

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-783

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

STATE OF NORTH CAROLINA

v.

Harnett County
No. 05 CRS 57099

EMMANUEL EDWARD SANDERS, JR.

Appeal by defendant from judgment entered 6 April 2006 by Judge Franklin F. Lanier in Harnett County Superior Court. Heard in the Court of Appeals 22 January 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Irving Joyner, for defendant-appellant.

MARTIN, Chief Judge.

Defendant, Emmanuel Edward Sanders, Jr. ("defendant"), was found guilty by a jury of robbery with a dangerous weapon. He appeals from a judgment entered upon the verdict sentencing defendant to a prison term of 77 to 102 months.

The State's evidence at trial tended to show the following: On the evening of 21 October 2005, defendant went to the residence of Demetrius McLaughlin ("McLaughlin") on Catfish Lane in the Spring Lake area of Harnett County to purchase marijuana. Defendant arrived at the residence in a burgundy and white pickup

truck driven by Martin Gilliam. McLaughlin testified he had known defendant for approximately one year and defendant had regularly purchased marijuana from him two or three times per week.

After defendant and McLaughlin completed their transaction, somebody knocked on McLaughlin's door. McLaughlin opened the door, and a man identified as Ashley Gilliam rushed into McLaughlin's residence and pulled a gun on McLaughlin. Defendant also pulled a gun on McLaughlin. McLaughlin then grabbed both of the guns and began wrestling with the two men. After approximately thirty seconds, Martin Gilliam entered the residence, began hitting McLaughlin on the back of his head with a gun, and forced McLaughlin to the ground. McLaughlin testified he had a lot of blood in his eyes and he eventually gave up. At that time, defendant and Ashley Gilliam began searching and ransacking McLaughlin's house while Martin Gilliam held McLaughlin down on the floor with his knee in McLaughlin's back and a gun to McLaughlin's head. After a period of time, Martin Gilliam tied McLaughlin's hands behind his back with a belt and joined defendant and Ashley Gilliam in searching and ransacking the house.

When Martin Gilliam left the room, McLaughlin got up, jumped through the front window of his trailer to escape, landed on the ground, and began to run. As he ran, McLaughlin was shot several times in the chest and once in the arm. He continued to run around the corner of his trailer, went to his neighbor's trailer, and asked his neighbor to call 911. McLaughlin then laid on the ground

in front of his neighbor's trailer until emergency personnel arrived.

McLaughlin was taken by ambulance to Cape Fear Valley Hospital where he underwent surgery. McLaughlin remained in the hospital for twelve days. After he was released from the hospital, McLaughlin received additional medical treatment to assist him in getting the strength back in his arm and hand because he initially did not have any feeling in his arm or hand. McLaughlin was out of work for approximately two months while he was recovering from his injuries.

At trial, McLaughlin testified that while defendant was in his home with Ashley and Martin Gilliam, defendant said, "give me your money. Give me your marijuana. We going to kill you." When asked whether they (referring to defendant, Ashley Gilliam, and Martin Gilliam) took anything from him, McLaughlin testified they took money, a necklace, and a quarter bag of marijuana having a value of \$25.00 that was in his kitchen.

Harnett County Deputy Sheriff Chris Hayes testified he was dispatched to Catfish Lane on the evening of 21 October 2005. He did not make it to Catfish Lane, however, because his vehicle got stuck in the mud as he was driving up Valley Road, a clay road, toward Catfish Lane. Deputy Sheriff Hayes testified it was raining that evening making it difficult to drive on Valley Road. While on Valley Road, he observed a pickup truck in a ditch on the side of the road. After ensuring nobody was in the pickup truck, Deputy

Sheriff Hayes searched it and found a semi-automatic handgun laying on the floorboard.

Richard Foley, a detective crime scene investigator with the Harnett County Sheriff's Department, testified he received a request to go to Catfish Lane on the evening of 21 October 2005. Because he had a four-wheel drive vehicle, he was able to make it there despite the rain and the muddy road. When he pulled up, he observed paramedics working on McLaughlin. Detective Foley saw bullet holes in McLaughlin's chest area and took photographs of his injuries. Detective Foley further testified he took photographs of the pickup truck that was in the ditch on the side of Valley Road as well as the weapon that was on the floorboard of the truck. He then disarmed the weapon and collected it as evidence.

Jerry Murphy, a detective with the Harnett County Sheriff's Department, testified he was dispatched to Catfish Lane on the evening of 21 October 2005. When he arrived, McLaughlin had already been taken away by emergency personnel. On 1 November 2005, Detective Murphy interviewed McLaughlin at the hospital about the events that occurred on the evening of 21 October 2005. McLaughlin informed Detective Murphy the man who purchased marijuana from him that evening was known as "Man" and the other two black males who subsequently entered his residence were Martin and Ashley. On 2 November 2005, Detective Murphy returned to the hospital at which time McLaughlin identified Ashley Gilliam and Martin Gilliam in photographic lineups. On 3 November 2005, Detective Murphy met with McLaughlin at the home of McLaughlin's

mother and presented McLaughlin with a photographic lineup of a third suspect. McLaughlin identified defendant as the man whom he knew as "Man." Finally, Detective Murphy testified the pickup truck that was in the ditch on Valley Road on the evening of 21 October 2005 was registered to Martin Gilliam.

Defendant presents two arguments on appeal. First, defendant argues the trial court committed plain error in entering judgment against him when insufficient evidence existed to support his conviction for robbery with a dangerous weapon. Second, defendant argues the trial court erred by instructing the jury on acting in concert. For the reasons set out below, we find no error.

Defendant first contends the trial court committed plain error in entering judgment against him on the ground there was insufficient evidence to support his conviction for robbery with a dangerous weapon. Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure mandates that a defendant must move to dismiss a criminal charge in the trial court in order to preserve the issue of the sufficiency of the evidence for appellate review. N.C.R. App. P. 10(b)(3) (2006) ("A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . at trial."). In the present case, defendant did not move to dismiss the charge at the close of the State's evidence or at the close of all the evidence. Accordingly, this assignment of error is dismissed. See *State v. Spaugh*, 321 N.C. 550, 552, 364 S.E.2d 368, 370 (1988) (dismissing assignment of error challenging sufficiency

of the evidence where the defendant failed to move to dismiss at the close of all the evidence).

Defendant next contends the trial court erred by overruling his objection to submitting an instruction on acting in concert to the jury. In support of this contention, defendant makes two arguments. First, he argues the trial court erred by instructing the jury on acting in concert because the indictment does not allege defendant was acting in concert during the commission of the offense. We disagree.

A criminal indictment "is sufficient in form for all intents and purposes if it express[es] the charge against the defendant in a plain, intelligible, and explicit manner[.]" N.C. Gen. Stat. § 15-153 (2005). Our Supreme Court has stated:

Specifically, the indictment must allege all of the essential elements of the crime sought to be charged. Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.

State v. Westbrooks, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (citations and quotations omitted).

Here, the indictment charged defendant with robbery with a dangerous weapon. 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) (citing N.C. Gen. Stat. § 14-87 (1994)). Acting in concert

is not an essential element of robbery with a dangerous weapon and, thus, would have been surplusage if included in the indictment. See *State v. Westbrooks*, 345 N.C. at 57, 478 S.E.2d at 492 (holding the allegation in the indictment that defendant acted in concert with two other persons was an allegation beyond the essential elements of the crime charged and was, therefore, surplusage). Accordingly, defendant's argument is without merit.

Second, defendant argues there was no factual basis for instructing the jury on acting in concert. In particular, defendant asserts the State failed to present any evidence of the identity of the individual who stole McLaughlin's marijuana. Absent such evidence, defendant asserts it was improper to instruct the jury on acting in concert.

In North Carolina, one may be convicted of a crime under the "acting in concert" principle if "he is present at the scene of the crime and . . . he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). "To support an instruction on acting in concert, the State must present sufficient evidence that two or more persons acted together with a common plan or purpose to commit a crime." *State v. Moxley*, 78 N.C. App. 551, 555, 338 S.E.2d 122, 124 (1985) (citation omitted), *disc. review denied*, 316 N.C. 384, 342 S.E.2d 904 (1986).

Here, the State presented evidence that tended to show defendant arrived at McLaughlin's residence in a pickup truck

driven by Martin Gilliam. After defendant purchased marijuana from McLaughlin, Ashley Gilliam entered McLaughlin's residence and pulled a gun on him. Defendant also pulled a gun on defendant at which time McLaughlin wrestled with the two men. Shortly thereafter, Martin Gilliam entered the residence, began hitting McLaughlin on the back of his head with a gun, and forced McLaughlin to the ground. Defendant and Ashley Gilliam were searching and ransacking McLaughlin's house while Martin Gilliam held McLaughlin down on the floor with his knee in McLaughlin's back and a gun to McLaughlin's head. McLaughlin testified that while defendant was in his home with Ashley and Martin Gilliam, defendant said, "give me your money. Give me your marijuana. We going to kill you." McLaughlin further testified they took money, a necklace, and marijuana having a value of \$25.00 from him. Based on these facts, we conclude the State presented substantial evidence that defendant, Ashley Gilliam, and Martin Gilliam acted together with a common plan or purpose to rob McLaughlin with a deadly weapon.

No error.

Judges McGEE and HUNTER concur.

Report per Rule 30(e).