An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-593
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. 	Hoke County
	Nos. 08 CRS 52927-52928

LUCINDA FAYE CHILDERS

Appeal by Defendant from judgments entered 4 November 2010 by Judge William R. Pittman in Superior Court, Hoke County. Heard in the Court of Appeals 25 October 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General James A. Wellons, for the State.

William D. Spence for Defendant-Appellant.

McGEE, Judge.

The State's evidence at trial tended to show that Lucinda Faye Childers (Defendant) and her boyfriend, Bobby Ray Lambert (Mr. Lambert), were discussing their finances on the morning of 26 December 2008 when they decided to rob a store. Defendant drove Mr. Lambert around Cumberland County in her vehicle as they looked for a store to rob. They decided to rob Hardin's

Express Stop (Hardin's). Mr. Lambert testified that Defendant's job was to

> go in the store, purchase an item or whatever, and then let me know that everything was good, let me know the layout of the store, who was in the store, . . . stuff like that. . . . . [A]nd tell me whether it was a man or a woman running the store behind the register or whatever, just look around, bringing me intel, let me know what [money] was in the register after she purchased an item or whatever. Whether it was, you know, robbable, I guess.

Defendant and Mr. Lambert went to two other stores before Hardin's, but they did not attempt to rob those stores because there was "[t]oo much traffic." When they stopped at Hardin's, Mr. Lambert went in first and attempted to purchase a beer, but the clerk would not sell the beer to him because he only had a Department of Correction identification card. Mr. Lambert then left Hardin's and returned to Defendant's vehicle where he told Defendant to go in the store and purchase the exact beer he had just tried to purchase so that his fingerprints would not be left at the scene of the robbery. Defendant then entered Hardin's, purchased the beer, and returned to her vehicle. Defendant told Mr. Lambert that there was money in the register.

They drove away and then returned to Hardin's from a different direction. Mr. Lambert waited until a customer drove away from Hardin's, then entered and robbed Hardin's by

threatening the clerk with a handgun. Mr. Lambert took the cash from the register and a carton of Newport cigarettes for Defendant. Mr. Lambert left the store, got in Defendant's vehicle, and told Defendant: "Let's go. Let's get out of here." Defendant then drove them away. Mr. Lambert put the money and the gun in

> a stash box in [Defendant's] car under the seat. That's where I would take a knife or whatever and pry it off. I would stash the gun and the money. I stashed the gun and money in the stash box in [Defendant's] car and just put the face on the seat back on.

When Defendant and Mr. Lambert returned home, they counted the money and Mr. Lambert gave some to Defendant. He then took the rest of the money and bought crack cocaine for re-sale. The events in Hardin's were recorded on the store's security cameras, and a DVD of the robbery was shown at trial.

Defendant was found guilty of robbery with a dangerous weapon, on a theory of accomplice liability. She was also convicted of conspiracy to commit robbery with a dangerous weapon. Defendant appeals.

I. Mistrial

In Defendant's first argument, she contends that the trial court erred in denying her motion for a mistrial. We disagree.

Defendant did not appear on time for the beginning of jury selection and the following colloquy occurred:

(The proceedings began at 9:45 a.m., Wednesday, November 3, 2010.)

(The Assistant District Attorney and Counsel for . . . Defendant were present in the courtroom.)

THE COURT: Ladies and gentlemen, we are going to start a trial, and . . . Defendant is not in court. And while there are certain things in which we can continue a trial without a defendant, we can't start one. So there are some things that we can do related to that, if you'll just sit tight. Once we figure out where we are, I'll let you know, and it may be that we can just be at ease for a while. Mr. Hedgepeth, do you have any idea where your client might be?

MR. HEDGEPETH: No, Your Honor, I don't.

THE COURT: All right. Would you call Lucinda Childers, please?

(Lucinda Childers was called and failed.)

THE COURT: Let the record reflect Mr. Hedgepeth has previously asked the Court for a little more time to see if he can secure her attendance, and I have, in the absence of his having any idea where she is or having contact with her, denied that. Order for arrest, order of forfeiture, double the bond. . . . .

(The Court was at ease.)

THE COURT: Mr. Hedgepeth is moving for a mistrial because I had . . . Defendant called out in the presence of the jury. I think -- do you want to argue about that?

. . . .

(The jury pool left the courtroom.)

(The Assistant District Attorney, Counsel for Defendant, and . . . Defendant were present in the courtroom. No jurors were present.)

THE COURT: It appears that the venire is outside the hearing of the court. Mr. Hedgepeth?

MR. HEDGEPETH: Your Honor, I'm going to speak fairly low and hope that the jury won't hear what I have to say. I just wanted to move for a mistrial because the--my client had an order for arrest that was issued in the presence of the jury, and that could prejudice her case with them having seen that happen. So because of that I am moving for a mistrial and ask for the case to be set in January.

MR. THOMPSON: I don't see how that could prejudice this jury panel. At the very -- at the most, I think perhaps a curative instruction to the jury panel not to let that factor in anything at all, but I don't know that that's necessarily appropriate either. I don't think at this point . . . Defendant's been prejudiced. It was pretty clear who we were waiting on for that time, once the jury was all assembled, prior to addressing the matter. It shouldn't have been any surprise.

THE COURT: All right. Motion for mistrial is denied.

MR. HEDGEPETH: Thank you, Your Honor.

THE COURT: If you are one minute late for another court session, you will spend the rest of this trial in jail. Do you understand that?

DEFENDANT: Yes, sir.

> THE COURT: All right. I find that your lateness to court, both yesterday as well as today, is contemptuous to this court. And so in addition to residing in jail, you may spend 30 days there on contempt. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: All right. Don't be late again. Anything else?
>
> MR. THOMPSON: No, sir.
>
> MR. HEDGEPETH: Thank you, Your Honor.

Defendant argues that she was prejudiced because the trial court issued an order for Defendant's arrest, forfeited her bond, and doubled her bond in the presence of the prospective jury pool. Our Supreme Court rejected a similar argument when the trial court ordered a defendant placed in custody due to his failure to be present during the trial. Our Supreme Court explained:

> It is perfectly plain from the Record that the judge's remarks and placing the defendant in custody was caused by the defendant's absence from the courtroom after court had opened and his trial should be resumed, and that the jury so understood it. There is no suggestion or intimation in the slightest degree that the committal of the defendant was for perjury. The judge's remarks and action had absolutely no reference as to any opinion of his as to the strength of the evidence, or as to the credibility of the defendant, or that he had any opinion whatever in respect to the case, and could not convey to the jury the slightest intimation that the judge had any

> opinion to such effect. The placing of the defendant in custody was within the discretion of the trial court, and under the circumstances as they appear in the Record we do not find that that discretion was abused. Assignment of error No. 2 is overruled.

State v. Mangum, 245 N.C. 323, 330, 96 S.E.2d 39, 45 (1957); *see also State v. Barnes*, 4 N.C. App. 446, 167 S.E.2d 76 (1969). In the present case, as in *Mangum*, there was no indication from the remarks of the trial court that it in any manner called into question the credibility of Defendant or that it was offering any opinion on the strength of the case. Defendant fails to show that the trial court abused its discretion in denying Defendant's motion for a mistrial. N.C. Gen. Stat. § 15A-1061 (2009); *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). Defendant's first argument is without merit.

II. 404(b) Evidence

In Defendant's second argument, she contends the trial court abused its discretion by allowing testimony concerning two other robberies committed by Defendant. We disagree.

On *voir dire*, Mr. Lambert testified concerning the two prior robberies. Relevant facts concerning the first robbery were as follows: Defendant, Mr. Lambert, and Mr. Lambert's cousin decided to rob Café 71 in order to obtain money to purchase illegal drugs. The three drove to Café 71 in

Defendant's vehicle. Defendant went into Café 71 to determine how many people were inside. She bought a drink to see if there was money in the register and to determine if Café 71 was "robbable[.]" Based on Defendant's information, they decided to rob Café 71. Defendant drove the two men a short distance away where they exited Defendant's vehicle and returned on foot to Café 71, with guns. The two men robbed Café 71, returned to Defendant's vehicle, and were driven away from the scene by Defendant. Defendant received just under one-third of the money that was taken in the robbery. This robbery occurred thirteen days before the robbery of Hardin's.

Relevant facts concerning the second robbery were as follows: Defendant was driving Mr. Lambert and a male friend of Mr. Lambert's around in her vehicle, looking for a store to rob. They stopped at a food market and Mr. Lambert and his friend entered the market while Defendant waited in her vehicle. Mr. Lambert took a quart of power steering fluid to the register, gave the clerk a five dollar bill and when the clerk opened the register, pulled a gun and demanded all the money from the register, and Newport cigarettes. The clerk gave Mr. Lambert the entire cash drawer from the register and the cigarettes. Mr. Lambert and his friend left the food market and got into Defendant's vehicle. Defendant then drove Mr. Lambert and his

friend away as Mr. Lambert emptied the cash from the cash drawer and tossed the empty drawer out of the window of Defendant's vehicle. Mr. Lambert stole the cigarettes for Defendant. This robbery occurred three days after the robbery at Hardin's.

The trial court ruled that the other two robberies were sufficiently similar and not too remote in time and, therefore, were admissible pursuant to Rule 404(b) for the purposes of showing "intent, knowledge, plan, or common scheme in this case." The trial court also ruled that the prejudicial effect of the testimony about the other two robberies did not outweigh its probative value under Rule 403.

We do not find it necessary to engage in a lengthy analysis of Defendant's argument. The two additional robberies testified to by Mr. Lambert occurred in close temporal proximity to the robbery of Hardin's. Defendant and Mr. Lambert planned each of the robberies. Defendant served as the driver for all three robberies, driving both to the three stores and then driving away after each store had been robbed. Defendant drove her vehicle for all three robberies. In each of the three robberies, someone went into the store to determine if it was "robbable." Defendant acted as the "scout" for the Hardin's robbery and the robbery of Café 71. Mr. Lambert and his friend "scouted" for the robbery of the food market. Defendant took a

share of the proceeds from each of the three robberies. Mr. Lambert obtained Newport cigarettes for Defendant in two of the robberies. We hold that the trial court did not abuse its discretion by allowing Mr. Lambert's testimony concerning the robberies of Café 71 and the food market. *State v. Owens*, 160 N.C. App. 494, 501-02, 586 S.E.2d 519, 524 (2003). Defendant's second argument is without merit.

III. Conspiracy and Substantive Crime

In Defendant's third argument, she contends that the trial court erred "in accepting the jury's verdict on the charge of conspiracy to commit armed robbery" because the conspiracy charge "merged into the substantive crime of robbery with a dangerous weapon . . . and punishment for both crimes violates double jeopardy." We disagree.

"[C]onspiracy is a separate offense from the completed crime that normally does not merge into the substantive offense." *State v. Kemmerlin*, 356 N.C. 446, 476, 573 S.E.2d 870, 891 (2002) (citation omitted). The exception to this general rule is that "a codefendant convicted of the substantive offense based solely on his participation in the conspiracy [cannot] be punished for both conspiracy and the separate offense." *Id.* (citation omitted). In the present case, evidence was presented that Defendant was an active participant

in the robbery. She not only conspired to commit the robbery, she drove Mr. Lambert to Hardin's, she scouted Hardin's to determine how many people were inside and whether there was enough cash in the register to justify the risk of committing the robbery, and she served as the "getaway" driver after Mr. Lambert used a handgun to rob the store. There was no error in convicting and sentencing Defendant for both conspiracy to commit armed robbery and armed robbery. *Id.* at 476-77, 573 S.E.2d at 891; *see also State v. Lyles*, 19 N.C. App. 632, 199 S.E.2d 699 (1973). Defendant's third argument is without merit.

No error.

Judges HUNTER, Robert C. and CALABRIA concur.

Report per Rule 30(e).