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NO. COA06-1177

NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2007

STATE OF NORTH CAROLINA

v. Robeson County
Nos. 04 CRS 050631
04 CRS 051228-48

JUDY NAYLOR MCPHAIL,
Defendant.

Court of Appeals

Appeal by defendant from judgments entered 27 April 2006 by Judge Jack A. Thompson in Robeson County Superior Court. Heard in the Court of Appeals 29 March 2007.

Slip Opinion

Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for defendant.

BRYANT, Judge.

Judy Naylor McPhail (defendant) appeals from judgments entered 27 April 2006, pursuant to jury verdicts finding her guilty of one charge of conspiracy to commit first degree murder, twenty-one charges of forgery, and nineteen charges of uttering a forged instrument. For the reasons below, we reverse defendant's convictions of uttering a forged instrument in 04 CRS 51231 and 04 CRS 51245, but otherwise hold defendant received a fair trial, free from error.

Facts

On 12 January 2004, Craig Hartman, the owner and operator of Absolute Bus, returned from an out of country vacation to his home and business at 1173 Kendrick Road in Lumberton, North Carolina and was shot as he attempted to step outside of his vehicle. Hartman subsequently determined that the checkbooks for his business and a shotgun that he kept in his bedroom closet in the apartment above his business were missing.

Hartman employed defendant as his secretary, and the next day, he learned she had not been to work for a few days. Defendant took care of all of the clerical aspects of his business, including payroll. She had permission to write checks for the business, but only Hartman was authorized to sign the checks.

After the incident, Hartman went to his banks, RBC Centura and Lumbee Guaranty Bank in Lumberton, to check his bank records. He determined that a total of twenty-one checks that he either didn't write, sign or authorize were cashed against his accounts with RBC Centura or Lumbee Guaranty Bank and signed affidavits of forgery regarding these checks. The checks were cashed between 31 December 2003 and 9 January 2004, during the time Hartman was on vacation, and were cashed for amounts ranging from $120.00 to $6,500.00. Eighteen of the checks were made out to defendant and three of the checks were made out to defendant's husband, Donald McPhail. Further investigation by the Robeson County Sheriff's Office led to the arrest of defendant and her husband on the charges of felony conspiracy to commit first-degree murder, attempted first-degree murder, forgery of endorsements, and uttering forged instruments.

Procedural History

On 12 April 2004, defendant was indicted for felony conspiracy to commit first-degree murder, attempted first-degree murder, twenty-one counts of forgery of endorsement, and nineteen counts of uttering a forged instrument. Defendant was tried before a jury during the 24-27 April 2006 Criminal Session of Robeson County Superior Court, the Honorable Jack A. Thompson, Judge presiding. On 27 April 2006, the jury found defendant guilty of all twenty-one charges of forgery, all nineteen charges of uttering, and the charge of felony conspiracy to commit first-degree murder. Defendant was found not guilty of the charge of attempted murder and this charge was subsequently dismissed by the trial court. The trial court entered judgments consistent with the jury verdict on 27 April 2006, sentencing defendant to an active term of imprisonment for a minimum of 200 months to a maximum of 249 months for the conspiracy conviction, and a suspended term of six to eight months, for the forgery and uttering convictions. Defendant appeals.

Defendant raises the issues of whether the trial court: (I) erred in admitting defendant's statement into evidence; (II) erred in entering judgment against defendant when there was insufficient evidence as to the charge of conspiracy to commit first degree murder and insufficient evidence as to two charges of uttering a forged instrument; and (III) erred in admitting the statement of a co-defendant during defendant's sentencing hearing.

I

Defendant first argues the trial court erred in admitting into evidence at trial her statement made to the investigating officers because it was procured by coercion. Defendant contends she was coerced into making the statement because the investigating detective questioning her forced her to speak with her abusive husband during her interview. We disagree.

"*Miranda* warnings protect a defendant from coercive custodial interrogation by informing the defendant of his or her rights." *State v. Al-Bayyinah*, 359 N.C. 741, 749, 616 S.E.2d 500, 507 (2005), *cert. denied*, __ U.S. __, 164 L. Ed. 2d 528 (2006). However,

> "[f]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process," and "[a] suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted[.]"

State v. Hyatt, 355 N.C. 642, 657, 566 S.E.2d 61, 71 (2002) (quoting *Davis v. United States*, 512 U.S. 452, 460-61, 129 L. Ed. 2d 362, 372 (1994)). Our Supreme Court has established that "[t]he State has the burden of showing by a preponderance of the evidence that the defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary." *State v. Thibodeaux*, 341 N.C. 53, 58, 459 S.E.2d 501, 505 (1995) (citation omitted). "Whether the confession was voluntarily made is a question of law[.]" *State v. Leeper*, 356 N.C. 55, 60, 565 S.E.2d 1, 4 (2002) (citation omitted). When determining whether a defendant has

validly waived his rights, the court must look at the totality of the circumstances. *State v. Parker*, 350 N.C. 411, 433-34, 516 S.E.2d 106, 122 (1999).

Here, there is no indication defendant made her statement involuntarily and without making a knowing and intelligent waiver of her rights. Defendant was interviewed by Detective Rory McKeithan on 30 January 2004. At the beginning of the interview, Detective McKeithan read defendant her constitutional rights in anticipation of making an arrest that day, and defendant subsequently signed a waiver of those rights. During the course of the interview, defendant requested numerous times to see her husband. Prior to Detective McKeithan's interview with defendant, her husband had also sent a note through other law enforcement officers to Detective McKeithan in which he asked to see defendant. Defendant and her husband spoke briefly at the door of the interview room, and neither appeared upset. No evidence was presented regarding the content of any conversation held between the defendant and her husband during the time he was in the doorway. At the conclusion of defendant's interview with Detective McKeithan, defendant insisted upon writing and signing her own statement. Reviewing the totality of the circumstances surrounding defendant's interview and statement, we hold that defendant made a knowing and intelligent waiver of her rights and that her statement was voluntary. This assignment of error is overruled.

II

Defendant next contends the trial court erred in denying her motion to dismiss, due to insufficient evidence, the charge of conspiracy to commit first-degree murder and two charges of uttering a forged instrument. To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense and that the defendant is the perpetrator. *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)). In considering a motion to dismiss, our Supreme Court has held that:

> the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. 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. Parker, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001) (internal citations omitted).

"Conspiracy to commit murder requires the defendant to enter into an agreement with another person to commit murder with the intent to carry out the murder." *State v. Kemmerlin*, 356 N.C. 446, 477, 573 S.E.2d 870, 891 (2002) (citation omitted). To prove conspiracy it is unnecessary for the State to prove an express agreement. *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835

(1991). The State must only present evidence tending to show a mutual, implied understanding. *Id.* Further,

> [t]he existence of a conspiracy may be shown with direct or circumstantial evidence. The proof of 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. Lawrence, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000) (internal citations and quotations omitted).

In the case *sub judice*, defendant admitted in her statement to police that she and her husband discussed how to cover up their crime of stealing money from defendant's boss by deciding to shoot him. Defendant called the airline company to confirm when her boss would be arriving upon his return from vacation. Defendant's husband stole a shotgun from Hartman's apartment and they both drove to a Wal-Mart where defendant's husband purchased shells for the shotgun. Defendant and her husband then drove to Hartman's house at the beach where they observed Hartman getting out of a taxi. They both watched Hartman load his car and then followed Hartman as he drove back to Lumberton. Upon their arrival at Hartman's home and business, Hartman drove into the lot and defendant drove past him as her husband fired three shots at Hartman from the backseat of their car. Defendant then drove the car a short distance down the road where her husband hid the shotgun near a guardrail. This evidence is sufficient to overcome defendant's motion to dismiss as to the charge of conspiracy to commit first-degree murder. This assignment of error is overruled.

Defendant argues the State did not produce any evidence that the two checks supporting the charges in 04 CRS 51231 and 04 CRS 51245 were ever offered to a bank teller for cashing. Our review of the record before this Court supports defendant's contention.

The offense of uttering a forged instrument "comprises three essential elements: (1) the offer of a forged check or other instrument to another; (2) with knowledge that the instrument is false; and (3) with the intent to defraud or injure another." *State v. Thompson*, 62 N.C. App. 585, 586, 303 S.E.2d 85, 86 (1983); *see also* N.C. Gen. Stat. § 14-120 (2005). At trial, the State did introduce evidence that the checks supporting the charges of uttering in 04 CRS 51231 and 04 CRS 51245 were in fact drawn on RBC Centura Bank and were made payable to defendant. However, the State offered no evidence that defendant cashed the checks or that defendant directed anyone else to cash the checks. The State's evidence raises only a suspicion or conjecture that defendant caused the checks to be cashed and the trial court erred in failing to dismiss the charges of uttering in 04 CRS 51231 and 04 CRS 51245. *See State v. Brayboy*, 105 N.C. App. 370, 374, 413 S.E.2d 590, 593, *disc. review denied*, 332 N.C. 149, 419 S.E.2d 578 (1992) (when evidence only raises a suspicion or conjecture that the crime was committed or that the defendant was the perpetrator, the motion to dismiss should be granted). A careful review of the transcript shows the State methodically presented specific evidence as to defendant's forgery of all of the checks in this case, and specific evidence of uttering as to all but these two checks. We thus

reverse defendant's convictions for uttering a forged instrument in case numbers 04 CRS 51231 and 04 CRS 51245.

III

Defendant lastly contends the trial court erred in admitting the statement of her husband, a non-testifying co-defendant, during her sentencing hearing. Defendant specifically argues that, by admitting the summary of her husband's statement over defendant's objection, "the trial court committed reversible error which substantially affected [defendant's] constitutional right to confront the witnesses against her, and impeded her trial attorney's ability to defend her during the sentencing hearing effectively." We disagree.

We first note that where a defendant has been convicted of a felony and the minimum sentence of imprisonment falls within the presumptive range of the defendant's prior record or conviction level and class of offense, the defendant may not appeal as a matter of right an issue concerning his sentence. N.C. Gen. Stat. § 15A-1444(a1) (2005). Further, this Court has recently declined to extend the application of the Confrontation Clause and the standard set forth by *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), to testimony given at a sentencing hearing in a non-capital case. *State v. Sings*, __ N.C. App. __, __, 641 S.E.2d 370, 371-72 (2007). This assignment of error is overruled.

Defendant does not present arguments on her remaining assignment of error and thereby abandons it pursuant to N.C. R. App. P. 28(b)(6).

No error in part; reversed in part.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).