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NO. COA05-1561

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

STATE OF NORTH CAROLINA

v.

Onslow County
No. 04 CRS 61147

ROBERT SCOTT, JR.

Appeal by defendant from judgments entered 20 May 2005 by Judge Jay D. Hockenbury in Onslow County Superior Court. Heard in the Court of Appeals 2 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General John P. Barkley, for the State.

Terry W. Alford, for defendant-appellant.

TYSON, Judge.

Robert Scott, Jr. ("defendant") appeals from judgments entered after a jury found him to be guilty of robbery with a firearm and conspiracy to commit robbery with a firearm. We find no error.

I. Background

A. State's Evidence

The State's evidence tended to show that on the night of 11 November 2004, Clint Nuckles ("Nuckles") and his brother, Thomas, were making pizza dough in a back room of Monster's Pizza restaurant on South Marine Boulevard in Jacksonville, North Carolina. Nuckles saw an armed man wearing a black ski mask and

black jacket walk down the hallway of the restaurant past a walk-in cooler. As Nuckles turned toward his brother, a second man wearing a ski mask approached, pointed an assault rifle at Nuckles and asked, "[W]here's the money?" Nuckles responded that the money was "up front." Nuckles, who was part owner in the restaurant, recognized the facial features and the voice of the second man. The second man handed Nuckles a pillow case and told him to place the money inside. The brothers noticed one robber was "doing all the talking" and was shorter than the other robber, who was thin and carried a "short or sawed off" shotgun. Both robbers wore black gloves. Nuckles and his brother walked to the front of the store as instructed. After Nuckles placed the money in the cash drawer into the pillow case, the two men took the pillow case and left the store. Nuckles called 911 on his cellular telephone.

When Jacksonville Police officers arrived, the brothers informed police that they has been robbed by two armed black males dressed in black. Captain Timothy Akers ("Captain Akers") broadcasted a "be on the look out" together with a general description of the robbers. As Captain Akers was obtaining more information from the brothers, he heard over the police radio that Officer Donald Jordan ("Officer Jordan"), had made a traffic stop of a vehicle which had run a red-light at the intersection of Highway 24 and Bell Fork and was traveling about sixty miles-per-hour in a forty-five miles-per-hour zone.

Captain Akers refocused his attention onto Nuckles, who stated that he remembered a little bit of the characteristics of one of

the robbers and stated, "I think I know the name because the guy used to work for us." Nuckles called the restaurant's assistant manager, Joey Redding ("Redding"), to assist him in remembering the former employee's name. Nuckles told Redding that the restaurant had just been robbed by a former employee, that he knew it was a guy named "Robert," but that he could not think of his last name. Nuckles described the former employee as "being one of the two black guys we had hired just after [Redding] had started working with us." Redding told Nuckles "right away [] that that was Robert Scott." While Nuckles sat on a bench outside the restaurant talking on his cellular telephone with Redding, Captain Akers walked to his patrol vehicle, picked up his hand-held radio, and listened to the traffic stop. Simultaneously, Captain Akers heard Officer Jordan inquire about the driver's license check of "Robert Scott" over the radio and Nuckles yelled out, "Robert Scott. It was Robert Scott." Nuckles testified at trial that Robert Scott had worked at the restaurant "on and off" for about six months, was paid in cash, and had not been placed on the store's payroll.

At the traffic stop, Officer Jordan looked in the vehicle, recognized part of an assault rifle in the rear and discreetly called for back-up. Officer Jordan also noticed that defendant was wearing a black coat. Once back-up officers arrived, defendant and Jesse Kuykendoll ("Kuykendoll"), the passenger, were arrested. The officers searched the vehicle and found an assault rifle, a short shotgun, ammunition for the guns, a pillowcase filled with cash, three dark ski masks, and two pairs of dark gloves.

B. Defendant's Evidence

Defendant testified that two days prior to the robbery, Kuykendoll asked him if he was going to rob Monster's Pizza with him and defendant had responded, "yeah, whatever man, whatever." Defense witness, Adrienne Lewis, confirmed defendant's response to Kuykendoll's question and testified that defendant had responded in a joking manner. Defendant further testified that on the night of the robbery, gave Kuykendoll a ride, dropped him off near Monster's Pizza, visited Crystal Northrop ("Northrop") for about one hour and returned to pick Kuykendoll up at a corner near where defendant had dropped him off earlier.

Northrop testified that defendant came over to her house on the night of the robbery around 10:00 p.m. and left around 11:00 p.m. Defendant testified that when he arrived at the corner, Kuykendoll and Kuykendoll's cousin, D.J., jumped into the car and told him to "drive the damn car." Defendant stated that Kuykendoll and D.J. were talking about having robbed Monster's Pizza. Defendant testified that Kuykendoll was handing an assault rifle, ski masks, gloves, and a bag back to D.J., who held a short shotgun. Defendant told Kuykendoll and D.J. that he did not want to be a part of the robbery. Defendant let D.J. out of the vehicle at Hargett Street and continued driving with Kuykendoll until the police pulled him over.

Defendant was charged with robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, two counts of second degree kidnapping, driving while license revoked, and

failure to stop at a stoplight. At the close of the State's evidence, defendant moved to dismiss the charges against him. The trial court allowed defendant's motion to dismiss the two kidnapping charges. Defendant renewed his motion to dismiss at the close of all the evidence, which the trial court denied. The State voluntarily dismissed the charge of driving while license revoked.

Before submitting the case to the jury, defendant pled responsible to the stoplight violation. A jury found defendant to be guilty of robbery with a firearm and conspiracy to commit robbery with a firearm. The trial court sentenced defendant to a term of seventy-seven months to 102 months imprisonment and a consecutive term of twenty-three to thirty-seven months imprisonment. Defendant appeals.

II. Issue

Defendant argues the trial court erred by denying his motion to dismiss the charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. We disagree.

III. Motion to Dismiss

A motion to dismiss for insufficiency of the evidence should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of the defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* at 597, 573 S.E.2d at 869. In ruling on a motion to dismiss, the trial court must consider all of the

evidence 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). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996).

A. Identification

Defendant contends that his identity as the perpetrator of the crime was not proven by substantial evidence to sustain a conviction for robbery with a dangerous weapon. Defendant argues that although Nuckles identified him as the perpetrator, his identification lacks credibility because Nuckles could not prove defendant worked at Monster's Pizza by payroll records. Defendant further argues his alibi proves Nuckles's identification of him was incorrect.

Nuckles and his brother testified two perpetrators robbed them. Minutes after the robbery, Nuckles told Captain Akers that he recognized one of the perpetrators as a former employee named "Robert." Once Nuckles spoke with Redding, Nuckles was able to identify defendant as one of the perpetrators. Nuckles also identified defendant at trial.

At the traffic stop, defendant was wearing a black coat and driving a vehicle containing the guns, masks, gloves, and money from the robbery. Although defendant offered an alibi in an attempt to prove his innocence, "[t]he trial court must [] resolve

any contradictions in the evidence in the State's favor [upon a motion to dismiss]. The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (citations omitted), *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002). Upon consideration of defendant's motion to dismiss for insufficiency of the evidence, "defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *Scott*, 356 N.C. at 596-97, 573 S.E.2d at 869. Considered in the light most favorable to the State, substantial evidence supports the jury's conclusion that defendant was the person who committed the offense.

B. Conspiracy to Rob

Defendant was also convicted of conspiracy to commit robbery with a firearm. Our Supreme Court has held:

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. Bindyke, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975) (internal quotations and citations omitted). Defendant argues the State failed to present substantial evidence that he entered into an agreement to rob Monster's Pizza.

Although no direct evidence shows defendant *agreed* to commit the offense charged, circumstantial evidence permits a reasonable

juror to conclude that defendant agreed to rob Monster's Pizza. Here, both defendant and Kuykendoll allegedly donned dark ski masks and gloves, walked into Monster's Pizza wielding firearms, took the restaurant's cash, left the restaurant together, and were stopped by police in a vehicle with items from the robbery shortly after the robbery. Defendant testified that Kuykendoll had asked defendant to join him two days before the robbery. Based upon this evidence, a jury could reasonably infer the existence of a conspiracy between defendant and Kuykendoll to commit robbery with a dangerous weapon. This assignment of error is overruled.

IV. Conclusion

Under our standard of review, the trial court properly denied defendant's motion to dismiss. Defendant received a fair trial free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).