NO. COA00-1326

NORTH CAROLINA COURT OF APPEALS

Filed: 2 January 2002

STATE OF NORTH CAROLINA

v.

CHICO JOHNSON

Scotland County
No. 99 CRS 8815, 8820;
96 CRS 5393, 8409; and
99 CRS 1898, 4337

Appeal by defendant from judgments entered 1 June 2000 by Judge B. Craig Ellis in Scotland County Superior Court. Heard in the Court of Appeals 5 November 2001.

Attorney General Roy Cooper, by Special Deputy Attorney General James P. Longest, Jr., for the State.

James R. Parish for defendant-appellant.

MARTIN, Judge.

Defendant was charged with robbery with a dangerous weapon in violation of G.S. § 14-87, and possession of a firearm by a felon in violation G.S. § 14-415.1. He entered a plea of not guilty. Briefly summarized, the evidence at defendant's trial tended to show that Jamonze Brown went to Kinston Street in the Carolina Park area of Laurinburg to visit relatives. His relatives were not at home, and he sat in his car waiting to see if they would return. Two males approached the car, one on each side of the vehicle. According to Brown, the assailant on the driver's side brandished

a handgun, and the assailant on the passenger side held what appeared to be an assault rifle. The men ordered him out of the car and ordered him to give them a gold necklace which he was wearing. The gunmen then tried to drive away in Brown's car, but were apparently unable to drive a manual transmission. They ran away, taking some money which was in the car.

Calvin Martin testified that he, defendant, Derrick Bethea, Michael Williams, and Joseph Carmichael were together in defendant's car on the date of the robbery and went to Carolina Park looking for Robert Breeden. While they were looking for Breeden, they saw Jamonze Brown sitting in his car. They were unable to find Breeden and were returning to defendant's car when defendant and Bethea stopped for a moment and had a conversation. Defendant pulled a handgun from his waistline and handed it to Bethea. Defendant, Martin, and Carmichael then returned to defendant's car; Bethea and Williams turned around and walked in Brown's direction. Defendant instructed Carmichael to drive the car to a point near the place where Jamonze Brown was parked, and watched while Bethea and Williams robbed Brown, stating, "Look at them boys, they crazy, ain't they? They're soldiers." After Bethea and Williams attempted unsuccessfully to steal Brown's car, both ran to defendant's car and left the area with defendant, Martin, and Carmichael. The State also offered evidence tending to show that defendant had been previously convicted of the felony of common law robbery on 2 June 1999.

Defendant offered no evidence. He was found guilty of robbery

with a dangerous weapon and possession of a firearm by a felon. The trial court entered judgments on the verdicts imposing consecutive active terms of imprisonment in the aggravated range. In addition, defendant was found to have violated the terms of an earlier probationary sentence. Probation was revoked and his sentence was activated. Defendant appeals.

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Defendant brings forward four assignments of error. Defendant has not presented arguments in support of the remaining three assignments of error contained in the record on appeal and they are deemed abandoned. N.C.R. App. P. 28(b)(5).

I.

Defendant first contends the trial court erred in admitting certain statements made by defendant at the time of his arrest. He argues the statements were not relevant to any issue before the jury and were unfairly prejudicial. We discern no error in the admission of defendant's statements.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. "It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it . . . reasonably allows the jury to draw an inference as to a disputed fact." *State v. Hunt*, 297 N.C. 258, 261, 254 S.E.2d 591, 594 (1979) (citation omitted). Relevant evidence, nevertheless, "may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403. Pursuant to Rule of Evidence 403, "the determination of whether relevant evidence should be excluded is a matter left to the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion." *State v. Wallace,* 351 N.C. 481, 523, 528 S.E.2d 326, 352-53, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000) (citation omitted).

At the time of his arrest over two weeks after Brown was robbed, defendant made several statements to the arresting officers. Following a *voir dire* hearing, the trial court determined the statements made by defendant were spontaneous, were not the result of police interrogation, and were therefore admissible. Laurinburg Detective Monroe then gave the following testimony:

> After [defendant] was arrested, I advised him what he was being arrested for and told him what the charges were. He then told me that he didn't know anything about a robbery, that he was not present and that he does not own a gun. The arrest process continued and he was fingerprinted and photographed and we were on our way to the magistrate's office and on our way to the jail. At that point he said "f--- you-all, f--- all of you-all." On the way to the jail he asked me why wasn't one of the other guys arrested.

Contrary to defendant's assertions, this statement, taken as a whole, was relevant to the issue of defendant's guilt or innocence of the crime of robbery with a dangerous weapon. The statement was internally inconsistent in that defendant initially denied any knowledge of the robbery, but later asked why his companions had

not been arrested. Between these inconsistent statements, defendant made an admittedly profane statement which, standing alone, is not relevant to a fact at issue, though it depicts a demeanor from which one could infer a guilty knowledge. Even without drawing such an inference, however, defendant's statements, taken as a whole, shed light on his knowledge of the robbery and are relevant and properly admissible. Moreover, the evidence of defendant's use of profanity is not so unfairly prejudicial as to substantially outweigh the statement's probative value. N.C. Gen. Stat. § 8C-1, Rule 403. Probative evidence presented by the State is necessarily prejudicial to the defendant; "the question is one of degree." *State v. Weathers,* 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). The trial court did not abuse its discretion in permitting the investigating officer to recount the spontaneous statements made by defendant, and defendant's assignment of error is overruled.

II.

Defendant next assigns error to the trial court's denial of his motion to dismiss the charge of robbery with a dangerous weapon based on the insufficiency of the evidence. We reject defendant's argument.

In order to survive a motion to dismiss, the State must present "substantial evidence" as to the existence of each element of the offense charged and of defendant's identity as the perpetrator. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984). "'Substantial evidence' is that amount of relevant

evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981) (citation omitted). In ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, "giving the State the benefit of all reasonable inferences which can be drawn therefrom." *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989) (citation omitted).

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) (citations omitted). "[N]either simultaneous action nor equal participation in the commission of a crime by two persons is a prerequisite for the application of the theory of acting in concert." *State v. Whiteside,* 325 N.C. 389, 405, 383 S.E.2d 911, 920 (1989). It has been 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 of the others, in furtherance of such common design.'" *State v. Lovelace*, 272 N.C. 496, 498, 158 S.E.2d 624, 625 (1968) (citations omitted).

In the present case, there was evidence tending to show that defendant had a conversation with Derrick Bethea and passed Bethea a handgun moments before the robbery occurred. Defendant then instructed Carmichael to drive him to a point near Brown's car, and

to wait for Bethea and Williams. Defendant watched the robbery in progress and commented: "Look at them boys, they crazy, ain't they? They're soldiers." After Bethea and Williams were unable to drive Brown's car, they ran to defendant's car and left the scene with him. From this evidence we conclude that a reasonable jury could infer that defendant was present and acted together with Derrick Bethea and Michael Williams with a common purpose to rob Brown, though he did not personally do any of the acts necessary to carry it out. Defendant's assignment of error is overruled.

III.

Defendant next contends the trial court erred by sentencing him in the aggravated range of punishment for robbery with a dangerous weapon because it used the same evidence necessary to prove an element of the offense as the basis to aggravate his sentence. We note that defendant failed to object to the trial court's finding on this ground, and that the question is not properly preserved for appellate review. N.C.R. App. P. 10(b)(1). Nevertheless, in the exercise of discretion granted us by N.C.R. App. P. 2, we will suspend the requirement of Rule 10(b)(1) and consider defendant's argument.

N.C. Gen. Stat. § 15A-1340.16(d) provides "[e]vidence necessary to prove an element of an offense shall not be used to prove any factor in aggravation" of punishment for that crime. This Court has stated, "[i]t is error for an aggravating factor to be based on circumstances which are part of the essence of a crime." *State v. Hughes*, 136 N.C. App. 92, 99, 524 S.E.2d 63, 67

(1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000). In this case, defendant argues that his conviction was based upon his acting in concert with Bethea and Williams to commit the robbery so that the court's finding in aggravation that defendant "joined with more than one other person in committing the offense and was not charged with committing a conspiracy" violated G.S. § 15A-1340.16(d). After careful consideration, we reject his argument.

The 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. *State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978), *see* N.C. Gen. Stat. § 14-87. Whether one acts alone or with others is not an element of the crime. Nor is it material to guilt whether one acts as a principal in the first degree or a principal in the second degree; both are equally guilty. *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970).

In the present case, while evidence that defendant acted with at least one other person was necessary to prove his participation as a principal, it was not necessary to prove an element of the crime. Moreover, the evidence that he "joined with more than one other person" was not required to prove either his participation as a principal or an element of the offense. As noted in *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983), and followed by this Court in *State v. Cinema Blue of Charlotte, Inc.*, 98 N.C. App. 628,

634, 392 S.E.2d 136, 139 (1990), many of the factors listed in the present 15A-1340.16(d) (formerly 15A-1340.4(a)(1)) contemplate some duplication in proof, but such duplication does not prohibit the trial court from using the evidence to find a factor in aggravation. We conclude the trial judge did not err in finding the factor in aggravation or in enhancing defendant's sentence by reason thereof.

IV.

Finally, defendant contends the trial court erred by finding the same aggravating factor, i.e, that "defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy," to enhance his sentence for possession of a firearm by a convicted felon. He contends there was no evidence to support the factor. After careful consideration of the evidence, we must agree with his assignment of error.

Initially, we note the transcript reveals that the trial court orally found that defendant "joined *with one or more other persons* in committing the offense," while the aggravating factor listed in the written findings was that defendant "joined *with more than one other person* in committing the offense and was not charged with committing a conspiracy." (emphasis added).

However, there is no evidence that defendant possessed the firearm with "more than one other person." The evidence showed only that defendant had a pistol, which belonged to Derrick Bethea, tucked into his waistband and that he handed the pistol to Bethea immediately before the robbery. There was no evidence to show when

or how defendant gained possession of the weapon, how long he had the weapon in his possession before returning it to Bethea, or that any of the other men had any relationship to the weapon while it was in defendant's possession. Thus, at most, the evidence showed that defendant joined with only one other person, Bethea, in possessing the pistol. Accordingly, it was error to find the aggravating factor and defendant is entitled to a new sentencing hearing regarding his conviction for possession of a firearm by a felon.

We find no error in defendant's trial; case number 99 CRS 8820, in which defendant was convicted of possession of a firearm by a felon, is remanded for a new sentencing hearing.

No error; new sentencing hearing in 99 CRS 8820.

Chief Judge EAGLES and Judge JOHN concur.

Report per Rule 30(e).