NO. COA02-1508

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

STATE OF NORTH CAROLINA

v. Craven County
No. 01 CRS 53958; 02 CRS 331

RUDOLPH JEROME WILLIAMS.

Appeal by Defendant from judgment entered 18 April 2002 by Judge Benjamin G. Alford in Superior Court, Craven County. Heard in the Court of Appeals 7 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General E. Clementine Peterson, for the State.

Rudolf, Maher, Widenhouse & Fialko, by Andrew G. Schopler, for the defendant-appellant.

WYNN, Judge.

Following a jury trial, Defendant, Rudolph Jerome Williams, appeals his convictions for conspiracy to commit armed robbery, armed robbery, and being a habitual felon. He contends the trial court erroneously (I) excluded as hearsay, state of mind testimony essential to his defense, (II) dismissed his objection to the search of his sister's apartment for lack of standing, and (III) admitted statements of Sergeant Dombrowsky that lacked foundation. We find no prejudicial error.

The State's evidence tended to show that on the rainy morning of 23 July 2001, two men dressed in dark clothing, white gloves and singularly armed with what appeared to be a serrated kitchen knife, entered a convenience store in New Bern, North Carolina with umbrellas collapsed over their heads. The men confronted the store manager, Barbara Belote, at the door of an office where she had been counting cash and told her it was a robbery. Ms. Belote told them to take the money; they took $2477.00 in cash, a pack of cigarettes and said "have a nice day." Thereafter, Ms. Belote called the police. After watching the store's surveillance camera video and hearing her descriptions of the suspects, one of whom she recognized as Dexter Spencer, a regular customer, the responding officers initiated an investigation.

Sgt. Dombrowsky set up a perimeter check north-west of the store while Officer DuBay brought a police canine to the site. After sniffing an umbrella left behind by the robbers, the canine led the officers to an apartment area before losing the scent. Thereafter the officers walked with the dog along an area where the grass had been pushed down. That led the officers to a fence at the rear of an apartment owned by defendant's sister, Farrah Baker.

At the apartment unit, Ms. Baker ultimately consented to the officers searching her apartment. After conducting a visual sweep of the apartment, Lieutenant Godette and Sgt. Dombrowsky heard a noise coming from overhead. Sgt. Dombrowsky stated loudly that the police were investigating a robbery and demanded that the persons overhead come down. Upon receiving no response, he sprayed pepper

spray into the attic prompting Dexter Spencer to come down. Thereafter, the officers found Defendant in the attic, buried under insulation. A further search of the apartment revealed $2,428.00, three cream colored gloves and a pair of black jean shorts.

As a result of the investigation, the officers arrested Dexter Spencer and Defendant. At his trial, Dexter Spencer pled guilty, but never implicated Defendant. At Defendant's trial, after a *voir dire* hearing, the trial judge instructed Ms. Baker not to testify about Defendant's expressed fear of being arrested on a separate, unrelated charge. Ms. Baker was allowed to testify that her brother was at her home when the store was being robbed, from 7:00 a.m. until 10:30 or 11:00 a.m. As rebuttal, the State offered Gloria Scott's testimony that between approximately 7:30 a.m. and 8:30 a.m., Defendant was not at his sister's home, but rather, was picking up cigarettes and beer for her.

From his convictions on the charged offenses, Defendant first argues on appeal that the trial court erred by excluding Ms. Baker's testimony that Defendant was hiding in the attic because he feared being arrested for an unrelated case. Defendant argues that Ms. Baker's hearsay testimony was admissible under the "state of mind" exception to the hearsay rule, and would have tended to undermine the inference of guilt from Defendant's flight from police, which was the State's strongest evidence in its wholly circumstantial case. While we agree that the trial court should have allowed this testimony, we find the error non-prejudicial in this case.

Although generally prohibited, if hearsay testimony tends to show "the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered," it is admissible. N.C.G.S. § 8C-1, Rules 801(c), 802, and 803(3).

During *voir dire,* Baker testified as follows:

> Q: Had Mr. Williams [Defendant] told you prior to that that he thought there was an order for his arrest?
>
> A: Yes.
>
> Q: Was he scared of being picked up?
>
> A: Yes.
>
> Q: Was he scared of going back to jail?
>
> A: That's right.
>
> Q: And he told you that?
>
> A: Yeah.

And later:

> Q: I guess I want to know how you have personal knowledge that the police had a warrant out for him [Defendant]?
>
> A: I didn't know they had a warrant for him. I knew he was suppose to have to went to court and he didn't go to court for this.

The trial judge sustained the State's objection and instructed Ms. Baker "not to testify in any respect that you knew there was an order of arrest outstanding for him and that's why he went and got in the attic."

The State argues that this testimony was unreliable and irrelevant to Defendant's "then-existing" state of mind. Defendant, however, contends that his statements to his sister, that he thought the police had an order for his arrest in an unrelated case, that he was scared of being picked up, and that he was scared of jail, constitute an expression of emotion and state of mind.

However, assuming without deciding that Ms. Baker's testimony regarding Defendant's expressed fear of arrest should have been admitted, we find it dispositive that not every error requires a new trial. Indeed, in this case, we hold that even if this testimony had been admitted, it would have had no reasonable possibility of affecting the verdict. *See* N.C. Gen. Stat. § 15A-1443(a). The record shows evidence that Defendant was found hiding in the attic with Dexter Spencer who admitted to participating in the robbery that had involved two men, wore the clothes identical to that worn by the robbers and was found where the stolen money was recovered. Accordingly, we find no prejudicial error in the trial court's failure to allow Ms. Baker's testimony.

Defendant next contends the trial court erred by dismissing his objection to the search of his sister's apartment for lack of standing. We disagree.

To challenge the legality of a search, Defendant bears the burden of demonstrating a reasonable expectation of privacy in the premises searched. *State v. Taylor,* 298 N.C. 405, 259 S.E.2d 502 (1979). In turn, this Court's review is limited to consideration

of whether competent evidence supports the trial court's findings of fact and whether the findings of fact support its conclusions of law. *State v. Johnston,* 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994).

The trial court's conclusion that "Defendant has failed to come forward with sufficient proof to show that he has any proprietary interest . . . to warrant protection of a legitimate privacy interest in said apartment" is supported by facts in the record. Specifically, the absence of Defendant's name on the lease and Defendant's own testimony that he lives between his sister's home, another apartment and the "streets," suffices to justify the denial of Defendant's motion to suppress the search of Ms. Baker's apartment for lack of standing. Thus, Defendant's second argument challenging the trial court's conclusion that he lacked standing to object to the search of his sister's apartment, is without merit.

Defendant last argues that the trial court abused its discretion in admitting testimony from Sgt. Dombrowsky on two issues; first, that he set-up a perimeter north west of the store because robbers typically ran that direction, and second, that he believed the grass leading to Defendant's hiding place was trampled by several people. We disagree.

N.C.G.S. § 8C-1, Rule 701 provides that "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the

determination of the issue. A trial court's decision regarding the admissibility of evidence will not be disturbed absent a showing of an abuse of discretion. *See State v. Washington,* 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000)(The admissibility of expert opinion or lay opinion testimony is reviewed by an abuse of discretion standard).

Evidence in the record supports the trial court's decision to allow Sgt. Dombrowsky's testimony. Sgt. Dombrowsky said he based his testimony about the perimeter and the trampled grass on his thirteen years of experience as an officer on the New Bern police force. Defendant's contention that this testimony "might have been allowable from a qualified expert tracker" is simply unworkable. It is not an abuse of discretion for a trial court to allow an experienced police officer, such as Sgt. Dombrowsky, to discuss from which direction he has seen robbery suspects run. Likewise, we are satisfied Sgt. Dombrowsky's testimony regarding "what appeared to me to be . . . a couple of people that run through and trampled and pushed the ground down," was properly based on his perception and was helpful to the trier of fact. Accordingly, the trial court did not abuse its' discretion in admitting Sgt. Dombrowsky's testimony.

No prejudicial error.

Judges TYSON and LEVINSON concur.

Report per Rule 30(e).