

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-341

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Wake County
No. 00CRS39864

JERRY LEE McDANIEL,
Defendant.

Appeal by defendant from judgment entered 26 October 2000 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 7 October 2002.

Attorney General Roy A. Cooper, by Special Deputy Attorney General Thomas R. Miller, for the State.

John T. Hall for defendant-appellant.

EAGLES, Chief Judge.

Jerry Lee McDaniel ("defendant") appeals from judgment entered on a jury verdict finding him guilty of robbery with a dangerous weapon. After careful consideration of the briefs and record, we discern no error.

The State's evidence tended to show that Tish Ford ("Ford") was a night manager at the McDonald's restaurant on Highway 64 in Wendell, North Carolina. Terry Kellam ("Kellam") and his girlfriend, Ford, planned to rob Ford's place of employment. According to their plan, Ford would leave the back door of the

restaurant open so that Kellam could gain entry. When Kellam drove Ford to work on 4 November 1999, the couple agreed that the robbery would occur that evening. Kellam then drove to a rooming house to find defendant and ask him to assist in the robbery. Defendant agreed to assist in the robbery and provided a rifle and hand grenade to use in the robbery. Kellam took the rifle and defendant carried the hand grenade and a toboggan. The two also found a Halloween mask at the rooming house. After recruiting a third person, a man known as "Face," the three co-conspirators drove to a convenience store where they bought gloves to wear during the robbery.

At around 10:00 p.m., the three men drove to the McDonald's restaurant, circled around the restaurant, and then drove to a nearby shopping center, where Kellam called Ford. Ford told Kellam that the back door was unlocked and that everything was okay. Face walked a short distance to the restaurant to see if there were people inside the restaurant. When Face returned, defendant and Kellam entered the restaurant through the open back door. Defendant wore a mask made from the toboggan and Kellam wore the Halloween mask. Defendant held up the grenade and ordered Ford and three other employees to do as they were told to prevent injury to themselves. Similarly, Kellam carried the rifle and told Ford and the other employees to do as they were instructed to avoid getting hurt. Kellam then escorted the restaurant employees, with the exception of Ford, to the dishwashing area and confined them there. Defendant and Kellam then yelled at Ford to give them the money

from the restaurant safe. Crying and frightened, Ford complied. After Ford gave Kellam and defendant the money, the two men ordered her to lie on the floor. The two then fled the scene and joined Face in the get-away vehicle. Kellam drove Face and defendant to a motel where Kellam and Ford were living. Kellam left defendant and Face at the hotel while he returned to the McDonald's to pick up Ford. Upon their return, Kellam, Ford, Face and defendant divided approximately \$5,000 stolen from the restaurant.

Ford called the police immediately after the robbery but did not confess her involvement until May 2000. She then identified defendant and Kellam as the robbers. Kellam also confessed his involvement to the police and identified defendant as the person who assisted him in the 4 November 1999 robbery of the McDonald's restaurant.

Defendant's evidence tended to show that defendant was at a party during a forty-eight hour period from the evening of 3 November 1999 to the morning of 5 November 1999. Latasha Robertson, a close friend of defendant, and Michelle Patterson, defendant's former girlfriend, testified that they were at the party with defendant.

The matter came to trial at the 23 October 2000 Criminal Session of Wake County Superior Court before Judge James. C. Spencer, Jr. The jury returned a verdict of guilty of robbery with a dangerous weapon. The trial court entered judgment on the jury verdict and sentenced defendant in the presumptive range to a term of 108 to 139 months imprisonment. Defendant appeals.

Defendant's sole argument on appeal is that the trial court erred in denying his motion to dismiss for insufficiency of the evidence. Defendant argues that since the night manager of the restaurant that was robbed was a co-conspirator in the robbery, the State cannot show that defendant committed the crime charged. We disagree.

A motion to dismiss for insufficiency of the evidence is properly denied "[i]f there [is] substantial evidence -- whether direct, circumstantial, or both -- to support a finding that the offense charged [has been] committed and that the defendant committed it" *State v. Ainsworth*, 109 N.C. App. 136, 142, 426 S.E.2d 410, 414 (1993) (quoting *State v. Degree*, 322 N.C. 302, 307-08, 367 S.E.2d 679, 683 (1988) (citations omitted)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Cobb*, ___ N.C. App. ___, ___, 563 S.E.2d 600, 607 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted)), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (2002). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

Here, defendant was charged with robbery with a dangerous weapon, in violation of G.S. § 14-87. G.S. § 14-87(a) states that:

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.

G.S. § 14-87(a) (2001). It is not necessary that the ownership of the property stolen be laid in any specific person to prove the crime of robbery with a dangerous weapon. *State v. Spillars*, 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1972). The allegations and proof must be sufficient to negate the idea that the accused took his own property. *State v. Fountain*, 14 N.C. App. 82, 86, 187 S.E.2d 493, 496 (1972). The essence of the offense is force or intimidation along with the use or threatened use of a firearm. *State v. Hartman*, 344 N.C. 445, 473, 476 S.E.2d 328, 344 (1996), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997).

Defendant's indictment charges that he

did steal, take, and carry away another's personal property, United States Currency, having a value of \$5,647.91, from the McDonald's Restaurant, Wendell, NC, by means of an assault consisting of having in his possession and threatening the use of a grenade and a rifle, dangerous weapons, whereby the lives of patrons and workers at the McDonald's Restaurant were endangered and threatened.

The evidence tends to show that defendant and a co-conspirator, Kellam, did enter the McDonald's restaurant on 4 November 1999. Defendant held a grenade and Kellam carried a rifle. The two used the weapons to force the restaurant employees to comply with their

demands. Defendant and Kellam told employees that they could prevent any harm to themselves by doing as instructed. Ford, the night manager who was on duty at the time of the robbery, had conspired with Kellam in planning the robbery and therefore, consented to the robbery. The remaining three employees, however, did not so consent. Those employees feared for their lives and did as they were told because of that fear. Ford subsequently took approximately \$5,000 from the restaurant safe and gave the money to defendant and Kellam.

This Court was presented with a similar set of facts in *State v. Thompson*, 57 N.C. App. 142, 291 S.E.2d 266, *aff'd*, 307 N.C. 125, 296 S.E.2d 297 (1982). Much like defendant in this case, the defendant in *Thompson* argued that there was not sufficient evidence to convict him of armed robbery because the evidence showed that the manager of the restaurant from which the money was taken was an accomplice to the crime, which meant that the money was taken with the accomplice-manager's consent. *Id.* at 144-45, 291 S.E.2d at 267. This Court rejected this argument and concluded that the defendant could be convicted of armed robbery, even if the manager of the restaurant was in fact an accomplice since there were other employees at the restaurant when it was robbed who had not consented to the taking of the subject property. *Id.* at 145, 291 S.E.2d at 267; *see State v. Ballard*, 280 N.C. 479, 488, 186 S.E.2d 372, 377 (1972) (providing that while the employees held at gunpoint had no access to the safe, they did share a duty to safeguard their employer's money held therein).

Although defendant argues to the contrary, we conclude that the State did present sufficient evidence to show that defendant committed the crime charged. First, as specified by the statute, the McDonald's restaurant may be properly named as an owner of stolen personal property. See G.S. § 14-87(a). Second, while Ford did conspire with Kellam to rob her employer and expected the robbery on 4 November 1999, her "consent" to the robbery in no way negates the fact that the three other employees present on the evening of the robbery were completely unaware of the conspiracy. See *Thompson*, 57 N.C. App. at 145, 291 S.E.2d 267. Those three employees were threatened by the defendant and were frightened for their lives. They did not consent to the robbery of the restaurant. Finally, it is immaterial to the crime of armed robbery that only Ford, a co-conspirator, had access to the safe. Every employee present in a place of business when it is robbed has a responsibility to safeguard the employer's property if he can do so without endangering his life. See *Ballard*, 280 N.C. at 488, 186 S.E.2d at 377.

In sum, the State made the requisite showing that defendant took and carried away approximately \$5,000 of currency from the McDonald's restaurant in Wendell, North Carolina with the use or threatened use of a rifle and grenade, thereby endangering certain employees of the restaurant. Accordingly, the trial court did not err in denying defendant's motion to dismiss.

No error.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).