NO. COA01-509

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Rockingham County
No. 00 CRS 4501

KENNETH JAMES McMASTERS,
Defendant.

Appeal by defendant from judgment entered 7 November 2000 by Judge Melzer A. Morgan, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 14 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge, for the State.

C. Orville Light, for defendant-appellant.

HUDSON, Judge.

Defendant appeals his conviction of attempted robbery with a firearm. *See* N.C. Gen. Stat. § 14-87 (1999). We find no error.

Evidence presented at trial tended to show that on 5 February 2000, at about 1:00 a.m., Terry Wilson was preparing to close his store, the Four-Corners Grocery Store, located in Reidsville. His wife, Angela Wilson, was gathering the money to put in the money box. Mr. Wilson asked Saul Hernandez, an acquaintance who was in the store with them, to check the street to see if everything was clear. Hernandez started out the door, just as a man started coming in. Mr. Wilson saw a long gun barrel coming through the

open door. Mrs. Wilson testified that the man holding the gun pushed Hernandez backwards. The man got into the doorway. He was holding the gun in both hands, moving it back and forth. He was wearing a mask that covered his face. Wilson yelled for his wife to get down and for Hernandez to get back, and he grabbed his own gun, which was lying on the counter, and pointed it at the man. The man ran away.

Lieutenant Ken Hanks and Detective Lieutenant Nancy Bennett ("Lieutenant Bennett") of the Reidsville Police Department first interviewed defendant regarding the attempted robbery on 24 February 2000. They brought defendant and his mother, Tracy Matkins, to the police department for the interview. Defendant denied any involvement in the attempted robbery. On 26 February 2000, Lieutenant Hanks interviewed defendant at his home. Defendant agreed to give a statement, which Lieutenant Hanks wrote down and defendant signed. Defendant stated:

> I had planned on going to the Four Corners to rob the place. I kept walking back and forth on the sidewalk near the grocery asking myself did I want to do this. I had the gun with me that I bought on Pennsylvania Avenue. I was wearing a stocking cap that covers the face. I kept saying to myself, you don't want to do this. About that time a guy walked out of the door. I lifted the gun up and pointed it at the guy. I looked inside the store and saw the guy holding a gun. I thought I heard him say something. I backed off. He could have shot me through the window, if he wanted. I took the gun and hid it in the woods and I went home.

Defendant subsequently moved to suppress the statement. The trial court denied his motion. Defendant was convicted of

attempted armed robbery and now appeals.

Defendant first argues that the trial court erred in denying his motion to suppress the statement he gave to Lieutenant Hanks. Defendant contends that his statement was not voluntary, because he gave it in response to Lieutenant Bennett's promise that he would not be prosecuted if he confessed. In support of his motion, defendant submitted an affidavit, in which he averred, in relevant part:

> 9. When my Mother and I arrived at the Police Station, [Lieutenant] Bennett talked to my Mother and me first. I felt I was under arrest because it had become obvious to me that if [I] didn't give the officers the information they wanted they would continue to hound me and cause trouble until I did. [Lieutenant] Bennett told me and my mother, that since nothing had been taken, no one went into the store and no one was hurt there was nothing to it: and, if I would sign a paper it would be over with. My mother told me to go ahead and sign the paper and maybe they would leave us alone. . . .
>
> 10. My reasons for signing the statement was [sic] to keep the Officers from bothering me and the promise that since nothing was taken there would be nothing to it.

Defendant's mother also submitted an affidavit, which reiterated the above.

The trial court held a hearing on defendant's motion. The court heard the testimony of Lieutenant Hanks, defendant's mother, and defendant. The court then made the following relevant finding of fact:

> In the interview room, Lt. Hanks, Lt. Nancy Bennett, the defendant and his mother, Tracey [sic] Matkins were all present. The defendant and his mother were told that the defendant

> was not under arrest and that defendant could leave at any time. The defendant was not advised of his *Miranda* rights. The officers made the defendant aware that the purpose of their questioning him was to determine if he had participated in an attempted armed robbery at the Four Corners Grocery on February 5, 2000. Lt. Bennett may well have told the defendant and his mother on February 24 that nothing was taken from the Four Corners Grocery, that no one was hurt, that the robber did not go into the store, and that was nothing to it and that the defendant should go ahead and sign a statement indicating his involvement so that the matter could be put behind him. The State chose not to call Lt. Bennett to give her side of this. It is clear that Lt. Bennett did not tell the defendant that if he just confessed that no prosecution would follow.

"A trial court's findings of fact following a hearing on the admissibility of a defendant's statements are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). The trial court's finding that no promise was made to defendant is supported by competent evidence. By defendant's own account, Lieutenant Bennett's statements to him do not include a promise not to prosecute, nor any specific mention of what, if anything, the State would or would not do. Accordingly, because this was the only basis for defendant's assertion that his statement was involuntary, this assignment of error is overruled.

Next, defendant argues that the trial court erred in denying his motion to dismiss the charge due to insufficiency of the evidence. On review of a trial court's denial of a defendant's motion to dismiss for insufficiency of the evidence, we must

"review the evidence introduced at trial 'in the light most favorable to the State to determine if there is substantial evidence'" of each element of the offense. *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000) (quoting *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). The State is entitled to every reasonable inference that can be drawn from the evidence. *See State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "Substantial evidence is that which a reasonable juror would consider sufficient to support the conclusion" that each element of the offense has been proven. *Baldwin*, 141 N.C. App. at 604, 540 S.E.2d at 821. "Evidence of the defendant which is favorable to the State is considered, but his evidence in conflict with that of the State is not considered upon such motion." *State v. Price*, 280 N.C. 154, 157, 184 S.E.2d 866, 868 (1971).

An attempted armed robbery "occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987). Defendant argues that his statement to police shows that he neither had, nor acted on, the intent to rob the store.

Mr. Wilson testified for the State that just before 1:00 a.m., as he was getting ready to close the store and his wife was collecting the money, he asked Hernandez to check the street. A man, later identified as defendant, came in the front door wearing

a mask and holding a gun. Mrs. Wilson testified that defendant shoved Hernandez as he came in the door and began waving the gun around. Mr. Wilson grabbed his own gun, and, when defendant saw it, he ran away.

This evidence gives rise to a reasonable inference that defendant entered the store with the intent to rob it. We conclude that there was substantial evidence of the elements of attempted armed robbery. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

Finally, defendant asserts that the trial court erred in refusing to instruct the jury on the offense of assault by pointing a gun, *see* N.C. Gen. Stat. § 14-34 (1999), which defendant contends is a lesser included offense of attempted robbery with a firearm.

> In ruling on whether to charge the jury on a lesser included offense, the trial judge must make two determinations. The first is whether the lesser offense is, as a matter of law, an included offense of the crime for which defendant is indicted. . . . The second is whether there is evidence in the case which will support a conviction of the lesser included offense.

State v. Thomas, 325 N.C. 583, 590-91, 386 S.E.2d 555, 559 (1989); *see* N.C. Gen. Stat. § 15-170 (1999).

We reject defendant's argument because assault by pointing a gun is not a lesser included offense of attempted robbery with a firearm. Our Supreme Court has held that "the definitions accorded the crimes determine whether one offense is a lesser included offense of another crime." *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 378 (1982) (emphasis omitted), *overruled in part on*

other grounds by State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993). In particular, "all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *Id.*, 295 S.E.2d at 379.

Assault by pointing a gun is proscribed by N.C.G.S. § 14-34, which provides that "[i]f any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor." Attempted armed robbery is proscribed by N.C.G.S. § 14-87, which provides as follows:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C.G.S. § 14-87(a). Assault by pointing a gun has as an essential element the pointing of a gun or pistol, while attempted armed robbery does not. As noted above, the language of N.C.G.S. § 14-87(a) provides that attempted armed robbery can be committed by merely having possession of a firearm, without pointing it at a person. Because assault by pointing a gun is not a lesser included offense of attempted armed robbery, the trial court did not err in

failing to give the instruction defendant requested.

No error.

Judges MARTIN and CAMPBELL concur.

Report per Rule 30(e).