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NO. COA06-328

NORTH CAROLINA COURT OF APPEALS

Filed: 5 December 2006

STATE OF NORTH CAROLINA

v.

DONTAVIS JAMAR ANDERSON

Mecklenburg County
Nos. 04 CRS 216136
05 CRS 024280

Appeal by defendant from judgment entered 29 September 2005 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 November 2006.

Attorney General Roy Cooper, by Assistant Attorney General Q. Shanté Martin, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

TYSON, Judge.

Dontavis Jamar Anderson ("defendant") appeals from judgment entered after a jury found him to be guilty of robbery with a firearm and found the aggravating factor of joining with more than one other person in committing the offense and not being separately charged with committing a conspiracy. We find no error.

I. Background

The State's evidence tended to show Mooresville Police Officer, Yakisha Norris ("Norris"), was engaged in a part-time business of selling clothes from her personal vehicle while off-duty and during holidays. On 10 April 2004, the day before Easter

Sunday, Norris met a woman named "Jay" while promoting her clothing business. Norris gave Jay her business card.

That night, Jay called Norris between 10:00 and 11:00 p.m. and informed Norris that she knew other individuals who were interested in purchasing clothes for Easter morning. Norris agreed to meet Jay at a Quick-N-EZ convenience store in Charlotte, North Carolina. When Norris arrived at the convenience store, Jay was not present. As Norris prepared to leave, Jay called Norris's cellular telephone and asked if Norris would pick her up.

Norris drove to a house to which Jay had directed her. Jay exited the house and entered the front seat of Norris's vehicle. Jay directed Norris to drive to a house where Jay's brother and cousin were purportedly interested in purchasing some of Norris's clothes. Defendant and another male entered Norris's vehicle and directed Norris to yet another location, where they could obtain the money to purchase the clothes.

After three to five minutes of driving, defendant told Norris to stop her vehicle. Defendant pointed a gun at Norris and demanded, "give me everything you have got." Norris gave defendant her pocketbook. Defendant and Jay ordered Norris to exit her vehicle and open the trunk. After going through the clothes in Norris's trunk, defendant, Jay, and the other male left Norris on the side of the road and drove away in Norris's car.

Norris used her cellular telephone to call the police and provided a description of her vehicle and the assailants. The police apprehended defendant, Jay, and the other male near the

location where Norris had originally picked up defendant and the other male. Norris identified all three suspects as her assailants and specifically identified defendant as the gunman. Defendant did not offer any evidence in his defense.

On 28 September 2005, a jury found defendant guilty of robbery with a firearm. The trial court entered the sentencing phase and the jury found defendant to be guilty beyond a reasonable doubt of the aggravating factor of joining with more than one other person in committing the offense and was not charged with committing a conspiracy. On 29 September 2005, the trial court sentenced defendant to a minimum of eighty-seven months and a maximum of 114 months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court's jury instruction that they could consider all the evidence presented in the guilt or innocence phase of his trial during the sentencing phase of his trial was error because the instruction: (1) violated N.C. Gen. Stat. § 15A-1340.16(d) and (2) was likely to mislead the jury.

III. N.C. Gen. Stat. § 15A-1340.16(d)

Defendant contends the trial court's jury instruction stating, "you will be able to consider all the evidence that you heard in the first phase of this trial in this the second phase of the trial," was error. Defendant argues this instruction violated N.C. Gen. Stat. § 15A-1340.16(d), which states in part, "Evidence necessary to prove an element of the offense shall not be used to

prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation."

During defendant's trial, the trial court instructed the jury on the elements the State was required to prove to find defendant guilty of robbery with a firearm. The trial court also instructed the jury that they could find defendant guilty of robbery with a firearm on a theory of acting in concert. The jury found defendant to be guilty. During the sentencing phase of the trial, the jury found the aggravating factor that defendant had joined with more than one other person in committing the offense and was not separately charged with committing a conspiracy beyond a reasonable doubt.

Defendant argues, "[t]he evidence required to apply the acting in concert theory for the substantive offense is almost completely the same as, and substantially overlaps with, the evidence . . . needed to support the aggravating factor." We disagree.

This Court addressed a similar argument in *State v. Sellers*, 155 N.C. App. 51, 574 S.E.2d 101 (2002). In *Sellers*, a jury found the defendant guilty of assault with a firearm on a law enforcement officer, assault with a deadly weapon inflicting serious bodily injury, assault with a deadly weapon, and discharging a firearm into occupied property. 155 N.C. App. at 54, 574 S.E.2d at 103. The trial court found the aggravating factor that the defendant had "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person" for each offense. *Id.* Like

here, the defendant contended the trial court violated N.C. Gen. Stat. § 15A-1340.16(d) and argued "since it was necessary for the State to prove defendant used a firearm to be convicted of [the substantive offenses] the trial court could not consider the use of the firearm as evidence to support an aggravating factor." *Id.* at 57, 574 S.E.2d at 105.

This Court disagreed and stated:

In order to prove the substantive crimes, the State needed to prove use of the firearm, but did not need to prove that defendant employed a weapon normally hazardous to the lives of more than one person, as required for finding the aggravating factor. The State proved that defendant utilized a semi-automatic pistol, which in its normal use is hazardous to the lives of more than one person and is the type of weapon contemplated by [this statute]. Therefore, we hold *additional evidence was required from the State to prove the existence of this aggravating factor, beyond that required for the offenses themselves*, and the trial court did not violate N.C. Gen. Stat. § 15A-1340.16(d) in finding this [aggravating] factor.

Id. at 57, 574 S.E.2d at 105-06 (emphasis supplied) (internal quotations and citations omitted).

Here, the State was required to present additional evidence beyond the evidence to prove the elements of robbery with a firearm in order to prove the aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy. A defendant can be found guilty of a substantive offense under a theory of acting in concert, "[i]f two or more persons act together, with a common purpose to commit the crime." *State v. Francis*, 341 N.C. 156, 160-

61, 459 S.E.2d 269, 272 (1995) (citing *State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994)). The aggravating factor requires the State to prove "defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." N.C. Gen. Stat. 15A-1340.16(d)(2).

To prove the aggravating factor, the State had to tender evidence of two elements "beyond that required for the offense[] [itself]." *Sellers*, 155 N.C. App. at 57, 574 S.E.2d at 106. First, while acting in concert requires "two or more persons", the aggravating factor requires the State to prove the "defendant joined with more than one other person." *Francis*, 341 N.C. at 160, 459 S.E.2d at 272; N.C. Gen. Stat. 15A-1340.16(d)(2). Acting in concert requires the involvement of at least two people in the substantive crime, while the aggravating factor requires proof of a conspiracy of at least three people, including the defendant, who committed the offense. *Id.* Second, the aggravating factor requires the State to prove the defendant "was not charged with committing a conspiracy." N.C. Gen. Stat. 15A-1340.16(d)(2). Proof tending to show defendant acted in concert in committing the substantive offense of robbery with a firearm requires neither element. *Francis*, 341 N.C. at 160-61, 459 S.E.2d at 272. This assignment of error is overruled.

IV. Misleading Instructions

Defendant argues the trial court's jury instruction, allowing all evidence presented in the guilt or innocence phase of his trial

could also be considered during the sentencing phase of his trial misled the jury about the law to apply. We disagree.

This Court has stated:

On appeal, this Court reviews jury instructions contextually and in their entirety. If the instructions present the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, then they will be held to be sufficient. The appealing party must demonstrate that the error in the instructions was likely to mislead the jury.

State v. Crow, ___ N.C. App. ___, ___, 623 S.E.2d 68, 73 (2005) (internal quotations and citations omitted), *disc. rev. denied*, 360 N.C. 485, 632 S.E.2d 495 (2006).

The trial court's instruction was not likely to mislead the jury when viewed in its entirety. Later in the proceeding, the trial court specifically charged the jury on the aggravating factor and stated:

[Y]ou must now consider whether the aggravating factor exists that the defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy

The State must prove to you beyond a reasonable doubt that the aggravating factor exists

Members of the jury, having found the defendant guilty of the offense of robbery with a firearm you must now consider the following question:

Do you find from the evidence beyond a reasonable doubt the existence of the . . . aggravating factor[?]

After reviewing the instructions in their entirety, defendant failed to show the jury was misled by the trial court's instruction. This assignment of error is overruled.

V. Conclusion

The State was required to present additional evidence beyond that required to prove the substantive offense of robbery with a firearm under an acting in concert theory in order to prove the existence of the aggravating factor. The trial court did not violate N.C. Gen. Stat. § 15A-1340.16(d) in instructing the jury during the sentencing phase of defendant's trial.

Defendant failed to show the trial court's instruction, allowing all evidence presented during the guilt or innocence phase of his trial to be considered by the jury during the sentencing phase of his trial, was likely to mislead the jury. Defendant received a fair trial and lawful sentence, free from prejudicial errors he preserved, assigned, and argued.

No Error.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).