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NO. COA05-1256

NORTH CAROLINA COURT OF APPEALS

Filed: 16 May 2006

STATE OF NORTH CAROLINA

v.

Forsyth County  
No. 03 CRS 057957

REGERMAINE SHERNARD ROSS

Appeal by defendant from judgment entered 17 May 2005 by Judge Lindsay R. Davis, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 24 April 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Jane T. Hautin, for the State.*

*Don Willey for defendant-appellant.*

McGEE, Judge.

Regermaine Shernard Ross (defendant) was convicted of robbery with a dangerous weapon on 17 May 2005. The evidence at trial tended to show that Anthony Palmer (Palmer), Megan Whitt (Whitt) and Erica Whittier were having a barbecue at their apartment in Winston-Salem, North Carolina on 28 April 2003. They invited a friend, Dan Mathurin (Mathurin), who brought two friends, Marco and Luke, to the barbecue. The men were playing video games in the living room around 11:00 p.m. when they heard three knocks at the door. Three black men ran into the apartment, one of them holding

a gun. The men were wearing large winter coats, hats, and masks or bandanas over their faces. One of the men told Palmer not to move and demanded his wallet. Palmer told him the wallet was empty, and the man hit Palmer in the ribs and took the wallet from him. When the man saw the wallet was empty, he returned it to Palmer. Meanwhile, the man with the gun went over to Marco and pointed the gun to the back of Marco's head. Marco fought him while another man tried to grab the wallet out of Marco's pants. Eventually, the man was able to take Marco's wallet. Once they had the wallet, the men started to leave the apartment. However, just as the man with the gun had one foot out the door, he stepped back in, fired a shot, and then ran away.

Nicholas Brooks (Brooks) testified that on 28 April 2003, he, Paul Moses (Moses), Mathurin and defendant had agreed to rob an individual called "Amigo." Brooks testified that defendant had a small revolver during the robbery. Moses also testified that he, Brooks, and defendant entered Palmer's apartment with the intent to rob Marco of cocaine. Moses testified that defendant pointed a gun to the back of Marco's head and fired the gun as they exited the apartment. Detective D.L. Rose of the Winston-Salem Police Department testified that he interviewed defendant in July 2003, and defendant admitted participating in the robbery, stating that he held a gun "to the Mexican's head, but I didn't ever shoot it."

Defendant was convicted of robbery with a dangerous weapon and sentenced to a term of 117 to 150 months in prison. Defendant appeals.

Defendant argues that the trial court erred by denying his motions to dismiss. First, defendant asserts that there is no evidence that defendant or any of his accomplices either threatened Witt or took property from her or in her presence. Second, defendant contends that because Palmer's wallet was returned to him, the robbery was not completed. Third, defendant argues that there was insufficient evidence establishing that he robbed "Marcos Reyes" as alleged in the indictment. Specifically, defendant contends that while there were references to "Marcos" and "Amigo," there was no competent evidence identifying the victim as "Marcos Reyes." Thus, defendant contends there was a fatal variance between the indictment and the evidence presented at trial.

The indictment in the case before us states that defendant stole

another's personal property, United States Currency and a man's wallet, all having a value of \$60.00 dollars from the person and presence of Marco Reyes, Megan Whitt and Anthony Palmer. The defendant committed this act by means of an assault consisting of having in possession and threatening the use of a firearm, to wit, a handgun whereby the life of Marco Reyes, Megan Whitt, and Anthony Palmer were threatened and endangered.

Defendant contends that there was a fatal variance because there was insufficient evidence presented identifying Marco Reyes. However, assuming *arguendo* there was a variance, it was not fatal.

"A bill of indictment is legally sufficient if it charges the substance of the offense and puts the defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated." *State v. Ingram*, 160 N.C.

App. 224, 225, 585 S.E.2d 253, 255 (2003) (citing *State v. Rankin*, 55 N.C. App. 478, 480, 286 S.E.2d 119, 120 (1982)). "It is only 'where the evidence tends to show the commission of an offense not charged in the indictment [that] there is a fatal variance between the allegations and the proof requiring dismissal.'" *State v. Poole*, 154 N.C. App. 419, 423, 572 S.E.2d 433, 436 (2002) (quoting *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981)), cert. denied, 356 N.C. 689, 578 S.E.2d 589 (2003). "'In an indictment for robbery with firearms or other dangerous weapons . . . the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapon.'" *Poole*, 154 N.C. App. at 422, 572 S.E.2d at 436 (citations omitted). "'[T]he specific owner or the exact property taken or attempted to be taken is mere surplusage.'" *Id.* at 423, 572 S.E.2d at 436 (quoting *State v. Burroughs*, 147 N.C. App. 693, 697, 556 S.E.2d 339, 342 (2001)).

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). In the present case, defendant admitted to police that he participated in the robbery, and his co-defendants also testified about his participation. Furthermore, both Whitt and Palmer testified that

a man put a gun to Marco Reyes' head, demanded his wallet, and took the wallet from Marco Reyes. Defendant admitted to putting the gun to Marco Reyes' head. Thus, we conclude there was sufficient evidence presented that defendant committed the offense of robbery with a dangerous weapon.

Although the indictment also cites Palmer and Whitt as victims, the State was not required to prove that defendant robbed both of them as well. See *Ingram*, 160 N.C. App. at 226, 585 S.E.2d at 255 (citing *State v. Montgomery*, 331 N.C. 559, 569, 417 S.E.2d 742, 747 (1992) (stating "the use of a conjunctive in [a robbery with a dangerous weapon] indictment does not require the State to prove various alternative matters alleged"). Furthermore, there is no potential danger of double jeopardy because any offense committed against Palmer and Whitt were part of one continuous transaction with the robbery of Marco Reyes. *State v. Martin*, 29 N.C. App. 17, 19, 222 S.E.2d 718, 719-20, *disc. review denied*, 290 N.C. 96, 225 S.E.2d 325 (1976). Therefore, we find no error.

No error.

Judges WYNN and HUNTER concur.

Report per Rule 30(e).