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NO. COA05-1148

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2006

STATE OF NORTH CAROLINA

v.

LATONYA ADALE HULCEY

Gaston County  
Nos. 04 CRS 51646, 50,  
53, 56

Appeal by defendant from judgment entered 13 April 2005 by Judge Richard D. Boner in Superior Court, Gaston County. Heard in the Court of Appeals 20 March 2006.

*Attorney General Roy Cooper, by Assistant Attorney General M. Lynne Weaver, for the State.*

*Bryan Gates for defendant-appellant.*

McGEE, Judge.

Latonya Adale Hulcey (defendant) was indicted on 7 June 2004 for robbery with a dangerous weapon, possession of a stolen motor vehicle, and two counts of conspiracy.

The State presented evidence at trial which tended to show that: the victim drove to the Edgewood Minimart (the store) in Bessemer City, North Carolina, to buy gasoline on 2 February 2004. The victim parked at the pump, went inside the store and paid ten dollars for gasoline. She exited the store and was stopped by two people who were standing outside the store. One was defendant and

the other was Jerry Wayne Phillips (Phillips). Defendant and Phillips told the victim they needed a ride to Kings Mountain. The victim testified she told them: "[N]o. [She] was not going that way." The victim turned and walked toward the pump where her vehicle was located. Once she got to the pump, she noticed defendant coming up behind her. Defendant told the victim to "go in the car." The victim looked at defendant and "kept going." Defendant told the victim again to "get in the car." Phillips "came around with his hand in his pocket." The victim looked over at Phillips, and Phillips pulled a switchblade knife and told the victim to get in the car. Defendant was standing next to Phillips. The victim got into her car on the driver's side. Defendant got in the back seat while Phillips pumped the gas. When Phillips finished pumping the gas, he got into the car and told the victim to drive. They drove a few miles and pulled into the driveway of a house. Phillips told the victim to get out of the car. Defendant threw the victim's dog to her, and defendant and Phillips drove away in the victim's car.

Phillips testified that on the day of the robbery, he had been drinking and smoking marijuana and crack, while defendant had been taking Xanax. He testified that defendant approached the victim, and the victim agreed to give a ride to Phillips and defendant. Phillips denied displaying a knife at the store. He stated that while they were in the car, he decided "out of the blue" to take the car from the victim and "pulled the knife out on [the victim]"; that he and defendant never discussed taking the car from the

victim; and that he never told defendant he was going to pull a knife.

Defendant was convicted as charged. The trial court consolidated judgment on the armed robbery and conspiracy to commit armed robbery convictions and sentenced defendant to a term of 84 to 110 months in prison. The trial court arrested judgment on the remaining convictions. Defendant appeals.

Defendant first argues the trial court erred by denying her motion to dismiss the conspiracy charge for insufficiency of the evidence. Defendant contends the evidence showed she was merely present at the crime, and that Phillips acted alone. Defendant asserts there was no evidence of communication between her and Phillips which showed that the robbery was planned or coordinated. Defendant further contends the evidence showed she was taking Xanax and may not have been aware of Phillips' actions.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). When reviewing the sufficiency of the evidence, "[t]he trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. To constitute a conspiracy it is not necessary that the parties should have come together and agreed in *express* terms to unite for a common object: 'A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.'"

*State v. Johnson*, 164 N.C. App. 1, 17, 595 S.E.2d 176, 185, *disc. review denied*, 359 N.C. 194, 607 S.E.2d 659 (2004) (quoting *State. Bindyke*, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975) (internal citation omitted)). We conclude the evidence was sufficient to show a mutual understanding between defendant and Phillips. The State's evidence tended to show that defendant and Phillips had known each other for years and had checked into a motel room together on the day of the robbery. The two approached the victim together at the store, and defendant asked the victim to drive defendant and Phillips to Kings Mountain. The victim declined, and defendant ordered her to "get in the car." When the victim did not immediately comply, Phillips took out a knife and repeated defendant's order to the victim to get in the car. While Phillips was brandishing the knife, the victim was standing right beside him. The victim then got into the car, and defendant got into the back seat.

Defendant contends that Phillips acted alone, and there was no evidence that the two had a plan or coordinated their actions. However,

"'[d]irect proof of conspiracy is rarely available, so the crime must generally be proved by circumstantial evidence.'" A

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."

*State v. Clark*, 137 N.C. App. 90, 95, 527 S.E.2d 319, 322 (2000) (internal citations omitted). In the present case, in the light most favorable to the State, a jury could reasonably conclude that defendant conspired with Phillips to commit the offense of robbery with a dangerous weapon. See *Cross*, 345 N.C. at 717, 483 S.E.2d at 434. Accordingly, this assignment of error is overruled.

Defendant next argues the trial court erred by failing to instruct the jury on the lesser included offense of common law robbery. Defendant contends "there was conflicting evidence about the character and presence of the knife[.]"

"An instruction on a lesser-included offense must be given only if the evidence would permit [a] jury rationally to find defendant guilty of the lesser offense and acquit him of the greater." *State v. Gary*, 348 N.C. 510, 524, 501 S.E.2d 57, 67 (1998). "Common law robbery is a lesser included offense of armed robbery or robbery with a firearm or other dangerous weapon and an indictment for armed robbery will support a conviction of common law robbery." *State v. Tarrant*, 70 N.C. App. 449, 451, 320 S.E.2d 291, 293-94 (1984). "Nevertheless, the trial judge is not required to instruct on common law robbery when the defendant is indicted for armed robbery if the uncontradicted evidence indicates that the robbery, if perpetrated, was accomplished by the use of what appeared to be a dangerous weapon." *Id.* at 451-52, 320 S.E.2d at

294.

The uncontradicted evidence shows that if a robbery was committed, it was accomplished through the use of a deadly weapon. The victim testified that Phillips displayed a switchblade knife while they were still at the store. Although the timing differed, Phillips admitted using a knife to accomplish the robbery. Defendant disputes the nature of the switchblade as a dangerous weapon.

A knife is not always a dangerous weapon *per se*; instead, the circumstances of the case are determinative. The determination of whether an object is a dangerous weapon "depends upon the nature of the instrument, the manner in which the defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use."

*State v. Bellamy*, 159 N.C. App. 143, 148, 582 S.E.2d 663, 667, *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003) (internal citations omitted). In the present case, the victim testified that Phillips used the knife to strengthen the demand that the victim get in the car, and the victim testified she was "scared to death." This is substantial evidence that the robbery was accomplished by the threatened use of the switchblade in a manner making it a dangerous weapon and that the victim perceived the knife as a dangerous weapon. See *id.* Thus, we conclude the trial court did not err in denying defendant's request for an instruction on common law robbery. Accordingly, we find no error.

No error.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).