NO. COA01-744

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 99 CRS 26620-22
99 CRS 26629-30, 26632-33

TIMOTHY HERRON and
TAHA JAABER

Appeals by defendants from judgments dated 6 December 2000 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant Timothy Herron.

The Law Firm of Charles L. Alston, Jr., by Charles L. Alston, Jr. for defendant-appellant Taha Jaaber.

GREENE, Judge.

Timothy Herron (Herron) appeals a judgment dated 6 December 2000 entered consistent with a jury verdict finding him guilty of three counts of robbery with a dangerous weapon. Taha Jaaber (Jaaber) appeals judgments dated 6 December 2000 entered consistent with a jury verdict finding him guilty of three counts of robbery with a dangerous weapon and one count of carrying a concealed weapon.

Herron and Jaaber were tried jointly at the 4 December 2000 session of Mecklenburg County Superior Court on three counts each of robbery with a dangerous weapon. Jaaber was tried on additional charges of carrying a concealed weapon and possession of marijuana.

The State presented evidence tending to show that at approximately 10:30 p.m. on 8 July 1999, Joshua Stokes (Stokes), Christopher Crowe (Crowe), and David Stansberry (Stansberry) arrived at the Rack and Roll game room in Charlotte. A man, later identified as Jaaber, who was wearing a white tee shirt and blue jeans and with his hair in dreadlocks, approached Stansberry in the parking lot and asked for a lighter. After receiving the lighter, Jaaber returned it and pointed a gun at Stansberry. Jaaber then ordered Stansberry to give him a necklace Stansberry was wearing. Stansberry gave Jaaber the necklace and everything else he had, including a pager. A second, shorter male, who also was armed with a gun, approached Stansberry. The two armed men pushed Stansberry toward a hunter green and beige Pontiac Transport van occupied by a person sitting in the driver's seat.

At that point, Stokes and Crowe came outside the game room and saw the two men with Stansberry near the Pontiac Transport van. As Crowe and Stokes approached Stansberry, the taller man, whom Crowe and Stokes identified as Jaaber, grabbed Crowe's cellular phone from Crowe's ear and talked to the person with whom Crowe had been conversing. When Crowe asked for the return of the cellular phone, Jaaber refused and pointed a gun at Crowe's chest, stating: "'This is a robbery. Give me all of your stuff.'" Crowe gave Jaaber his

necklace and bracelet. Jaaber also took a pager, keys, and $7.00 in cash from Crowe. Meanwhile, the shorter man, whom Stokes identified as Malcolm Grissette (Grissette), pointed a gun at Stokes and removed money, a pager, and a dime bag of marijuana from Stokes' pockets. After searching Stokes' vehicle, Jaaber returned to Crowe and punched Crowe in the face. Shortly thereafter, Jaaber and Grissette entered the Pontiac Transport van through the back sliding door, and the vehicle sped away from the parking lot.

Officer James C. Smith (Officer Smith) of the Charlotte-Mecklenburg Police Department answered a dispatch at approximately 10:30 to 10:35 p.m. on 8 July 1999 to the Rack and Roll located at 7917 Morris Chapel Road. Stokes, Stansberry, and Crowe told Officer Smith they had been robbed by two men who departed in a green over gray Pontiac Transport van. They described the men as one tall black male with dreadlocks and wearing a white tee shirt and blue jeans and one shorter black male wearing a "dew rag" and camouflage clothing. They could not describe the driver of the van. Officer Smith issued a bulletin to officers in the area to be on the lookout for a vehicle matching the description given by Stoken, Stansberry, and Crowe.

Officer Brian Keith Nicholson (Officer Nicholson) of the Charlotte-Mecklenburg Police Department heard the dispatch that a green van suspected of involvement in an armed robbery was headed on Little Rock Road toward I-85. Within three to four minutes after hearing the dispatch, Officer Nicholson saw a green van with a dark stripe along the bottom pass his vehicle on I-85

approximately three or four miles from 7917 Morris Chapel Road. Officer Nicholson pursued and stopped the van, which was occupied by three black males. One of the men was wearing army fatigues and a "dew rag" on his head, and a second man, who was taller, had his hair in dreadlocks. Officer Nicholson identified the men as Jaaber and Grissette. He identified the third man, the driver of the vehicle, by name as "Timothy Herron." He also identified him in court as Herron. Although Officer Nicholson observed Herron's in-court appearance was different from when he stopped Herron on 8 July 1999, he explained the difference was due to the fact that Herron's hair was longer and braided.

Officer Smith brought Stansberry and Crowe to the scene of the stop. Stansberry and Crowe identified Grissette and Jaaber as the men who had robbed them.

With the driver's consent, Officer Nicholson searched the van at 10:43 p.m. and seized a gun from underneath the seat occupied by Jaaber and a gun from the seat occupied by Grissette. Officer Nicholson also seized a cellular phone, two silver necklaces, a silver bracelet, and a small amount of marijuana from a hat lying on the dashboard. In addition, Officer Nicholson found a pager in Jaaber's pocket. The cellular phone and pager responded when Officer Nicholson dialed the numbers given to him by the victims. Officer Nicholson transported Herron and Grissette downtown to the Charlotte-Mecklenburg Intake Center and obtained a photograph of each. At trial, the State offered the photograph of Herron taken shortly after he was arrested. Officer Nicholson identified the

photograph as the man who was driving the van. When the State moved for the photograph of Herron to be offered into evidence, the trial court asked Herron's attorney if she wished to be heard. She indicated she did not, and the trial court admitted the intake photograph of Herron.

After the State rested, both Herron and Jaaber moved to dismiss the charges against them. The trial court denied both motions. Neither defendant presented any evidence but both renewed their motions to dismiss. Again, the trial court denied those motions.

After the jury returned its verdicts, Herron made a motion to set aside the verdict based on the insufficiency of the evidence. The trial court denied Herron's motion. The trial court consolidated Herron's convictions of robbery with a dangerous weapon and sentenced him to an active term of imprisonment of a minimum of 100 months and a maximum of 123 months. The trial court consolidated one count of Jaaber's convictions of robbery with a dangerous weapon with the conviction of carrying a concealed weapon and imposed an active term of a minimum of 61 months and a maximum of 83 months. The trial court consolidated Jaaber's remaining two convictions of robbery with a dangerous weapon and imposed an active sentence of a minimum of 77 months and a maximum of 102 months. The trial court ordered Jaaber's sentences to run consecutively.

The issues are whether: (I) substantial evidence existed that

Jaaber was the perpetrator of the robberies; (II) substantial evidence existed that Herron aided and abetted in the commission of the robberies; (III) the trial court abused its discretion in failing to set aside the jury's verdict in Herron's trial; and (IV) the trial court committed plain error by admitting into evidence a photograph of Herron taken shortly after he was arrested.

Jaaber

I

Jaaber argues the trial court erred in failing to dismiss the charges of armed robbery as the evidence was insufficient to identify him as the perpetrator of the crimes. We disagree.

A motion to dismiss must be denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that [the] defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). In considering a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that may be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The trial court must disregard contradictions and discrepancies in the evidence, leaving them for jury resolution. *Id.* The test is the same whether the evidence is direct, circumstantial, or both. *State v. Earnhardt*, 307 N.C. 62, 68, 296

S.E.2d 649, 653 (1982).

In order to defeat a motion to dismiss for robbery with a dangerous weapon, the State must present substantial evidence that the defendant: (1) took, or attempted to take, the personal property of another (2) by the use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of the person is endangered or threatened. N.C.G.S. § 14-87(a) (1999); *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998).

In this case, all three victims positively identified Jaaber as one of the two men armed with guns. As the robberies were transpiring, the victims saw a third person seated behind the driver's seat of the Pontiac Transport van parked nearby. The victims then saw the two men who had taken their property jump into the back of the Pontiac Transport van and the van speed away. Approximately fifteen minutes after the robberies, Officer Nicholson stopped a Pontiac van similar in description to the one in which the robbers were seen leaving the scene, less than five miles from the scene of the robberies, occupied by two men positively identified by the victims as perpetrators of the robberies. The van contained two loaded guns, as well as the personal property of the victims acquired earlier. A jury could reasonably find, based upon this evidence, that Jaaber committed the robberies of the three victims. Accordingly, the trial court did not err in failing to dismiss the charges against Jaaber.

Herron

II

Herron argues the trial court erred in failing to dismiss the charges against him as there was no evidence he committed the robberies. We disagree.

A person is guilty of a crime under the theory of aiding and abetting if (1) "the crime was committed by another" person; (2) "the defendant knowingly advised, instigated, encouraged, procured, or aided the other person"; and (3) "the defendant's actions or statements caused or contributed to the commission of the crime by the other person." *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). The defendant "must aid or actively encourage the person committing the crime" or communicate to the perpetrator his intent to assist. *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999). A defendant's intent to aid may be inferred from the defendant's actions and from his relation to the actual perpetrators. *Id.* If evidence exists that a defendant is seen driving a vehicle that the perpetrators of a crime were seen getting into, it can be inferred the defendant was in the vehicle at the time of the crime and he aided and abetted in the commission of the crime by driving the car from the scene. *See State v. Foster*, 33 N.C. App. 145, 149, 234 S.E.2d 443, 446 (1977).

In this case, all three victims saw Jaaber and Grissette get into a green Pontiac Transport van after taking the victims' property. Approximately fifteen minutes after the robberies, Officer Nicholson spotted the vehicle and stopped it three or four miles from the Rack and Roll. Officer Nicholson identified Herron

as the driver of the vehicle. It could reasonably be inferred from this evidence that Herron was present in the vehicle at the time of the robberies and that he aided and abetted in the commission of the robberies by driving the vehicle from the scene. Accordingly, the trial court did not err in denying Herron's motion to dismiss the robbery charges against him.

III

Herron also argues the trial court erred in failing to set aside the jury verdict based upon insufficiency of the evidence. A motion to set aside the verdict based on insufficiency of the evidence is addressed to the sound discretion of the trial court. *State v. Hamm*, 299 N.C. 519, 523, 263 S.E.2d 556, 559 (1980). The trial court's refusal to grant such a motion "is not reviewable on appeal in the absence of [an] abuse of discretion." *Id.* In this case, because there was substantial evidence to survive a motion to dismiss on the charges of robbery with a dangerous weapon, Herron has failed to show an abuse of discretion by the trial court. *See id.*

IV

Herron argues the trial court erred by admitting into evidence a photograph taken of him at the time he was arrested and processed for the present charges. Herron, however, failed to object to the admission of the photograph at trial and relies on plain error.

A defendant arguing plain error has the burden to show an error occurred and the error was a "'"*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice

cannot have been done."'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). As a result, the defendant must show the error "had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 379.

A photograph is admissible "to explain or illustrate anything that it is competent for [the witness] to describe in words." *State v. Cutshall*, 278 N.C. 334, 347, 180 S.E.2d 745, 753 (1971). The admission of evidence without a limiting instruction "will not be held error in the absence of a request by the defendant for limiting instructions." *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988).

In this case, Officer Nicholson testified Herron's appearance in court was different from how it was on 8 July 1999 and he explained this difference. The State offered the photograph to illustrate Officer Nicholson's testimony. At the time the photograph was submitted, the trial court asked Herron's attorney whether she wished to be heard regarding the admission of the photograph and she declined. Officer Nicholson had already identified Herron as the driver of the vehicle and stated Herron had taken a photograph shortly after being arrested. There is no indication in the record to this Court that admission of the photograph had a "probable impact on the jury's finding of guilt." Accordingly, the trial court did not commit plain error in admitting the photograph into evidence.

No error.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).