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NO. COA02-339

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v.

NICHOLAS TAVARES WEST

Onslow County  
Nos. 00CRS054908  
00CRS053823  
00CRS053819

Appeal by defendant from judgments entered 3 October 2001 by Judge Russell J. Lanier, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 28 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Joseph Ellis Herrin, for the State.*

*Edward G. Bailey for defendant-appellant.*

EAGLES, Chief Judge.

Defendant was charged with robbery with a dangerous weapon, conspiring to commit robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tended to show that defendant and Calvin Decker had an argument with Randall Boggs during a cocaine purchase from Boggs at about 9:00 p.m. on 9 April 2000. Defendant and Decker subsequently approached Dallas Adrian Wesley Burgess about 30 minutes later, with a plan to rob Boggs of his drugs. In return for Burgess' participation, Decker and defendant would share some

of the stolen drugs with him. In preparation, defendant gave Burgess a rusty .22 caliber revolver, which defendant told Burgess did not work. Defendant had a .25 automatic pistol.

After defendant and Decker recruited Burgess to assist them in the robbery, Decker called the boarding house where Boggs resided and told one of Boggs' house mates that defendant had left his cellular telephone at the boarding house. The resident located the phone on the counter and told Decker that it was okay to come by and retrieve it. Decker then drove the two other co-conspirators to the house and waited outside while Burgess and defendant entered the house.

When defendant and Burgess entered the boarding house, defendant told Boggs that he wanted more cocaine. Boggs agreed and went into the back room of the boarding house to retrieve the cocaine. Defendant pulled his gun and instructed Burgess to follow Boggs. Defendant remained in the kitchen area of the house. Once inside the bedroom, Burgess pulled out his gun and demanded drugs from Boggs. Burgess and Boggs began to wrestle. During the struggle, Boggs pulled out his own gun and pointed it at Burgess' head. The struggle ended when Burgess shot Boggs in the neck. Burgess took Boggs' gun but left the drugs. Burgess ran out of the boarding house, shooting a dog that was in the boarding house along the way. Defendant followed with his gun drawn. Once outside, defendant and Decker asked Burgess if he had obtained any drugs. Burgess responded that he had not. The three fled the scene, driving to a friend's house, where defendant stashed two guns that

he had in his possession. Defendant placed one of the guns into some bushes and the other into a nearby dumpster. The three then got back into the car. While driving along the roadway, defendant disposed of the gun he had given Burgess and the gun Burgess had taken from Boggs. Defendant also instructed Burgess to throw his hat into some woods. The three later split up and went their respective ways.

When emergency medical assistance responded to the scene, they found Boggs lying on a bed, with a gun shot wound in the right side of his neck, between his shoulder and jaw. Boggs was beginning to turn blue and appeared to have lost a large amount of blood. Once he was stabilized, Boggs was transported to the hospital by ambulance.

In response to information given by occupants of the boarding house where Boggs lived, police questioned defendant on the evening of the robbery. Defendant admitted to being at the house but denied involvement in the shooting. Decker, who was questioned some six weeks after the 9 April 2000 robbery, showed police officers where the guns had been thrown by defendant. One .22 caliber handgun was recovered after several hours of searching. Burgess turned himself in to authorities approximately a month and one half after the 9 April 2000 robbery and gave a statement admitting his role in the robbery of Boggs.

Defendant did not present any evidence. On the motion of defendant, the trial court dismissed the assault with a deadly weapon with intent to kill charge inflicting serious injury. The

court then submitted to the jury the lesser offense of assault with a deadly weapon inflicting serious injury, along with the remaining offenses of robbery with a firearm and conspiracy. The jury found defendant guilty of robbery with a firearm, conspiracy to commit robbery with a firearm and assault with a deadly weapon inflicting serious injury. The trial court entered judgments sentencing defendant to a consolidated term of 82-108 months imprisonment for the robbery and conspiracy convictions, and a consecutive term of 20-33 months imprisonment for the assault conviction. Defendant appeals.

We begin by noting that "[t]he appellate court will not consider arguments based upon issues which were not presented [to] or adjudicated by the trial tribunal. Further, the lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect." *State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980). See also, N.C.R. App. P. 10(a).

Here, defendant asserts numerous points as error which were neither presented to the trial court nor properly preserved by an assignment of error in the record. Accordingly, defendant has waived appellate review of these issues.

By his sole assignment of error on appeal, defendant argues that the trial court erred in denying his motion to dismiss at the close of all the evidence. Defendant contends there was not sufficient evidence to support his convictions of robbery with a firearm, conspiracy to commit robbery with a firearm and assault with a deadly weapon inflicting serious injury. We disagree.

A motion to dismiss is properly denied if there exists substantial evidence -- direct or circumstantial -- of each essential element of the crime charged and that the defendant committed that crime. *State v. Moss*, 332 N.C. 65, 70, 418 S.E.2d 213, 216 (1992). Substantial evidence has been defined as that quantum of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Everette*, 111 N.C. App. 775, 781, 433 S.E.2d 802, 805 (1993). In passing upon a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, giving the State every reasonable inference to be drawn therefrom. *State v. Woody*, 124 N.C. App. 296, 306, 477 S.E.2d 462, 466 (1996).

Under the doctrine of acting in concert, "one may be found guilty of committing the crime if he is at the scene acting together with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime." *State v. Abraham*, 338 N.C. 315, 346, 451 S.E.2d 131, 147 (1994). It has been long held that "[e]veryone who enters into a common purpose or design is equally deemed in law a party to every act . . . which may afterwards be done by any one of the others, in furtherance of such common design." *State v. Lovelace*, 272 N.C. 496, 498, 158 S.E.2d 624, 625 (1968).

The essential elements of robbery with a dangerous weapon are (1) the unlawful taking or attempted taking of the property from another person with (2) the possession, use, or threatened use of

a firearm or other dangerous weapon, (3) by which the life of the other person is endangered or threatened. See N.C. Gen. Stat. § 14-87 (2001). If the State presents competent evidence that the defendant committed a crime with what "appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence," there is a mandatory presumption that a dangerous weapon was used and that the victim's life was indeed endangered. *State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985) (emphasis omitted). In *State v. Dalton*, this Court defined a criminal conspiracy as,

an agreement between two or more people to commit a substantive offense. The agreement may be an express understanding or a mutual implied understanding. The existence of a conspiracy may be established by direct or circumstantial evidence. Once an unlawful agreement is formed, the conspiracy continues until it is either completed or abandoned.

122 N.C. App. 666, 672, 471 S.E.2d 657, 661 (1996) (citations omitted). In *State v. Bindyke*, the North Carolina Supreme Court emphasized, "[t]he conspiracy is the crime and not its execution. Therefore, no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975). Finally, the elements of the offense of assault with a deadly weapon inflicting serious injury, in violation of G.S. 14-32, are "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997). A pistol is a deadly weapon. *State v. Pettiford*, 60 N.C. App. 92,

98, 298 S.E.2d 389, 392 (1982). "Our Courts have declined to define 'serious injury' for purposes of assault prosecutions, other than stating that 'the injury must be serious but it must fall short of causing death' and that 'further definition seems neither wise nor desirable.'" *State v. Hannah*, 149 N.C. App. 713, 718, 563 S.E.2d 1, 4 (2002) (quoting *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994)).

In the light most favorable to the State, the evidence tends to show that defendant, Decker, and Burgess entered into an agreement to rob Boggs of illegal drugs on the night of 9 April 2000. In exchange for Burgess' assistance in the robbery, he would receive some of the stolen drugs. After entering into this agreement, the three co-conspirators traveled to the residence of Boggs. Decker, the driver, remained in the car while defendant and Burgess went inside. Once inside, defendant pulled his gun and demanded drugs from Boggs. Defendant instructed Burgess to go to the back bedroom with Boggs to get the drugs. Burgess did as instructed and also drew his gun and demanded that Boggs give him drugs. A struggle ensued between Boggs and Burgess, whereupon Boggs drew a gun and held it to Burgess' head. Burgess shot Boggs in the right side between the shoulder and jaw. Without having obtained any drugs from Boggs, Burgess took Boggs' gun and fled with defendant from the residence. The two men got into the vehicle driven by Decker and the three co-conspirators fled the scene. They subsequently threw the gun stolen from Boggs out of the car window while driving down a roadway. Boggs lost a large

amount of blood and had to be transferred to an area hospital as a result of being shot by Burgess.

Here, the conspiracy was complete upon defendant, Decker, and Burgess' agreement to commit the robbery. Those acts done by Burgess in furtherance of the conspiracy are chargeable to defendant and Decker, even though the conspirators only conspired to rob Boggs of drugs. Moreover, both the assault of Boggs and theft of his gun were acts in furtherance of a common plan or purpose to rob Boggs. Therefore, the conspirators were "acting in concert." In sum, there was plenary evidence from which the jury could find that defendant entered into a conspiracy with Decker and Burgess, and that he committed the offenses of robbery with a firearm and assault with a deadly weapon inflicting serious injury. Hence, the trial court did not err in denying defendant's motion to dismiss.

Having so concluded, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).