NO. COA05-912

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

STATE OF NORTH CAROLINA

v. Lincoln County
No. 00 CRS 2074 & 2075

SHELTONIA LOGAN EVERETT

Appeal by defendant from judgment entered 13 June 2001 by Judge J. Gentry Caudill in Lincoln County Superior Court. Heard in the Court of Appeals 22 February 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for the State.

Gary C. Rhodes for defendant-appellant.

ELMORE, Judge.

Sheltonia Logan Everett (defendant) appeals her convictions for conspiracy to commit robbery with a dangerous weapon and attempted robbery with a dangerous weapon. After a careful review of the record, we find no error in defendant's trial.

On 6 April 2000 defendant was relaxing and drinking outside of her house with her husband, Dennis Everett, and their friends, Derrick Baker and Jontavan Moore. After some discussion, they decided to commit a robbery. The group first chose to rob a woman known to defendant by the name of Diane. To facilitate the robbery, the group arranged to borrow a 9 mm assault rifle from

Timothy Cloud. Moore was close friends with Cloud and his brother, Antonio; defendant did not know either of them. Defendant and her colleagues left defendant's house in her 1985 Oldsmobile between the hours of 10:00 and 10:30 p.m. Though the record is unclear, we accept that defendant drove the car to the Cloud residence, reviewing the facts in the light most favorable to the State. *See State v. Irwin*, 304 N.C. 93, 98, 282 S.E.2d 439, 443 (1981) (stating that when considering a motion to dismiss, all evidence is to be considered in the light most favorable to the State and all reasonable inferences are to be drawn therefrom). Upon their arrival at Timothy and Antonio Cloud's residence, Moore obtained the loaded gun while the others waited in defendant's car.

Having thus armed themselves, the crew next went to Diane's house, where they were disappointed to discover that no one was home. After some discussion, they decided to instead target Micah Anderson, a man known to both Moore and defendant. It was defendant's belief on that night that Anderson lived on McIntosh Road in Lincoln County. While he had at one point resided there, however, he had not lived there for some time. When they reached McIntosh, the crew turned around on a side road, pulling near the address. Defendant's husband exited the car with Moore, taking with them the loaded assault rifle, and possibly a second handgun. After an indeterminate time, defendant heard shots, and her husband returned, panicked, to the car. In his haste to leave the scene, he drove the car into a ditch, from which they were helped by a passerby. After they had extricated themselves from the ditch,

defendant's husband stated, "I think I shot John." Moore had, in fact, been shot, and was discovered dead the next day.

Based on these facts, defendant was charged and convicted for conspiracy to commit robbery with a dangerous weapon and attempted robbery with a dangerous weapon; she was found not guilty of felony murder. Defendant received a sentence of 63 to 85 months for the attempt conviction and 24 to 38 months for the conspiracy conviction, the sentences to run consecutively. Defendant now brings forth numerous issues on appeal.

Defendant first contends that the trial court erred by allowing witness Timothy Cloud to testify about statements made to him by Jontavan Moore, deceased, on 6 April 2000. In the first statement, Cloud testified that Moore had called him on the telephone to ask to borrow Cloud's assault rifle for the robbery. Cloud also testified as to a second conversation, which took place at his house. At that time, Cloud testified that Moore took the rifle and that Moore told Cloud that the people waiting in the car, including defendant, were his friends and could be trusted. There is no doubt that such testimony, as an out-of-court statement offered into evidence to prove the truth of the matter asserted, constituted hearsay under Rule 801(c) of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 801(c) (2005). As defendant concedes, however, under Rule 803(3) such statements are admissible if they reflect the "declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . .

. ." N.C. Gen. Stat. § 8C-1, Rule 803(3). *See State v. Burrus*, 344 N.C. 79, 91, 472 S.E.2d 867, 876 (1996). Because Cloud's testimony was that Moore stated that he needed to borrow the gun to commit a robbery, and that the others in the car could be trusted, the hearsay statement fits into the 803(3) exception as a description of the declarant's plan. Although defendant seeks to persuade the Court that the statement's lack of specificity should have precluded its admission, she offers no authority for that proposition. Moreover, her contention that any inference regarding intent should be limited to Moore, and that the statement, as a result, lacks in probative value, is incorrect. Regardless of whether the statement allows an inference as to defendant's intent, Moore's statements concerning his plan to commit a robbery with her and the other passengers in the car certainly have probative value. Finally, "[t]he failure of a trial court to admit or exclude this evidence will not result in the granting of a new trial absent a showing by the defendant that a reasonable possibility exists that a different result would have been reached absent the error." *State v. Burke*, 343 N.C. 129, 142-43, 469 S.E.2d 901, 907 (1996) (citing *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986)), *cert. denied* 519 U.S. 1013, 136 L. Ed. 2d 409 (1996). Accordingly, as this Court finds that the evidence was properly admitted, and that there is no indication that the exclusion of this testimony would have led to a different result in any case, the defendant's assignment of error is without merit.

Defendant next contends that the trial court committed plain error by instructing the jury that it could find defendant guilty of conspiracy with a co-conspirator not named in the indictment. In delivering his instructions to the jury, the trial judge originally included Jontavan Moore's name in his list of conspirators. When the mistake was brought to his attention, the judge promptly recalled the jury and corrected his error. The jury instructions began at 3:57 p.m., and the jury retired at 4:16 p.m. By 4:20 p.m., the jury had returned to the courtroom for the judge's correction. Although we find that the trial court was in error, the error did not prejudice defendant.

Our Supreme Court has stated:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial'" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings "or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Because the error in this case was so quickly and thoroughly corrected, it cannot be said to be so fundamental as to rise to the standard

imposed by *Odom*. Accordingly, the mistake does not meet the requirements for plain error.

Defendant also contends that the trial court erred in denying his motion to dismiss the charges of conspiracy to commit robbery with a dangerous weapon and attempted robbery with a dangerous weapon at the close of the State's evidence. Our Supreme Court has recently ruled on the issue of how to determine whether a trial court's denial of a motion to dismiss is in error:

> The applicable law is well-defined. In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence. In resolving this question, the trial court must examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case. Moreover, circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.

State v. Mann, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002) (internal citations and quotations omitted). "The trial court must also resolve any contradictions in the evidence in the State's favor. . . . 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 (2002) (citing *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001)).

Because our analysis must center on whether there was "substantial evidence of each essential element" of each crime with which defendant was charged, we will consider the conspiracy and attempt charges in turn.

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Reid*, ___ N.C. App. ___, ___, 625 S.E.2d 575, 583 (2006) (quoting *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991)). Proof of a "mutual, implied understanding" is sufficient; an express agreement is not necessary. *Id.* "Direct proof of the charge is not essential, for such is rarely obtainable. It 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.* (quoting *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933)). "The crime is complete when the agreement is made; no overt act in furtherance of the agreement is required." *State v. Ledwell*, 171 N.C. App. 328, 333-34, 614 S.E.2d 412, 415 (2005) (citing *State v. Rozier*, 69 N.C. App. 38, 49-50, 316 S.E.2d 893, 900-01 (1984)).

In the present case, the record shows that defendant admitted the existence of an agreement to commit robbery. Lt. Ronnie Matthews testified that defendant stated, "Me and John knew people on McIntosh, so we decided to go down there and rob Micah. [sic] Anderson." This statement establishes that defendant had agreed with the others in the car to commit a robbery. Defendant asserts

that this evidence is unreliable as it is based solely on Lt. Matthews's testimony. But, as stated above, "[T]he question for the trial court is not one of weight, but of the sufficiency of the evidence. In resolving this question, the trial court must examine the evidence in the light most advantageous to the State, drawing all reasonable inferences from the evidence in favor of the State's case." *Mann,* 355 N.C. at 301, 560 S.E.2d at 781 (citations omitted). The evidence of defendant's confession, properly admitted, is sufficient in this case. Even absent defendant's confession, however, there is a plethora of additional evidence to support the charge. This evidence includes the trip to obtain the gun, Cloud's testimony as to Moore's statements there, and the fact of the group's admitted presence with weapons outside what they thought was Micah Anderson's residence. There was no error in the trial court's denial of defendant's motion to dismiss the conspiracy charge.

"The two elements of an attempt to commit a crime are: first, the intent to commit the substantive offense; and, second, an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense." *Robinson*, 355 N.C. at 338, 561 S.E.2d at 257 (citing *State v. Smith*, 300 N.C. 71, 79, 265 S.E.2d 164, 169-70 (1980)), *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002). "A person commits the felony offense of attempted robbery with a dangerous weapon if that person, 'with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does

some overt act calculated to bring about this result.'" *Id.* at 341, 561 S.E.2d at 258 (quoting *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987)).

The first element of attempted robbery, intent, is not in dispute. Defendant makes no real attempt to argue its absence, and it is clear that the agreement among the friends to commit a robbery, combined with their subsequent actions of obtaining a weapon, selecting a victim, and traveling to where they expected that victim to be, is sufficient to prove the existence of intent.

The issue, then, is whether the actions taken by defendant and her colleagues were adequate to constitute an overt act. "Between preparation for the attempt and the attempt itself there is a wide difference. The preparations consist in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement towards the commission after the preparations are made." *State v. Addor*, 183 N.C. 687, 690, 110 S.E. 650, 651 (1922) (citations omitted). To constitute an overt act, an act "need not be the last proximate act to the consummation of the offense . . . ." *State v. Miller*, 344 N.C. 658, 668, 477 S.E.2d 915, 921 (1996) (quotation omitted). However, "it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made." *Id.*

When defendant's husband and Moore exited the car, loaded gun or guns in hand, near what they thought was Anderson's house, with the intent of robbing him, it constituted an overt act beyond mere

preparation. While these actions are clearly not "the last proximate act to the consummation of the offense," they are nonetheless "the first . . . step in a direct movement towards the commission of the offense after the preparations are made." *See id.* at 670, 477 S.E.2d at 922 ("Once defendant placed his hand on the pistol to withdraw it with the intent of shooting and robbing [the victim], he could no longer abandon the crime of attempted armed robbery."), *and State v. Powell*, 6 N.C. App. 8, 13, 169 S.E.2d 210, 213 (1969) ("The act of reaching into the pocketbook, and pulling out the pistol was sufficient evidence of an *overt act* which went beyond mere acts of preparation, and justified submission of the case to the jury."). *But see State v. Parker*, 66 N.C. App. 355, 358, 311 S.E.2d 327, 329 (1984) ("Although lurking outside a place of business with a loaded pistol may be unlawful conduct, it does not constitute the sort of overt act which would clearly show that defendant attempted to rob that business."). It is immaterial that defendant herself neither exited the car nor had a weapon. "[I]f two or more persons act together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan." *State v. Golphin*, 352 N.C. 364, 456, 533 S.E.2d 168, 228 (2000), (citing *State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618 (1989)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). "[A] person is constructively present during the commission of a crime if he is close enough to provide assistance and to encourage the actual execution of the crime." *Id.* at 457,

533 S.E.2d at 228. Because defendant was constructively present in this case, she is bound by the actions of Moore and her husband.

Though defendant attempts to argue that she cannot be guilty of the attempted robbery of Micah Anderson because of the impossibility of the consummation of the crime at the time and place alleged, that argument, too, must fail. "If there is an apparent ability to commit the crime in the way attempted, the attempt is indictable, although, unknown to the party making the attempt, the crime cannot be committed because the means employed are in fact unsuitable." *Addor*, 183 N.C. at 690, 110 S.E. at 651 (citation omitted). Here, the fact that defendant and her cohorts believed that their selected victim resided on the property shows that they were unaware of the crime's impossibility. As such, they possessed the apparent ability to consummate the robbery, and defendant cannot now claim impossibility as a defense.

The trial court did not err in its denial of defendant's motion for dismissal. There was substantial evidence both of each essential element of the crimes and that defendant was the perpetrator of them.

Having reviewed defendant's remaining assignments of error, we hold that they are without merit.

No error.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).