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NO. COA01-475

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

STATE OF NORTH CAROLINA

v.

Cabarrus County
Nos. 99 CRS 20551-52

BILLY LEE EIDSON

Appeal by defendant from judgment entered 5 October 2000 by Judge C. Preston Cornelius in Cabarrus County Superior Court. Heard in the Court of Appeals 4 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General David G. Heeter, for the State.

Amy S. Davis for defendant appellant.

TIMMONS-GOODSON, Judge.

On 5 October 2000, a jury found Billy Lee Eidson ("defendant") guilty of robbery with a dangerous weapon based upon evidence tending to show the following: On the morning of 6 December 1999, defendant spoke with Clyde Ronald Blackwelder ("Blackwelder") on the front porch of Blackwelder's residence in Kannapolis, North Carolina. According to Blackwelder, defendant expressed interest in renting a room at his boarding house. As he spoke with defendant, Blackwelder noticed another person standing on his porch. Peering around the front door, Blackwelder saw a man, later

identified as George Draper ("Draper"), who was wearing a ski mask. Defendant and Draper then "slung the door out of [Blackwelder's] hand, busted in and started beating up on" him. Defendant held Blackwelder while Draper repeatedly cut him with an eight-inch butcher knife. Blackwelder called out to another occupant of the residence, Jackie Sheets ("Sheets") for assistance. Defendant seized Sheets by the neck and led her through the hallway to a bedroom. He and Draper then "tore" the room apart, searching for valuables. Defendant ordered Sheets to "[t]ell [Blackwelder] to give [Draper] the money and I won't let [Draper] kill him." Blackwelder gave defendant a one-hundred dollar bill and gave Draper the contents of his wallet. Draper also took a .357 magnum revolver.

At trial, Draper testified that on 5 December 1999, he and defendant discussed "taking Mr. Blackwelder down and get[ting] his money." On the morning of 6 December 1999, Draper and defendant went to Blackwelder's residence and concealed themselves in some shrubbery until they determined that Blackwelder was alone in the home. Draper carried a butcher knife which defendant had obtained for him. Draper's account of the robbery was substantially similar to Blackwelder's version. According to Draper, defendant told Blackwelder "to give [Draper] the money and I won't let him kill you." Draper observed defendant take the one-hundred dollar bill from Blackwelder and admitted taking \$185.00 and the handgun from Blackwelder's bedroom.

Kannapolis Police Officer Scott Boggs ("Officer Boggs")

responded to Sheets' call for emergency assistance in time to see "a male subject with a dark ski mask" emerge from Blackwelder's front door. Officer Boggs noticed that the man was carrying a "large caliber handgun." Officer Boggs apprehended the man, whom he recognized as Draper after removing his ski mask. Law enforcement officers found a butcher knife and \$218.00 in cash on Draper's person. Shortly after midnight, officers also took defendant into custody. He gave a statement denying participation in the robbery.

Testifying in his own defense, defendant claimed that he visited Blackwelder's residence in order to rent a room at the boarding house and was unaware of Draper's intent to rob Blackwelder. Defendant denied taking \$100.00 from the residence. Although he admitted that Draper had spent the night at his residence on 5 December 1999, defendant denied discussing a robbery with Draper or obtaining a knife for him. According to defendant, he and Draper walked together to Blackwelder's residence, whereupon Draper continued walking toward the boarding house. Defendant did not see Draper again until he appeared on the porch in a ski mask and forced his way into the residence. Defendant claimed that he attempted to protect Sheets by leading her into the bedroom, away from Draper. Defendant asked Sheets to give Blackwelder's money to Draper "so that they'll go on and I can get out of here and get back home where I'm supposed to be." As Draper and Blackwelder came into the bedroom, Blackwelder attempted to give defendant some gold necklaces, which defendant refused to accept. Defendant

further testified that he pushed Blackwelder aside in order to leave the house when he saw Draper brandish the handgun.

Upon receiving the jury's guilty verdict, the trial court sentenced defendant to an active term of imprisonment for 94 to 122 months. Defendant now appeals his conviction and resulting sentence to this Court.

Defendant presents three issues for review, arguing that the trial court erred in (1) admitting hearsay testimony; (2) failing to give a curative instruction; and (3) denying defendant's motion to dismiss. For the reasons stated herein, we find no error by the trial court.

In his first assignment of error, defendant contends the trial court erred in admitting hearsay testimony offered by the State. The statement at issue arose in the following exchange:

[PROSECUTOR]: What did they, what did [defendant] say about money?

[BLACKWELDER]: He said to Ms. Sheets, ["G]et, tell Ron to give [Draper] the money and I won't let [Draper] kill him.["

[DEFENSE COUNSEL]: Your Honor, I'll object to this. It sounds like this is stuff that he knows second-hand from what Ms. Sheets has told him.

[BLACKWELDER]: No, I saw it.

. . . .

[PROSECUTOR]: Your Honor, I'm not offering this for truth or falsity. Mr. Blackwelder's testified he was present and did hear this said.

[THE COURT]: Overruled.

Defendant asserts that the trial court's ruling improperly allowed the State to introduce Sheets' out-of-court statement to the jury. He avers that Blackwelder could not have heard the statement he ascribed to defendant and therefore must have obtained this information from Sheets. We disagree.

The trial court properly overruled defendant's hearsay objection. Defendant's claim that the witness based his testimony on Sheets' out-of-court account of events is purely speculative, expressly contradicted by Blackwelder's sworn testimony that he observed the exchange in question. See N.C. Gen. Stat. § 8C-1, Rule 602 (1999). Similarly, defendant's assertion that Blackwelder could not have heard his conversation with Sheets due to their respective positions in the residence is unsupported by the transcript. Because the witness claimed personal knowledge of defendant's statement to Sheets, any conflicting evidence went to the credibility of the testimony, not its admissibility. See *State v. Stitt*, __ N.C. App. __, __, 553 S.E.2d 703, 707 (2001). We note further that defendant waived his objection by subsequently allowing Draper to describe the same event without objection. See *State v. Wingard*, 317 N.C. 590, 599, 346 S.E.2d 638, 644 (1986).

Although defendant does not specifically raise the issue, we further conclude that defendant's own out-of-court statement was not hearsay as defined by Rule 801 of our Rules of Evidence, because it was not offered for the truth of the matter asserted, *i.e.*, that defendant would not let Draper kill Blackwelder if Blackwelder surrendered his money. Rather, this statement was

admissible as part of the *res gestae* of the robbery. See *State v. Sidden*, 315 N.C. 539, 552, 340 S.E.2d 340, 348 (1986). Thus, because these statements were not hearsay, the trial court properly overruled defendant's objection, and we therefore overrule defendant's first assignment of error.

By his second assignment of error, defendant argues that the trial court committed plain error by failing to give a curative instruction after the introduction of Blackwelder's hearsay testimony. Having concluded that the testimony discussed above was admissible, we overrule the assignment of error as to this evidence. Defendant cites additional testimony offered by Blackwelder, which was stricken by the trial court, as follows:

[BLACKWELDER]: . . . Ms. Sheets says,
["Ron's got money --["

THE COURT: Is she here? Is she a witness?

[PROSECUTOR]: She's not present.

. . . .

THE COURT: All right, you can't testify to what she did or said.

[PROSECUTOR]: Skip what she said.

[DEFENSE COUNSEL]: Motion to strike.

. . . .

THE COURT: Well, strike, yes.

[BLACKWELDER]: Okay.

THE COURT: Sustained as to what she may have said.

As shown above, the trial court immediately recognized the hearsay

problem and intervened *ex mero motu* before any significant testimony was offered. Moreover, the court allowed defendant's subsequent motion to strike, making clear that the witness could not testify about Sheets' out-of-court statements. While we believe the trial court's actions were sufficient and that no additional curative instruction was required, we further note the absence of any possible prejudice arising from the statement, "Ron's got money[.]" See *State v. York*, 347 N.C. 79, 93-94, 489 S.E.2d 380, 388-89 (1997). This assignment of error is without merit.

In his remaining assignment of error, defendant avers the trial court erred in denying his motion to dismiss the charge for want of sufficient evidence. We review the denial of a defendant's motion to dismiss by examining the evidence in the light most favorable to the State. See *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 700 (2001). Rather than contend with this well-established standard of review, however, defendant fashions his argument based entirely on his own trial testimony, completely ignoring the prosecution's proffer. Taking into account the testimony of Blackwelder, Draper, and Officer Boggs, the State adduced substantial evidence that defendant, far from being an unwitting observer, discussed the robbery with Draper beforehand, procured the butcher knife for Draper, forced his way into Blackwelder's house, joined with Draper in physically assaulting Blackwelder and in ransacking his bedroom and study, and stole \$100.00 from Blackwelder's home. These facts are more than

sufficient to demonstrate that defendant acted in concert with Draper to commit robbery with a dangerous weapon, and the trial court properly denied defendant's motion to dismiss. We therefore overrule defendant's final assignment of error.

In conclusion, we hold defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge McCULLOUGH concur.

Report per Rule 30(e).