant did not warrant intervention. The above-noted remarks could reasonably be inferred from the evidence presented that Green visited defendant in jail but did not report the incident to police. Furthermore, the prosecution's remarks were clearly prompted by comments during the defense's closing arguments that Green did not have an "axe to grind," that he was disinterested, and that he was "interested in seeing justice done." Under all of these circumstances, we do not find the prosecutor's closing remarks to be so grossly improper as to require the trial court to intervene *ex mero motu*. Accordingly, defendant is not entitled to relief.

IV.

Defendant next assigns error to the trial court's failure to instruct the jury on common law robbery, a lesser-included offense to robbery with a dangerous weapon. We find that any error in the court's failure to so charge the jury was invited.

When an error is invited by a defendant's own conduct at trial, the defendant is not entitled to relief on that ground on appeal, even under plain error review. *State v. Wilkinson*, 344 N.C. 198, 213-214, 474 S.E.2d 375, 383 (1996); *see also* N.C.G.S. § 15A-1443(c) (2001) ("A defendant is not prejudiced . . . by error resulting from his own conduct."). Our Supreme Court has

previously held that "a defendant may not decline an opportunity for instructions on a lesser-included offense and then claim on appeal that failure to instruct on the lesser-included offense was error." *State v. Gay*, 334 N.C. 467, 489, 434 S.E.2d 840, 852 (1993) (citations omitted) (finding no error where court asked defendant if there was a lesser-included offense to the charged crime, and in response, defendant's attorney replied "[n]ot based on the evidence, I don't think so your honor").

During the charge conference, the court asked defendant whether he wanted to include the lesser-included offense of common law robbery in the jury instructions. In so doing, the court noted its own belief that the gun could have been pulled after the money was dropped. In response, defendant's attorney stated the following:

Your Honor, the defense isn't requesting it. Your Honor has obviously pointed out that you're under an obligation. If you believe it's supported by the evidence, then Your Honor has to give it. I'll be frank with the Court that's not a theory that we proceeded on during this case. I don't think the State has looked at it that way and I don't think we have either. But, if that's something Your Honor feels must be given to the jury, we'll go forward that way.

Given the defense's response to the trial court's offer for a lesser-included offense instruction, we conclude that any error in the court's failure to do so was invited and that defendant cannot now argue that such error entitles him to relief.

Defendant argues that the trial court erred in improperly instructing the jury on the "mere presence" doctrine. The State objected to defendant's proposed "mere presence" instruction and offered a compromise instruction. Defense counsel responded, "If Your Honor is inclined to give the [compromise instruction], I think we can accept [it]." Given defendant's clear acquiescence to the State's compromise instruction, we find any error in the court's decision to accept the instruction to be invited error. See *Wilkinson*, 344 N.C. at 213-14, 474 S.E.2d at 383. This argument is without merit.

VI.

Briefly, we address defendant's argument that his short-form first-degree murder indictment was unconstitutional. As acknowledged by defendant, our Supreme Court has previously decided, in a number of cases, that short-form murder indictments are constitutional. See *State v. Holman*, 353 N.C. 174, 540 S.E.2d 18 (2000) (holding that short-form indictment does not impinge upon defendant's Sixth Amendment right to notice or his rights under Article I, Section 19 of North Carolina Constitution), *cert. denied*, ____ U.S. ____, 151 L. Ed. 2d 181 (2001); *State v. Braxton*, 352 N.C. 158, 175, 531 S.E.2d 428, 438 (2000) (holding that "premeditation and deliberation need not be separately alleged in the short-form indictment"), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Because we are bound by those decisions, see *State v. Parker*, 140 N.C. App. 169, 172, 539 S.E.2d 656, 659 (2000), *review denied*, 353 N.C. 394, 547 S.E.2d 37 and *cert.*

denied, 532 U.S. 1032, 149 L. Ed. 2d 777 (2001), we conclude that the above-noted argument is without merit.

CONCLUSION

For the reasons stated above, we find no error.

NO ERROR.

Judges GREENE and MARTIN concur.

Report per Rule 30(e).