NO. COA11-441
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Forsyth County
No. 09CRS055665

KEREY DAMIEN DOWELL,
Defendant.

Appeal by defendant from judgment entered 30 November 2010 by Judge Edwin G. Wilson in Superior Court, Forsyth County. Heard in the Court of Appeals 10 October 2011.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Robert R. Gelblum, for the State.

Anne Bleyman, for defendant-appellant.

STROUD, Judge.

Kerey Damien Dowell ("defendant") appeals from his conviction for robbery with a dangerous weapon. For the following reasons, we find no error in defendant's trial.

I. Background

On 8 March 2010, defendant was indicted on one count of robbery with a dangerous weapon. Defendant was tried on this charge during the 29 November 2010 Criminal Session of Superior

Court, Forsyth County. The State's evidence presented at trial tended to show the following: Carmen Baldeon testified that on 30 January 2009 she was working as a cashier at the Abarrotera La Guadalupana store. Ms. Baldeon stated that around 7 or 8 p.m. she was sitting behind the cash register when a man wearing a mask that covered his face, a jacket with a hood pulled up, a baseball cap, and yellow shoes, entered the store and approached the cash register with a small black handgun in his hand. The man pointed the gun at her head and told her to open the cash register and to give him all the money. After taking about $2,000 from the register and Ms. Baldeon's wallet, the man exited the store and she watched as he ran through the parking lot and crossed the street. Ms. Baldeon then locked the door and called the police. Ms. Baldeon told police investigators and testified in court that she recognized the man who robbed her. She said that the man had been in the store three times that same day with a woman, and only an hour to an hour-and-a-half before the robbery, they had come in to buy a 12 bottle pack of Budweiser beer. She said the man tried to pay with a $100 bill, but she would not take it because she thought that it was counterfeit. The woman then paid for the beer and they left. Ms. Baldeon testified that the man who came in with the

woman to buy beer with the $100 bill was the same person who had robbed her, and he was wearing the same clothes that he had been wearing when she had seen him before. During Ms. Baldeon's testimony, the jury was permitted to view the security video from the day in question, as Ms. Baldeon described what happened.

Officer Kevin Shay of the Winston-Salem Police Department responded to the robbery at the Abarrotera La Guadalupana on 30 January 2009. When he arrived, Ms. Baldeon told him what had happened and gave a description of the perpetrator as "a black male wearing a black hooded jacket with a black mask over his face[.]" Officer Shay viewed the store's surveillance tape and compared the image of the man who entered with the woman 30 minutes before the robbery to the image of the perpetrator. Officer Shay noted that the black male who entered with the woman

> was wearing a dark green puffy jacket, had black pants, brown boots that to me looked like they were possibly the Timberland-style boots. He also had a black baseball-type hat on and had a distinct silver design on the top of the bill of the hat. And it also appeared that underneath that green puffy jacket, there was a dark blue hooded jacket underneath that.

In comparison, the man who robbed the store looked the same

> except for the green jacket was gone, but the Timberland-style boots were still the same. It was black pants, they were still the same. I noticed the same baseball-style hat with the silver lettering on it -- or the silver design on it. And the same height, same weight as the person who had come in 30 minutes before that.

In Officer Shay's opinion, these images were of the same person. Police searched the area around the store but were unable to find the suspect.

Cheryl Grimes and Angelo Barkley testified that on 30 January 2009, Willette Sims and defendant came over to their house to drink beer. Defendant decided that he wanted to go to the store, so Ms. Grimes, Ms. Sims, and defendant rode in defendant's vehicle, a green four-door "Oldsmobile" car, to the "Hispanic grocery store" "around the corner where [Ms. Grimes] lived[.]" Mr. Barkley did not go to the store but instead took a nap. When they arrived at the store, Ms. Grimes and defendant went to the counter to pay for some beer, but the cashier threw defendant's $100 bill back to him. Ms. Grimes had to pay for the beer. After she bought the beer, defendant took Ms. Sims and Ms. Grimes back to the house and they continued drinking. A short time later, defendant left the house and returned for Ms. Sims 30 minutes later. Mr. Barkley stated that he did not leave

the house that evening but continued drinking when the others returned.

Detective Bryan Ogle with the Winston Salem Police Department testified that he did further investigation into the robbery and ultimately identified defendant as a suspect and located defendant in a boarding house. Parked in the driveway of the boarding house was a light green "1987 Buick Regal Limited" registered to Kai Derek Dowell. This vehicle looked similar to the one that was in the video in which defendant and Ms. Grimes arrived to buy beer before the robbery. Defendant consented to an interview and told Detective Ogle that on the day in question he had attempted to purchase beer with Ms. Grimes at the store but the clerk would not take his money. Defendant "denied ever coming back to the [store]" but said that he returned to Ms. Grimes' residence and received a call from his cousin "Ronald Little Dumas" and went to see him. However, Detective Ogle was unable to contact or locate this individual using the phone number defendant had given him and was never able to confirm this information. Defendant was subsequently arrested for the robbery. Police did not get any fingerprints or locate the gun from the robbery.

At the close of the State's evidence, defendant made a motion to dismiss. The trial court denied his motion. Defendant did not present any evidence at trial but renewed his motion to dismiss, which was denied by the trial court. On 30 November 2010, a jury found defendant guilty of robbery with a dangerous weapon. The trial court sentenced defendant to 71 to 95 months imprisonment. Defendant gave notice of appeal in open court. On appeal, defendant contends that (1) the trial court erred in denying his motion to dismiss for insufficiency of the evidence and (2) the trial court committed error or plain error in denying his motion for a mistrial.

II. Insufficiency of the evidence

First, defendant contends that the trial court erred in not granting his motion to dismiss the charge of robbery with a dangerous weapon because there was insufficient evidence that he was the perpetrator of the offense. Defendant argues the cashier, Ms. Baldeon, was consistent in identifying Angelo Barkley as the person who robbed her, as she told police that the suspect was a regular customer, lived in the neighborhood, drove a white Cadillac, had been in the store earlier the same day, and identified Mr. Barkley as the suspect in a photo lineup. Defendant contends that this identification by the

victim should be considered overwhelming evidence that defendant did not commit the crime. Defendant further argues that the State did not present substantial evidence that he was the perpetrator as there was no physical evidence linking defendant to the crime; Ms. Grimes had a motive to make a false identification of defendant as she was in a relationship and business partnership with Mr. Barkley; Mr. Barkley's testimony was inconsistent with Ms. Grimes' testimony; and Detective Ogle's comparisons of Mr. Barkley and the perpetrator were conclusory and unbelievable.

We have stated that

> The proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Martin, 195 N.C. App. 43, 50, 671 S.E.2d 53, 59 (2009) (citation omitted). "The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the

case but are for the jury to resolve." *State v. Phillpott*, ___ N.C. App. ___, ___, 713 S.E.2d 202, 209 (2011). Further,

> [c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty. . . . When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455-56 (citations, quotation marks, emphasis, and brackets omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed. 2d 150 (2000). The elements of robbery with a dangerous weapon are: "(1) the unlawful taking or an 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." *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citations and quotation marks omitted); N.C. Gen. Stat. § 14-87(a) (2009).

Defendant does not challenge the sufficiency of the evidence of any of the elements of the crime but argues only that the State failed to put forward sufficient evidence to show that he was the perpetrator of the crime.

Here, the State's circumstantial and direct evidence that defendant was the perpetrator was sufficient to permit the charge to go to the jury. Most significant is the evidence identifying defendant as the person who went into the store with Cheryl Grimes to buy beer prior to the robbery, as the evidence also showed that this person was the same person who committed the robbery. Ms. Grimes testified that defendant drove her and her friend, Willette Sims in his car to the Abarrotera La Guadalupana store; she went in with defendant to buy beer; defendant attempted to pay for the beer with a $100 bill; the clerk would not accept that bill for payment; and Ms. Grimes paid for the beer. Mr. Barkley confirmed that defendant, Ms. Sims, and Ms. Grimes were at their house and they returned to his house with a 12-pack of beer that evening. Both Ms. Grimes and Mr. Barkley were consistent in their accounts of what happened in both their trial testimony and during their interviews with Detective Ogle. Detective Ogle testified that even though defendant denied returning to the store on the day

of the robbery, he admitted in his interview that he did visit the store on that day with Ms. Grimes to buy beer and he had tried to pay but the clerk would not accept his money. Ms. Baldeon, the victim, testified that the same person who arrived at the store with the woman to buy beer with the $100 bill was the same person who robbed her 20 to 30 minutes later. Officer Shay, after viewing the surveillance video, confirmed that the person attempting to buy beer with the $100 bill and the person who later robbed the store were the same person, as he noted that they were wearing the same "black pants, brown boots that . . . looked like they were possibly the Timberland-style boots[,] . . . a black baseball-type hat on and had a distinct silver design on the top of the bill of the hat[, and] . . . . a dark blue hooded jacket" which was under the green jacket in the first instance. Therefore, the State presented evidence defendant was the person who tried to buy beer with a $100 bill and who later returned to rob the store.

Defendant's arguments focus on Ms. Baldeon's identification of Angelo Barkley as the person who robbed her at trial and in a police photographic lineup. Ms. Baldeon told police and testified at trial that the perpetrator lived in the neighborhood and drove a white, older model Cadillac. She

further stated that the man and woman were regular customers at the store and came in several times a week to buy beer. However, as noted above, Ms. Grimes and Mr. Barkley testified that Mr. Barkley did not leave their house on the day in question but defendant went with Ms. Grimes to the store. Mr. Barkley stated that he did not rob the store on 30 January 2009, as he was at home at the time. Further, Ms. Baldeon admitted that she could not see the robber's face because he was wearing a mask, a baseball cap, and a hood, which hid his face. Ms. Baldeon further admitted that she may have picked Angelo Barkley out the photographic line-up, not because she recognized him from the robbery, but because she recognized him as a person who had frequently been in the store, as he usually wore a baseball cap and was "always with a woman[.]" She also stated that there was no picture of defendant in the photographic line-up. Although Mr. Barkley did drive a four door, white and burgundy "1993 Cadillac Sedan Deville[,]" Detective Ogle observed the surveillance video from the exterior camera at the store, which viewed the front of the business at the time the man and woman came in the store to buy beer 20 minutes before the robbery, and noted that even though the video was not in color but black and white, the vehicle the couple arrived in was not a white, four-

door Cadillac, but the car had two-doors and was "a little bit darker than white." Further, defendant offered an alibi as to where he went after dropping Ms. Grimes and Ms. Sims off that night but this alibi was never confirmed as Detective Ogle could not contact or find the person defendant identified as his cousin. The jury was permitted to view the security video and hear the testimony of the witnesses and, as noted above, any "[c]ontradictions and discrepancies" in the evidence were "for the jury to resolve." *See Phillpott*, ___ N.C. App. at ___, 713 S.E.2d at 209. Even though there were conflicting identifications of the perpetrator by Ms. Baldeon and Ms. Grimes, it was for the jury to weigh the credibility of their testimony and make a determination. *See State v. Ocasio*, 344 N.C. 568, 574, 476 S.E.2d 281, 284 (1996) (noting that "[t]he determination of the witnesses' credibility is for the jury.").

In summary, the State presented evidence that the same person who tried to buy beer with Ms. Grimes was also the perpetrator and Ms. Grimes testified that defendant went to buy beer before the robbery. Viewing the State's evidence in "the light most favorable to the State" and giving the State "every reasonable inference to be drawn from that evidence" *see Phillpott*, ___ N.C. App. at ___, 713 S.E.2d at 209, we hold that

there was sufficient evidence presented by the State to permit the charge to go to the jury. As to defendant's argument regarding a lack of physical evidence, the direct and circumstantial evidence presented by the State, as noted above, permits a "reasonable inference of defendant's guilt" sufficient to withstand a motion to dismiss. *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. We decline to address defendant's remaining arguments as to the motives of Ms. Grimes and Mr. Barkley in their testimony or the effectiveness of Detective Ogle's testimony, as their credibility was for the jury to determine. *See Ocasio*, 344 N.C. at 574, 476 S.E.2d at 284. Defendant's argument is overruled.

III. Motion for Mistrial

Defendant next contends that the trial court erred and abused its discretion in denying his motion for mistrial after it refused to accept the jury's proper "not guilty" verdict and "resubmit[ed] the verdict to the jury for reconsideration" and allowing the jury to return with a guilty verdict, which the trial court accepted. Defendant also argues in the alternative, that the trial court's resubmitting the verdict to the jury amounted to plain error, as he was acquitted and then re-

prosecuted for the same crime, amounting to double jeopardy in violation of his federal and state constitutional rights.

> [A] "[m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Smith*, 320 N.C. 404, 418, 358 S.E.2d 329, 337 (1987) (citation and quotation marks omitted). The trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2003). However, "[n]ot every disruptive event which occurs during trial automatically requires the court to declare a mistrial." *State v. Allen*, 141 N.C. App. 610, 617, 541 S.E.2d 490, 496 (2000) (citation omitted), *disc. review denied and appeal dismissed*, 353 N.C. 382, 547 S.E.2d 816 (2001). "Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion." *State v. Simmons*, 191 N.C. App. 224, 227, 662 S.E.2d 559, 561 (2008) (citation omitted).

State v. Dye, ___ N.C. App. ___, ___, 700 S.E.2d 135, 140 (2010). N.C. Gen. Stat. § 15A-1237(a), (b) (2009) establishes that a verdict must be (1) in writing, (2) signed by the foreman, (3) made a part of the record in the case, (4) unanimous, and (5) returned by the jury in open court. Further,

> [t]he statutory requirement of a written jury verdict was intended to cure defects that would occur in the verdict if the jury foreman inadvertently omitted some essential

> element of a verdict in stating it orally. Official Commentary, G.S. 15A-1237. That statute does not bar inquiry from the court or a polling of the jury to insure that the written verdict is sufficiently clear and free from doubt.

State v. Smith, 299 N.C. 533, 536, 263 S.E.2d 563, 565 (1980). "[W]hen the verdict is 'incomplete, imperfect, insensible, or repugnant', the judge, in the exercise of a limited legal discretion, must refuse to accept it, and direct the jury to retire and bring in a proper verdict." *State v. Hicks*, 44 N.C. App. 166, 169, 260 S.E.2d 680, 682 (1979) (citation omitted).

Here, the jury initially returned with its written verdict and after being asked by the trial court, the jury foreman orally confirmed that the verdict was unanimous. The clerk then read the verdict in open court: "We the Jury, unanimously find the defendant, Kerey Damien Dowell, not guilty." After addressing an outburst from the audience, the trial court asked the jury, "Now the clerk has read the verdict as being not guilty. For all the jurors who agree to that verdict, please raise your hands." The transcript indicates that none of the jurors raised their hands in response to the question and the jury foreman immediately approached the bailiff but was told by the trial court to sit back down. The trial court then stated, "All right. So it's clear that there's been some mistake." Then

the trial court asked the jury to return to the jury room, stating that "the second portion of it is for each juror to raise his or her hand indicating unanimous consent. They have not done that. I'm going to send back a new verdict sheet." Defendant then moved for a mistrial arguing that there was no unanimity in the verdict and the jury had changed its mind. The trial court denied defendant's motion for a mistrial, brought the jury back in and sent the original verdict sheet back with the instruction that they continue deliberations. Defense counsel objected to sending the jury for further deliberations and the trial court overruled that objection. Four minutes after resuming deliberations, the jury brought back a verdict of guilty and all jurors indicated that this was their unanimous decision. The clerk then polled each juror individually and each indicated that he or she assented to the guilty verdict. The trial court then accepted the verdict.

We find no abuse of discretion in the trial court's actions. The trial court discovered that there may have been a mistake on the verdict sheet, *see Smith*, 299 N.C. at 536, 263 S.E.2d at 565, and that the not guilty verdict was not unanimous, as required by N.C. Gen. Stat. § 15A-1237. Since it could not accept the verdict, the trial court properly asked the

jury to further deliberate until that verdict was unanimous. *See Hicks*, 44 N.C. App. at 169, 260 S.E.2d at 682. Therefore, there was "no error or legal defect in the proceedings[.]" *See Dye*, ___ N.C. App. at ___, 700 S.E.2d at 140. We also fail to see how the trial court's or jury's "conduct inside or outside the courtroom" resulted in "substantial and irreparable prejudice to the defendant's case[,]" *See id*. The transcript clearly shows that the not guilty verdict was not assented to by any of the jurors and therefore not unanimous and further deliberation was merely to correct a mistake on the verdict sheet, as the jury only deliberated for four more minutes and then returned a guilty verdict, which was assented to by each individual juror. Accordingly, we find no abuse of discretion in the trial court's denial of defendant's motion for mistrial.

As to defendant's double jeopardy argument, we note that defense counsel made objections as to the trial court's decision to allow the jury to continue deliberations, but raised no argument based on double jeopardy grounds. Our Supreme Court has stated that

> "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004) (citation omitted), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285

> (2005); *see also* [*State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991)] (holding that the defendant waived a constitutional double jeopardy argument he failed to raise at trial).

State v. Davis, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010). Defendant argues that this issue is subject to plain error analysis. "Our Courts have consistently held that plain error analysis applies only to jury instructions and evidentiary matters." *State v. Ross*, ___ N.C. App. ___, ___, 700 S.E.2d 412, 416 (2010) (citation and quotation marks omitted). Defendant raises no argument as to the introduction of evidence or any of the jury instructions but argues that the trial court's decision to send the jury back for further deliberations amounted to double jeopardy. Accordingly, plain error analysis is inapplicable and we decline to address defendant's argument.

For the foregoing reasons, we find no error in defendant's trial.

NO ERROR

Chief Judge MARTIN and Judge GEER concur.

Report per Rule 30(e).