NO. COA03-910

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

STATE OF NORTH CAROLINA

v. Cumberland County
No. 01 CRS 50225

CARLTON LAMONT DAVIS

Appeal by defendant from judgments entered 14 August 2002 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 18 May 2004.

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

Margaret Creasy Ciardella, for defendant-appellant.

CALABRIA, Judge.

Carlton Lamont Davis ("defendant") appeals judgments entered on jury verdicts finding him guilty of first-degree murder under the felony murder rule, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. We find no error.

The State's evidence adduced at trial tended to show the following: on or about 26 November 2000, defendant and Donnell Bratcher ("Bratcher"), who was armed, went to the residence of Sherman Holliday (the "victim") in an attempt to rob him. The

robbery attempt failed when the victim slammed the door on defendant and Bratcher, catching the latter's arm in the door and causing him to lose his gun.

Later, the victim showed up at the house of Eric Robinson ("Robinson"), defendant's half-brother. When Robinson, Bratcher, and defendant met the victim outside, the victim asked them if they "want[ed] to play" and left. Robinson was concerned about the possibility of "trouble" and warned Bratcher and defendant that they "can't be bringing [any] drama around [his] mom['s] house."

Following the confrontation, defendant met with Jerome Thomas ("Thomas") and related the events of the failed robbery. Defendant stated he wanted to go back but needed another gun. Thomas agreed to get defendant another gun and accompanied him to Robinson's house later that night after procuring a gun. While at Robinson's house, Thomas understood that defendant intended to go to the victim's house a second time to again attempt a robbery. Armed with two handguns, defendant, Robinson, Bratcher, and Thomas discussed their respective roles in the robbery attempt and left Robinson's house.

On the way to the victim's house, Robinson and Thomas changed their minds with respect to their role in the robbery but, nonetheless, continued on with Bratcher and defendant and remained outside while they broke into the victim's house. After waiting outside approximately ten minutes, Robinson and Thomas heard gunshots and fled back to Robinson's house. Later, they were joined by defendant and Bratcher, who had injuries to his head and

hand. Bratcher explained his injuries resulted from fighting with the victim and breaking a window to flee from the victim's house. Nothing was taken from the victim's house. Investigating officers subsequently found the victim in the house. Medical treatment was unsuccessful, and an autopsy revealed the victim died from a single gunshot wound to the chest.

Following an investigation, defendant was arrested and indicted for first-degree murder, first-degree burglary, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant filed motions to dismiss the indictment, for a bill of particulars, and for disclosure of the theory upon which the State would seek a conviction of first-degree murder. These motions were denied by the trial court, the case proceeded to trial, and, after the State rested its case-in-chief, the defendant elected not to present evidence.

At the close of all the evidence, defendant moved for a dismissal of all charges on grounds of sufficiency of the evidence. The trial court denied defendant's motions. The jury found defendant guilty of first-degree murder under the felony murder rule based upon robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon but acquitted him of first-degree burglary. The jury recommended a sentence of life imprisonment without parole. The trial court entered judgment of life imprisonment without parole on the first-degree murder conviction and a concurrent sentence of 23 to 37 months' imprisonment for the conspiracy to

commit robbery with a dangerous weapon conviction but arrested judgment as to attempted robbery with a dangerous weapon. Defendant appealed.

On appeal, defendant asserts the trial court erred in (I) denying defendant's motions regarding the first-degree murder indictment, (II) admitting hearsay evidence concerning what defendant's co-conspirators said, and (III) denying defendant's motion to dismiss the charges based on sufficiency of the evidence. We find no error.

I. Indictment for First-Degree Murder

In his first assignment of error, defendant asserts the trial court erred by denying his motions regarding the indictment for first-degree murder and by submitting a charge to the jury that the indictment was insufficient to support. Specifically, defendant argues the "indictment against defendant failed to allege all of the elements of first degree murder in that it failed to specify what felony or felonies supported felony murder." We disagree.

Defendant was tried for first-degree murder based on a short-form murder indictment. Our Supreme Court "has consistently held that the short-form first-degree murder indictment serves to give a defendant sufficient notice of the nature and cause of the charges against him or her." *State v. Squires*, 357 N.C. 529, 537, 591 S.E.2d 837, 842 (2003), *cert. denied*, ___ U.S. ___, 159 L. Ed. 2d 252 (2004). Moreover, where an "indictment . . . complies with the short-form indictment authorized by [N.C. Gen. Stat. §] 15-144[,] [it] is . . . sufficient to charge first degree murder

without specifically alleging premeditation and deliberation or felony murder." *State v. Avery*, 315 N.C. 1, 14, 337 S.E.2d 786, 793 (1985). Finally,

> [t]he State is not required at any time to elect a theory upon which it will proceed against the defendant on the charge of first degree murder, and it is proper for the trial court to submit the issue of the defendant's guilt to the jury on each of the theories of first degree murder supported by substantial evidence presented at trial.

State v. Clark, 325 N.C. 677, 684, 386 S.E.2d 191, 195 (1989).

With these principles in mind, it is clear the indictment in the present case was sufficient to charge defendant with first-degree murder despite that it did not disclose the specific felony upon which the prosecution intended to rely. Such information is not required by N.C. Gen. Stat. § 15-144, and according to our Supreme Court, a short-form murder indictment need not even specify that felony murder is the basis upon which the State intends to proceed; therefore, it follows that disclosure of which felony will be the predicate under the felony murder rule is likewise not required.

To the extent defendant desired more precise information than that provided by the short-form indictment properly drawn under N.C. Gen. Stat. § 15-144, defendant could and did apply for a bill of particulars addressed to the discretion of the trial court. However, no argument has been presented on appeal that the trial court abused its discretion in denying defendant's motion. Accordingly, that assignment of error is abandoned. N.C. R. App. P. 28(b)(6) (2004).

II. Hearsay

Defendant's second assignment of error challenges as inadmissible hearsay a number of statements which the trial court admitted into evidence. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003). While hearsay is not generally admissible into evidence, *see* N.C. Gen. Stat. § 8C-1, Rule 802 (2003), "a statement by a coconspirator [of the party against which it is offered] during the course and in furtherance of the conspiracy" is an exception to the general hearsay rule and is admissible. N.C. Gen. Stat. § 801(d)(E) (2003). Recently, our Supreme Court explained

> [a]dmission of a conspirator's statement into evidence against a co-conspirator requires the State to establish that: (1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended. Proponents of a hearsay statement under the co-conspirator exception must establish a *prima facie* case of conspiracy, without reliance on the statement at issue. In establishing the *prima facie* case, the State is granted wide latitude, and the evidence is viewed in a light most favorable to the State.

State v. Valentine, 357 N.C. 512, 521, 591 S.E.2d 846, 854 (2003) (internal citations and quotation marks omitted).

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995). It "continues until [it] is accomplished or abandoned."

State v. Grady, 136 N.C. App. 394, 400, 524 S.E.2d 75, 79 (2000) (citing *State v. Fink*, 92 N.C. App. 523, 375 S.E.2d 303 (1989)). Our Supreme Court has recognized the "inherent difficulty" in establishing a criminal conspiracy. *Valentine*, 357 N.C. at 522, 591 S.E.2d at 855. Thus, direct proof is not required; rather, conspiracy "may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *Id.* (citation omitted).

In the instant case, Thomas testified, without objection, that he met defendant at his sister's house on 28 November 2000. While there, defendant stated he "and his cousin . . . went to [the victim's] house, and tried to rob him, but [the victim] had slammed the door in [their] face so [defendant] was telling me . . . he need[ed] another gun to go back over there because he wanted -- they wanted to go back over there because [the victim] had some money." Thomas further stated defendant asked "if there[] [was] any possible way [Thomas] could get [a gun]," and Thomas agreed to try. After Thomas procured a gun, he, defendant, and Bratcher met Robinson at his house. Thomas affirmed his understanding "from talking with [defendant] that it was [defendant's] intention to go to the [victim's] house a second time" for the purpose of "rob[bing] him." We find this testimony, in the light most favorable to the State, constitutes a *prima facie* showing of the existence of a conspiracy between Thomas, Bratcher, Robinson, and defendant.

Defendant argues the trial court erred in admitting Robinson's testimony prior to the State establishing a *prima facie* case of conspiracy. However, this Court has previously stated that "[t]he judge, in his discretionary authority over the presentation of evidence, may admit the statements *subject to a later showing* of conspiracy." *Fink*, 92 N.C. App. at 530, 375 S.E.2d at 307 (emphasis added). Accordingly, this argument is without merit.

Defendant also asserts the trial court erroneously allowed the testimony by Robinson and Thomas because they ceased to be co-conspirators when they "abandoned any plan to commit robbery" and "informed the others that [they] were not participating" when all four arrived at the victim's house immediately prior to defendant and Bratcher's entry. We disagree. Just as the conspiracy continues until abandoned, *see Valentine*, 357 N.C. at 521, 591 S.E.2d at 854; *State v. Conrad*, 275 N.C. 342, 348, 168 S.E.2d 39, 43 (1969), it follows that statements made during the conspiracy and before it is abandoned remain admissible under the hearsay exception. Thus, assuming *arguendo*, Robinson and Thomas abandoned the conspiracy immediately prior to defendant's entry into the victim's house, that would only affect challenged statements occurring *after* the purported abandonment. We now turn to the specific portions of testimony defendant asserts were improperly admitted.

Defendant challenges Robinson's testimony that Bratcher and defendant told him they were "going over to [the victim's] house" the day of the first, failed robbery attempt. Defendant also

challenges Detective McLamb's testimony that both Robinson and Thomas had previously denied involvement in the victim's murder during his investigation. The transcript reveals, however, that defendant failed to object to either of these portions of testimony, and, moreover, defendant has failed to assert on appeal that the trial court committed plain error. "[A]s defendant has not alleged plain error in his arguments to this Court, he has waived appellate review of these issues on such grounds." *State v. Thibodeaux*, 352 N.C. 570, 582, 532 S.E.2d 797, 806 (2000) (citing N.C. R. App. P. 10(c)(4)).

The third portion of testimony defendant challenges on appeal is Thomas' testimony concerning what Bratcher told Thomas "about th[e] plan to go to the [victim's] house" while they were at Robinson's house prior to the second robbery attempt. Defendant objected, asked the trial court to "note [his] objection for the record," and stated he understood the trial court was "ruling [the statement was] by a co-conspirator." We have already considered and rejected defendant's contention that the statements did not properly fit within the co-conspirator exception to the hearsay rule; accordingly, the trial court properly overruled defendant's objection.

Defendant challenges Thomas' testimony of Bratcher's explanation that the injuries to his head and hand resulted from an altercation between himself and the victim during the second robbery attempt and his punching out a window in fleeing from the victim's house. Presupposing Thomas had abandoned the conspiracy

when Bratcher made the challenged statements, defendant has failed to show how testimony concerning the victim's aggression and combativeness or testimony concerning Bratcher's flight from the victim's house prejudiced him. *See* N.C. Gen. Stat. § 15A-1443(a) (2003).

Defendant's final hearsay challenge relates to a statement given by Robinson to Detective McLamb on 3 January 2002. At trial, the State inquired of Detective McLamb as to what Robinson said to him during the course of the interview in which he took Robinson's statement. Defendant objected and stated he "knew that [the State] asked for statements as to corroboration. And my concern is that there's other things in that statement that are not corroboration." After excusing the jury from the courtroom, the trial court, defendant, and the State engaged in a lengthy conference over twenty-five transcript pages regarding defendant's stated concern. The trial court's precautions included having the court reporter print various portions of prior testimony in order to resolve any conflicts upon which the State and defendant could not otherwise agree. The transcript clarifies the trial court's detailed discussion with defendant fully resolved his challenge to each portion of the statement. As a result, nothing remained in contention regarding the redacted statement. Indeed, the following exchange took place:

> THE COURT: Okay. Are we ready to go otherwise?
> [DEFENSE COUNSEL]: Yes, your Honor.
> THE COURT: Any other matters we need to address?
> (No response.)

> [DEFENSE COUNSEL]: Um, no your Honor.
> . . .
> [DEFENSE COUNSEL]: We would just ask for the corroboration instruction.

Pursuant to defendant's request, the trial court recalled the jury to the courtroom and instructed them to listen to the statement to be read by Detective McLamb being offered for corroborative purposes only. Thereafter, Detective McLamb read the redacted statement without objection by defendant. Moreover, defendant has failed to argue the trial court committed plain error in allowing Detective McLamb to read the statement into evidence. Accordingly, defendant has waived his right to review of this issue. *See Thibodeaux*, 352 N.C. at 582, 532 S.E.2d at 806.

III. Motion to Dismiss

In his last assignment of error, defendant asserts the trial court erred in denying his motion to dismiss the charges of first-degree murder and conspiracy to commit robbery with a dangerous weapon on the grounds of sufficiency of the evidence. "In determining the sufficiency of the evidence to withstand a motion to dismiss and to be submitted to the jury, the trial court must determine 'whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.'" *Squires*, 357 N.C. at 535, 591 S.E.2d at 841 (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is such relevant evidence as is necessary to persuade a rational juror to accept a conclusion." *Id.* "The trial court must review the evidence in the light most

favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *Id.*

A. First-Degree Murder

Defendant first argues the trial court should have granted his motion to dismiss the first-degree murder charge under the felony murder rule premised on the underlying felony of robbery with a dangerous weapon. Specifically, defendant contends a "review of the record clearly shows that there [was] no evidence to support the submission of armed robbery to the jury [because the] State presented no evidence that anything was taken from the [victim's] house."

North Carolina General Statutes § 14-87 (2003) 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 . . . shall be guilty of a Class D felony.

(Emphasis added). The essential elements of robbery with a dangerous weapon are: "(1) an unlawful taking *or an attempt to take personal property* from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998) (emphasis added).

Whether denominated robbery with a dangerous weapon or attempted robbery with a dangerous weapon is, for purposes of N.C.

Gen. Stat. § 14-87, a distinction without a difference in this case. *See State v. Parker*, 262 N.C. 679, 682-84, 138 S.E.2d 496, 499-500 (1964), *overruled on other grounds*, *State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987) (observing that the measure of profit to the offender "is not of controlling consequence," but, rather, the offense is complete when there is an attempt to take property by means of a dangerous weapon endangering or threatening life). Moreover, the trial court instructed the jury that "to find defendant guilty of first degree murder under the first degree felony murder rule, the state must prove . . . that the defendant . . . attempted to commit the offense of robbery with a dangerous weapon." This assignment of error is overruled as it relates to the submission to the jury of the charge of first-degree murder.

B. Conspiracy

Finally, defendant argues the trial court erred in denying his motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon. In support of this argument, defendant contends (1) there was no evidence anything was taken from the victim's house and (2) "but for the trial court's erroneous admission of the inadmissible hearsay testimony of [Thomas and Detective McLamb] . . . there was insufficient evidence to support the conviction of . . . conspiracy to commit robbery with a dangerous weapon." Both of these contentions have been rejected; therefore, we need not re-visit them for purposes of deciding this issue. This assignment of error is overruled.

We have carefully considered defendant's remaining arguments and find them to be without merit.

No error.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).