NO. COA02-273

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

CHARLES DAVID BECTON,
Defendant

Wake County
No. 98CRS64472, 99CRS13
99CRS1280, 63109-10

Appeal by defendant from judgment entered 9 August 1999 by Judge Ronald Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

John T. Hall for defendant-appellant.

EAGLES, Chief Judge.

Defendant was charged with felony possession of a stolen motor vehicle and four counts of robbery with a dangerous weapon. The State's evidence tends to show that on the afternoon of 24 November 1998 an unidentified male, wearing a blue and white plaid flannel shirt and white t-shirt underneath, an allergy mask over his face and a blue ball cap on his head, and carrying a small green canvas bag, entered the Branch Banking and Trust Company (BB&T) on Creedmoor Road in Raleigh, North Carolina. Upon entering the bank, the man approached Terry Frye, a bank customer service

representative who was working as a teller on that day, while extracting a silver handgun from the green bag that he was carrying. The gunman demanded money. Frye believed the gun to be real, and therefore, gave the robber approximately $3,000.00. The gunman then moved to the next teller, Amy Preddy, and again demanded and was given money. The masked man then exited the bank. The bank's security camera recorded the entire robbery. Frye and Preddy observed the robber drive away in what looked like a silver Nissan. Frye was unable to obtain the license plate number from the vehicle. At trial, Frye and Preddy identified defendant as the person who robbed the Creedmoor Road BB&T on 24 November 1998.

On the afternoon of 21 December 1998, Mark Williams observed an unattended, but idling champagne-colored, metallic Nissan Maxima in the Summit Credit Union parking lot in Raleigh, North Carolina. As Williams entered a nearby elevator, he noticed a man, reading a newspaper standing on the walkway near the credit union's entrance. Williams described the man as approximately 6 feet in height, stocky build, and clean shaven. The man was wearing hospital scrub type pants, light tan Timberland boots and a jacket, with a canvas bag on the floor next to his feet. Williams became suspicious of the man when he returned to the parking lot and the man was still there. Williams left and used his cellular telephone to call back to the Summit Credit Union and tell bank officials about the suspicious man. Later that same afternoon, Williams was called by Raleigh police officers. The officers wished to speak with

Williams about the suspicious man he had seen earlier, since the credit union had been robbed. Williams subsequently identified defendant as the suspicious man who had earlier been standing outside of the credit union and credit union employees identified defendant as the person who robbed the credit union.

Trooper J.K. Holland of the North Carolina Highway Patrol located the gold Nissan Maxima utilized by defendant to flee the scene of the Summit Credit Union robbery in the Rex Hospital parking lot. Agent Brian Robert Hotchkiss of the City-County Bureau of Investigation collected five fingerprints from the vehicle. These fingerprints were subsequently determined to match those of defendant. Police officers later determined that the vehicle found in the hospital parking lot had been stolen from its owner Sean Kohler on 3 November 1998 from the Books-A-Million parking lot in Raleigh.

On 21 January 1999, defendant robbed the Carolina Telco Federal Credit Union located at 2509 Creedmoor Road in Raleigh. Linda Bennett, the credit union manager, and Fran Donovant were operating the front counter when defendant entered with a coarse piece of fabric over his head, carrying a small silver gun and demanded money. Defendant also wanted to know the location of the safe. When Bennett and Donovant turned to go toward the safe, defendant shot Donovant and fled the scene. Later, on the same day, Bennett positively identified defendant as being the man who robbed the credit union. Bennett also identified defendant as the robber at trial.

After fleeing the scene of the Carolina Telco robbery in a white Chevy Blazer, defendant led Raleigh police officers on a high speed chase. Defendant lost control of the vehicle he was driving. When the vehicle came to a halt, defendant jumped out of the vehicle while clutching a black bag to his chest and ran up a hill. However, after running up the hill and discovering that there was nowhere to run, defendant gave up. He dropped the black bag that he was carrying, and was then handcuffed and placed under arrest. While Officer William Potter of the Raleigh Police Department was handcuffing defendant, defendant inquired if the lady was okay and stated that he did not mean to shoot the lady. Police found a gun lying in the grass where defendant originally jumped out of the vehicle and discovered that the black bag that defendant had been clutching contained a large amount of United States currency. In processing the vehicle, police officers also found a green backpack and black leather portfolio. Additionally, a blue baseball cap with white lettering reading CT was found on the floorboard behind the driver's seat and a black nylon stocking cap was located in the front passenger's seat.

Defendant testified at trial, denying his participation in any of the robberies. He testified that he was visiting his father in Orlando, Florida at the time of the BB&T robbery on 24 November 1998, but could not provide the specific dates of travel or any receipts for his bus tickets. Defendant stated that he earned an adequate income from selling items on eBay, an Internet auction site. Defendant maintained that he purchased the white Blazer in

which he was apprehended at the same time that the 21 December 1998 Summit robbery occurred, but admitted that his notarized signature on the vehicle's bill of sale was dated 22 December 1998. He denied ever driving the Nissan Maxima involved in the BB&T and Summit robberies. In fact, defendant stated that he found the black bag full of money at a computer school building in which he had been. The black stocking cap found in the Blazer was stated by defendant to be a "wave cap," used to produce hair waves. He admitted that the baseball cap found in the Blazer at the time of his arrest belonged to him, but denied that the gun found at the scene was his. Additionally, while defendant initially denied having asked police officers about the condition of the woman who had been shot during the 21 January 1999 Summit robbery, he later admitted to asking about her "out of sheer concern" because officers told him someone had been shot in an armed robbery. Defendant explained that he ran from police because he was on probation.

Defendant's wife testified and corroborated defendant's testimony that he was in Orlando, Florida on 24 November 1998. She also indicated that the Blazer was bought on 21 December 1998. Defendant's wife, however, admitted that she had no knowledge of defendant doing any work on the computer.

A jury found defendant guilty as charged and the trial court sentenced him to a total of four consecutive terms of 96-125 months imprisonment. Defendant appeals.

On appeal, defendant first argues that the trial court erred in allowing the State to admit, over his objection, evidence of the robbery of the Carolina Telco Credit Union on 21 January 1999. Defendant contends that the evidence was inadmissible under N.C.R. Evid. 404(b) and 403. We disagree.

Rule 404(b) provides that while relevant evidence of other crimes, wrongs or acts may not be admissible as character evidence to prove that the defendant acted in conformity with those other events, such evidence "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.R. Evid. 404(b). Rule 404(b) has been noted to be a rule of *inclusion*, and not exclusion. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Rule 404(b) evidence is "subject to the weighing of probative value versus unfair prejudice mandated by Rule 403." *State v. Agee*, 326 N.C. 542, 549, 391 S.E.2d 171, 175 (1990). To that end, our Supreme Court noted in *State v. Coffey*, that evidence which is probative of the State's case is necessarily prejudicial to the defendant; "the question is one of degree." 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990). "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *Id.*

In the instant case, prior to jury selection the trial court heard evidence relating to defendant's arrest, which included evidence regarding the 21 January 1999 robbery of the Carolina Telco Credit Union. The State presented a summary of the evidence

which tended to show that defendant was alleged to have committed a series of three bank robberies -- the 24 November 1998 robbery of the BB&T on Creedmoor Road, the 21 December 1998 robbery of the Summit Credit Union, and the 21 January 1999 robbery of the Carolina Telco Credit Union. During the first robbery, defendant wore a blue baseball cap and carried a green backpack similar to the ones found in defendant's vehicle after the 21 January 1999 Carolina Telco Credit Union robbery, police chase and resulting arrest. During the second robbery, defendant wore a black nylon stocking similar to that found in the vehicle after the 21 January 1999 bank robbery and police chase, which resulted in his arrest. Finally, the black bag that defendant clutched after the 21 January 1999 police chase was similar to the bag described by Mark Williams and the bank tellers from Summit Credit Union. Notably, all three of the robberies involved banking institutions, situated within a few miles of each other. In each robbery, the assailant wore a cap or some other head cover, used some implement to cover a portion of his face, brandished a small silver gun while demanding money and carried similar bags to collect the stolen money. Finally, in all of the robberies, there were only two tellers on duty at the time of the robbery's commission.

We conclude that evidence of the 21 January 1999 robbery of Carolina Telco Credit Union, the subsequent police chase and capture of defendant, and the search incident to his lawful arrest was admissible to show defendant's identity, common plan, scheme or modus operandi under Rule 404(b). Further, the evidence regarding

the 21 January 1999 robbery of Carolina Telco also tends to "complete the story," so as to qualify under the pre-Rules of Evidence chain of circumstances exception. *See State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998) (citing *Agee*, 326 N.C. at 548, 391 S.E.2d at 174-75).

Defendant next argues that the trial court improperly admitted the evidence in violation of N.C.R. Evid. 403. After hearing the State's proffer and arguments from counsel, the trial court allowed the State's motion in limine. In doing so the court stated:

> So Mr. DA, your motion is allowed as to that proffered evidence for the limited purposes under 404B . . . . In regards to Rule 403, . . . the Court is going to find that the probative value on behalf of the State is substantially outweighed by any danger or unfair prejudice to the Defendant, and will allow it in review in Rule 403 also.

Defendant contends the trial court's statement that "the probative value on behalf of the State is substantially outweighed by any danger of unfair prejudice," supports his argument that the trial court erred in admitting the evidence. We disagree.

A closer review of the record reveals that this statement was mere *lapsus linguae*. Immediately after the misstatement, the trial court stated that the evidence of the 21 January 1999 robbery of Carolina Telco Credit Union and the circumstances relating to defendant's capture would also be admitted under Rule 403. Therefore, when read in context, it is clear the language to which defendant points was nothing more than a slip of the tongue on the part of the trial court. Although the evidence was necessarily prejudicial, we conclude that the trial court correctly concluded

that the probative value of the evidence was not substantially outweighed by its risk of unfair prejudice. Therefore, the trial court did not abuse its discretion in admitting the evidence.

Defendant next argues that the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon in 99CRS63110, the 21 December 1998 armed robbery of Bonnie Driver at the Summit Credit Union. Again, we disagree.

"In reviewing the denial of a defendant's motion to dismiss, this Court determines only whether the evidence adduced at trial, when taken in the light most favorable to the State, was sufficient to allow a rational juror to find defendant guilty beyond a reasonable doubt on each essential element of the crime charged." *State v. Cooper*, 138 N.C. App. 495, 497, 530 S.E.2d 73, 75, *aff'd per curiam*, 353 N.C. 260, 538 S.E.2d 912 (2000). The State must be given the benefit of every favorable inference to be drawn from the evidence. *Id.* Contradictions and discrepancies must be resolved in favor of the State. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001).

To obtain a conviction of robbery with a dangerous weapon, the State must show that defendant (1) unlawfully took or attempted 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. *State v. Hartman*, 344 N.C. 445, 473, 476 S.E.2d 328, 344 (1996), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997). This Court recently reiterated, "'[w]hen a person commits a robbery

by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, the law presumes, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be -- an implement endangering or threatening the life of the person being robbed.'" *State v. Duncan*, 136 N.C. App. 515, 519, 524 S.E.2d 808, 811 (2000)(quoting *State v. Joyner,* 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985)). The gravaman of the offense is force or intimidation along with the use or threatened use of a firearm. *Hartman*, 344 N.C. at 473, 476 S.E.2d at 344.

The evidence in the light most favorable to the State tends to show that defendant took a certain sum of money from Bonnie Driver on 21 December 1998 and that he brandished what looked like a gun. Although, Driver testified that she was not sure that the gun was real, we note that the manner in which defendant used the gun during the December 1998 robbery supports a legal presumption that it was indeed a firearm. This presumption, along with the testimony regarding defendant's use of a gun during other robberies, and the subsequent recovery of a gun fitting Driver's description upon defendant's arrest, certainly supports a reasonable inference of defendant's guilt. Moreover, although Driver testified to being more shocked than frightened during the robbery, this testimony does not negate the fact that Driver's life was endangered or threatened -- particularly in light of the fact that defendant did in fact shoot the second teller who was working alongside Driver during the robbery. Notably, Driver's reaction

was shock rather than fear because she had been alerted earlier to the presence of a suspicious person just outside the bank. We conclude that there existed sufficient evidence from which the rational fact-finder could determine that defendant committed the offense as charged. Defendant's argument to the contrary is unpersuasive.

Defendant's final argument on appeal is that the trial court erred in denying his motion to dismiss the charge of felonious possession of a stolen motor vehicle in 99CRS13. Defendant contends, and the State concedes, that there was not sufficient evidence presented to prove the value of the vehicle was more than $1,000, so as to support the conviction. As a consequence, defendant's conviction of felonious possession of stolen goods in 99CRS13 must be vacated. Further, this matter must be remanded to the superior court for entry of a judgment of guilty of misdemeanor possession of stolen property and re-sentencing, accordingly. As to the remaining convictions, we hold that defendant received a fair trial, free from prejudicial error.

Vacated and remanded in part; no error in part.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).