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NO. COA07-1271

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STATE OF NORTH CAROLINA

v.

Robeson County  
No. 06 CRS 50921

ANTHONY MCRAE

Appeal by defendant from judgment entered 14 February 2007 by Judge William C. Gore, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 1 April 2008.

*Attorney General Roy Cooper, by Special Deputy Attorney General Gerald M. Robbins, for the State.*

*William D. Spence for defendant-appellant.*

BRYANT, Judge.

Anthony McRae (defendant) appeals from a judgment entered 14 February 2007 consistent with a jury verdict finding him guilty of second-degree burglary, robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. For the reasons given below, we find no error.

#### *Facts*

The evidence at trial tended to show that on 9 February 2006, Kevin Leach (Leach) was staying at the Redwood Motel in Lumberton, North Carolina when defendant, Leach's cousin, came to his room and asked to borrow \$10.00. Two other men, Tyrone Davis (Davis) and

Gary McArthur (McArthur), accompanied defendant to Leach's room. After a short visit, defendant and the two men left Leach's room. Leach testified that after defendant and the other men left, Leach placed his remaining money in his socks before leaving his room to place a phone call. As he was leaving the motel room, a man drove by in a gold Ford Explorer and asked Leach if he "needed anything."

Approximately thirty minutes later, Leach ended the phone call and walked back to his room. When Leach turned the corner, he saw two or three men standing at the corner near his room. As Leach walked around the individuals, he saw that the lock on his motel room door was broken and the door was pushed in. Leach walked into the room and saw that the beds were turned over and the room appeared to have been ransacked. When Leach attempted to leave his room, defendant and two other individuals named Trans Irons (Irons) and Stephen Moore (Moore) blocked his exit. Irons, whom Leach identified as the man driving the gold truck, held a gun on Leach. Leach testified Moore struck Leach as he pushed Leach back into the room and demanded that Leach tell him where the rest of the money was hidden. After Leach stated the money was in his right sock, defendant pulled off Leach's sock and retrieved five \$20.00 bills. Defendant and Moore first counted the money retrieved from Leach's sock, then Moore demanded to know where Leach hid the rest of his money. Leach told Moore he did not have any more money. In response, defendant stated Leach was lying and he had more money. Defendant and Moore turned Leach onto his stomach, physically searched him, and found \$200.00 in his left sock. During the

entire incident, Irons continued to point the gun at Leach. After the defendant and Moore removed the money from Leach, they left the room. As they were leaving, Moore fired a shot into the floor. Leach later testified that during the incident, Davis did not enter the room but stood outside. Leach did not testify regarding whether McArthur had returned to the room with the other men.

On 8 May 2006, defendant was indicted on one count of second-degree burglary, robbery with a dangerous weapon and felony conspiracy. On 14 February 2007, the jury returned a verdict finding defendant guilty of all three charges and defendant was sentenced to a minimum term of 20 months to a maximum of 24 months for the second-degree burglary conviction. Defendant was also sentenced to a consecutive minimum term of 117 months to a maximum term of 150 months for the robbery with a dangerous weapon conviction to be served concurrently with a minimum term of 46 months to a maximum term of 65 months for the felony conspiracy conviction.

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Defendant raises the issues of whether the trial court erred by: (I) denying defendant's motion to dismiss the second-degree burglary charge; (II) denying defendant's motion to dismiss the robbery with a dangerous weapon charge; and (III) denying defendant's motion to dismiss the felony conspiracy charge. In addition, defendant raises several issues which he addresses under the following question: (IV) Whether the trial court erred by finding and concluding that defendant knowingly, voluntarily and

intelligently waived his *Miranda* rights and admitting defendant's statement into evidence.

*Standard of Review*

The standard of review for a motion to dismiss in a criminal case is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Pointer*, 181 N.C. App. 93, 95, 638 S.E.2d 909, 911 (2007) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). In ruling on a motion to dismiss, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

*I*

Defendant argues the State failed to prove defendant intended to commit the felony of robbery with a dangerous weapon inside Leach's motel room at the time of the breaking and entering. We disagree.

"The constituent elements of second-degree burglary are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or sleeping apartment (5) of another (6) with the intent to commit a felony therein." *State v. Key*, 180 N.C. App. 286, 292, 636 S.E.2d 816, 821 (2006) (quotation omitted); see also N.C. Gen. Stat. § 14-51 (2007). Although a burglary indictment is no longer required to state the specific felony a defendant

intended to commit, *State v. Worsley*, 336 N.C. 268, 281, 443 S.E.2d 68, 74 (1994), "when the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged," *State v. Wilkinson*, 344 N.C. 198, 222, 474 S.E.2d 375, 388 (1996) (quoting *State v. Faircloth*, 297 N.C. 388, 395, 255 S.E.2d 366, 370 (1979)).

In this case, the indictment for second-degree burglary specifically alleged that defendant "broke and entered with the intent to commit a felony therein, 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. McCree*, 160 N.C. App. 19, 30, 584 S.E.2d 348, 356 (2003). Here, the question is not whether there is sufficient evidence of robbery with a dangerous weapon but whether there is sufficient evidence of defendant's intent at the time he broke and entered Leach's motel room. We recently addressed this issue in a companion case, *State v. Irons*, \_\_\_ N.C. App. \_\_\_, 657 S.E.2d 733 (2008). We therefore adopt and incorporate our analysis in *Irons* in the instant case.

A "breaking" is any act of force, however slight, used to gain entrance through any usual or unusual place of ingress, whether open, partly open, or closed. *State v. Jolly*, 297 N.C. 121, 128, 254 S.E.2d 1, 5-6 (1979). "A breaking may be actual or

constructive." *Id.* "A constructive breaking occurs where entrance is obtained in consequence of violence commenced or threatened by defendant." *Id.*

The evidence at trial tended to show that Leach was not present the first time defendant and the other individuals forcibly entered Leach's motel room to look for money by breaking the lock. However, the evidence shows that after Leach returned to his motel room, he attempted to leave and was prevented from doing so by defendant, Irons and Moore. Additionally, the evidence showed Irons pointed a gun at Leach while Moore hit Leach and forced Leach into the room where he was then robbed by defendant and Moore at gunpoint. Defendant argues this evidence is insufficient to show he intended to commit robbery with a dangerous weapon in the unoccupied room at the time he broke the lock and entered the room. However, the evidence is more than sufficient to show that defendant intended to commit robbery with a dangerous weapon at the time Leach returned to his motel room and attempted to reenter. Further, the evidence is sufficient to show that a constructive breaking occurred when Leach was directly controlled and forced into the motel room at gunpoint while being physically assaulted. See *Jolly*, 297 N.C. at 128, 254 S.E.2d at 6 (pushing victim into the hotel room as he opened the door was constructive breaking sufficient to sustain a charge of second-degree burglary). Therefore, we hold the State presented sufficient evidence of each element of second-degree burglary. Accordingly, this assignment of error is overruled.

II

Defendant argues the trial court erred in denying his motion to dismiss the robbery with a dangerous weapon charge because there was insufficient evidence that he shared a common plan with Irons or Moore to rob Leach.

Acting in concert means "to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979).

Where the state seeks to convict a defendant using the principle of concerted action, that this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading toward the crimes' commission. That which is essentially evidence of the existence of concerted action should not, however, be elevated to the status of an essential element of the principle. Evidence of the existence of concerted action may come from other facts. It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show 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.

*Id.* Under the theory of acting in concert, if two or more persons join in a purpose to commit a crime, each person is responsible for all unlawful acts committed by the other persons as long as those acts are committed in furtherance of the crime's common purpose. *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991). Therefore, the State need not present evidence that defendant actually possessed the dangerous weapon. The State must only show

that defendant "acted in concert to commit robbery and that his co-defendant used the dangerous weapon in pursuance of that common purpose to commit robbery." *State v. Johnson*, 164 N.C. App. 1, 13, 595 S.E.2d 176, 183 (2004). "The theory of acting in concert does not require an express agreement between the parties. All that is necessary is an implied mutual understanding or agreement to do the crimes." *State v. Giles*, 83 N.C. App. 487, 490, 350 S.E.2d 868, 870 (1986), *cert. denied*, 319 N.C. 460, 356 S.E.2d 16 (1987).

Viewing the evidence in the light most favorable to the State, we find there was sufficient evidence that defendant acted in concert with other individuals to commit an armed robbery. Defendant, Davis and McArthur visited Leach in his motel room where they saw Leach's money. Davis testified that defendant told him as well as Irons that Leach had a significant amount of money in his room. Defendant was present when Leach returned to his motel room and helped prevent Leach from leaving the room. During the commission of the robbery, defendant told Moore that Leach had more money than was initially taken from him and helped Irons turn Leach over and pat him down while Irons pointed a gun at Leach. Also, after defendant and Moore took Leach's money, Moore fired a shot in Leach's direction as the men exited the room. Taken in the light most favorable to the State, the evidence is sufficient to show that defendant, together with Irons and Moore, committed the crime of robbery with a dangerous weapon pursuant to a common purpose. Accordingly, this assignment of error is overruled.

III

Defendant argues the trial court erred in denying his motion to dismiss the felony conspiracy charge because there was insufficient evidence of an express or implied agreement between defendant and the named co-conspirators to commit armed robbery.

"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. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). "In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *Id.*

Viewing the evidence in the light most favorable to the State, we conclude substantial evidence existed to support a finding that defendant conspired with Irons and other individuals to commit armed robbery against Leach. Davis testified defendant told him and Irons that Leach had a significant amount of money in his motel room. Also, defendant told Irons and the other men to follow him back to the motel room. When defendant arrived at Leach's room, he kicked the door in and went inside to search for more money. When Leach returned to the room, defendant, with the help of Moore, searched Leach and took money out of his socks while Irons pointed a gun at Leach. Also, defendant and Moore forced Leach to lie face-down on his bed while defendant and Moore searched for more money. Of the three men present in the room at that point - defendant, Moore and Irons - defendant was the only one who had previously been in Leach's room and knew that Leach had additional

money. Based on this evidence, we conclude that the evidence supported a finding that defendant conspired with others to commit armed robbery. Therefore, the trial court did not err in denying defendant's motion to dismiss the charge of conspiracy to commit robbery with a dangerous weapon.

IV

Defendant argues the trial court erred by finding and concluding defendant knowingly, voluntarily and intelligently waived his *Miranda* rights and admitting his statement into evidence because he was intoxicated at the time he waived his rights. We disagree.

"Generally, an appellate court's review of a trial court's order on a motion to suppress 'is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion.'" *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735 (quoting *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829 (2002)), *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). "The trial court's conclusions of law, however, are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). "[A] defendant's intoxication at the time of a confession does not preclude a conclusion that a defendant's statements were freely made." *State v. Barnes*, 154 N.C. App. 111, 116, 572 S.E.2d 165, 168 (2002). "The inquiry to be conducted is whether the defendant is so impaired as to be unconscious of the meaning of his words,

not whether he or she has consumed drugs or alcohol." *State v. Marion*, 126 N.C. App. 58, 60, 483 S.E.2d 447, 448 (1997) (citation and internal quotation omitted).

The trial court found that Detective Kimberly Grant apprised defendant of his rights. The trial court also found that defendant indicated he was under the influence of drugs or alcohol and that he hand wrote, "I drank a few beers. I am coherent." The trial court found that Detective Grant had the opportunity to observe defendant on other occasions when defendant was intoxicated. The court further found that on the night the statement was made, defendant appeared to be "fine," his voice was "understandable" and he "used coherent syntax"; "his demeanor was calm" and his eyes "appeared focused." The court also found that no evidence was offered by defendant that he was intoxicated or unable to understand the *Miranda* rights read to him except for his answer to the question "are you under the influence of drugs or alcohol." These findings were unchallenged by defendant. Based on its findings, the court concluded defendant's statement was made voluntarily and intelligently after a voluntary and intelligent waiver of his *Miranda* rights. Based on the evidence before it, the trial court's findings were supported by competent evidence and the findings support the trial court's ultimate conclusion that defendant voluntarily and intelligently made the statement after knowingly and intelligently waiving his rights. Accordingly, this assignment of error is overruled.

No error.

Judges WYNN and JACKSON concur.

Report per Rule 30(e).

