NO. COA08-379

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STATE OF NORTH CAROLINA

v. Iredell County
Nos. 05 CRS 53581
05 CRS 53582

PRENTISS ORLANDO CROSS,
Defendant.

Appeal by defendant from judgments entered 14 September 2007 by Judge W. Erwin Spainhour in Iredell County Superior Court. Heard in the Court of Appeals 12 January 2009.

Attorney General Roy Cooper, by Assistant Attorney Generals Creecy C. Johnson and Barbara A. Shaw, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

GEER, Judge.

Defendant Prentiss Orlando Cross appeals from his conviction of robbery with a dangerous weapon and felonious larceny. We agree with defendant that the trial court erred in not dismissing the charge of felonious larceny because the State's evidence established only a single transaction rather than two separate takings. In accordance with *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080, 116 S. Ct. 2563 (1996), we arrest judgment on the charge of

felonious larceny. We find no error as to the robbery with a dangerous weapon conviction.

Facts

The State presented evidence tending to show the following facts. On the morning of 21 April 2005, Tony Brown was asleep at his home in Mooresville, North Carolina. At around 11:30 a.m., a knock on his door woke him up, and he went to the door and looked out. Mr. Brown saw two men he did not know, so he did not answer the door and went back to lie down. When he heard his car alarm go off, he ran to the front door and saw a man with dreadlocks carrying a speaker from his car across the yard. Mr. Brown then opened the front door and saw a second man standing about five feet from the front door wearing a gray tee-shirt and carrying a handgun. He noticed a third man wearing a baseball cap and holding a pump shotgun, standing behind a white Lincoln Town Car with a brown top parked in the driveway next door. At trial, Mr. Brown identified the man wearing the gray tee-shirt as defendant.

Mr. Brown asked what the men were doing, and the man carrying the speaker lifted up his shirt, displaying a handgun tucked in the man's pants. Defendant and the man with dreadlocks then rushed at Mr. Brown, pushed him into his house, and held their handguns to his head. The men asked Mr. Brown if he had any money and pushed him into his bedroom. Defendant held Mr. Brown in his bedroom while the other man searched the house. Mr. Brown grabbed a cell phone and tried to call the police, but defendant struck Mr. Brown

in the face with the barrel of his gun, and the man with dreadlocks fired his gun towards Mr. Brown. The two men then moved Mr. Brown into a bathroom and barricaded the door with the kitchen stove and refrigerator.

After about 20 seconds, Mr. Brown heard his car start. Mr. Brown moved the refrigerator out of the way and made his way to a neighbor's house where he called the police. Upon the arrival of the police, Mr. Brown informed them that, in addition to his car, a Chevrolet Impala, he was missing a gray 20-inch television, his wallet containing about $80.00 in cash, his keys, his cell phone, some DVDs, and a plastic replica of an AK-47 assault rifle. Mr. Brown did not know the exact denominations of the cash stolen from him, but he knew he had some 20, 10, five, and one dollar bills.

A short time later, police officers located the Lincoln Town Car and Mr. Brown's Impala being driven together. Officers stopped the two cars, and defendant was taken into custody. Defendant was driving the Lincoln and had two passengers, a woman named Rachel Rios and a man named Henry Bristo. A man named Shawn Gulley was driving Mr. Brown's Impala. Officers took the four people into custody and found a handgun in defendant's back pants' pocket. A further search of defendant turned up approximately $80.00 in cash consisting of 20, 10, five, and one dollar bills. From the Lincoln Town Car, officers recovered a television set, a plastic or rubber replica of an AK-47 assault rifle, a 12-gauge shotgun, and various other items. Officers also found a Glock 17 handgun under the left

front wheel of the Impala, where Mr. Gully had thrown it when he exited the Impala.

On 1 August 2005, defendant was indicted for one count of robbery with a dangerous weapon and one count of felonious larceny. On 23 May 2007, a jury found defendant guilty of both charges. The trial court imposed a presumptive-range sentence of 64 to 86 months imprisonment for robbery with a dangerous weapon and a consecutive presumptive-range sentence of six to eight months imprisonment for felonious larceny. Defendant timely appealed to this Court.

Discussion

Defendant first contends that the trial court erred in denying his motion to dismiss and entering judgment on the charge of felonious larceny because the evidence at trial showed the charges of robbery with a dangerous weapon and felonious larceny arose from a single continuous transaction. It is well established that "larceny is a lesser included offense of armed robbery." *State v. Jordan*, 128 N.C. App. 469, 473, 495 S.E.2d 732, 735, *disc. review denied*, 348 N.C. 287, 501 S.E.2d 914 (1998). Nevertheless, "convictions of a defendant for both robbery with a dangerous weapon and larceny may be upheld, *but only if the larceny and the robbery with a dangerous weapon involved two separate takings*." *Jaynes*, 342 N.C. at 275-76, 464 S.E.2d at 464 (emphasis added) (internal quotation marks omitted). On the other hand, "'[a] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time

and place.'" *Id.* at 275, 464 S.E.2d at 464 (quoting *State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992)).

Here, the State's evidence, viewed in the light most favorable to the State, indicates that defendant and his accomplices first knocked on Mr. Brown's door. When he did not answer, they broke into his car and removed a speaker, setting off the car alarm. Mr. Brown then opened the front door, and the robbers entered the house. After threatening Mr. Brown with guns and barricading him in a bathroom, they took various items from the house. Over an approximately 20-second period, they loaded the items into Mr. Brown's car and drove away in that car.

We do not see any meaningful distinction between this case and the Supreme Court's opinion in *Jaynes*. The Supreme Court opinion noted that defendant and his accomplice went to a farm that they intended to rob and knocked on the front door of a mobile home on the property. *Id.* at 258, 464 S.E.2d at 454. Defendant entered the home and shot the owner. *Id.* Defendant then loaded the victim's car with personal items from the victim's mobile home, while his accomplice drove the victim's truck over to a workshop and loaded it with other property from the workshop. *Id.* at 259, 464 S.E.2d at 454. The two men drove the victim's vehicles to another accomplice's house, where they left the loaded truck. *Id.*, 464 S.E.2d at 455. Defendant drove the victim's car back to the farm so that the two men could retrieve their car. *Id.*

After considering this evidence, the Supreme Court held that "there was no basis on which to distinguish the taking of the

smaller items of personal property from the takings of the vehicles." *Id.* at 276, 464 S.E.2d at 464. The Court observed that "[t]he evidence tended to show that defendant and [his accomplice] loaded the victim's property into the victim's vehicles and drove them away" and concluded that "[t]he takings of the vehicles and the other items occurred simultaneously and were linked together in a continuous act or transaction." *Id.*, 464 S.E.2d at 464-65. The Court held, therefore, that "there was but one taking, and the larcenies were lesser-included offenses of the robbery with a dangerous weapon." *Id.*, 464 S.E.2d at 465.

The State, however, contends that this Court's decision in *Jordan* is controlling. In *Jordan*, although the defendant initially intended only to steal the victim's car, he entered her home and stayed for 15 to 20 minutes walking through the house deciding what property he wanted to take. 128 N.C. App. at 474, 495 S.E.2d at 736. After stealing credit cards and jewelry, he then went to her car and drove off. *Id.* This Court distinguished its facts from those in *Jaynes* on the ground that *Jaynes* "involved nearly simultaneous takings of property from the victim along with the theft of the victim's vehicle." *Id.* The Court observed that *Jaynes* was a case "where there was one crime with multiple items of property stolen at the same time[,]" while "Jordan stole from the victim in her house. He then left her house and stole her car." *Id.* at 474-75, 495 S.E.2d at 736. The Court concluded that "[b]ecause of the lapse of time between the two takings, we

conclude that separate takings occurred in this case." *Id.* at 475, 495 S.E.2d at 736.

We believe that this case more closely resembles *Jaynes* and that we are bound to follow its holding. Here, defendant and his accomplices started by removing property from the victim's car, then removed property from the victim's home and loaded it into the victim's car, and finally stole the car. The theft of Mr. Brown's personal property and his car were intertwined, and there was not a lapse of time comparable to the 15 to 20 minutes that this Court found dispositive in *Jordan*. In this case, as in *Jaynes*, the time elapse was that amount of time necessary to load property into the victim's car — here, apparently, a total of 20 seconds. The takings of the car and the personal property "were linked together in a continuous act or transaction," *Jaynes*, 342 N.C. at 276, 464 S.E.2d at 464-65, with the takings occurring right on top of each other.

Accordingly, *Jaynes* controls, and we arrest judgment on defendant's conviction for felonious larceny. *See also State v. Buckner*, 342 N.C. 198, 233, 464 S.E.2d 414, 434 (1995) ("Defendant further argues that since the larceny in the present case was part of the same continuous transaction as the robbery with a dangerous weapon, the trial court violated defendant's federal and state constitutional rights to be free of double jeopardy by convicting him for both crimes. We agree; and based on the authority of *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), we arrest judgment

on the felonious larceny conviction."), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47, 117 S. Ct. 91 (1996).

Defendant next argues the trial court improperly expressed an opinion as to defendant's guilt in violation of N.C. Gen. Stat. §§ 15A-1222 and -1232 (2007). Defendant contends the trial court abandoned its neutrality when it told the jury defendant had absconded from trial, issued orders for his arrest and forfeiture in front of the jury, and instructed the jury that it could consider his absence from the trial as evidence of guilt. We need not address the merits of defendant's contention because he has failed to meet his burden of showing prejudice.

When a defendant claims that he was deprived of a fair trial by statements from the trial court, the defendant "has the burden of showing prejudice in order to receive a new trial." *State v. Gell*, 351 N.C. 192, 207, 524 S.E.2d 332, 342, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110, 121 S. Ct. 163 (2000). "Whether the accused was deprived of a fair trial by the challenged remarks must be determined by what [was] said and its probable effect upon the jury in light of all attendant circumstances." *State v. Burke*, 342 N.C. 113, 122-23, 463 S.E.2d 212, 218 (1995).

In this case, defendant argues that the trial court abandoned its impartiality when it ordered the arrest of defendant in front of the jury after defendant failed to return to court following a recess:

> Ladies and Gentlemen, I feel I owe you an explanation of the fact the Defendant is not present. He did not choose to join us after the recess. Appropriate action will be taken

> at the close of these proceedings. In fact I tell you what. Call out the Defendant, please. (Whereupon the Defendant was called out by the Sheriff.) All right. Order for arrest, order of forfeiture. He should be held with [sic] bond until these proceedings are concluded.

Defendant acknowledges that these remarks did not directly express an opinion as to defendant's guilt on the charged offenses, but he points to the trial court's decision — without any request from the State — to give the following jury instruction on flight:

> The State contends that the Defendant fled during the course of the trial of this case. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish Defendant's guilt.

According to defendant, the initial remarks about defendant's absence from the trial when combined with this instruction constituted an improper expression of opinion on defendant's guilt and amounted to the trial court's abandoning its neutrality and, at least temporarily, assuming the role of the prosecutor in this case.

Even assuming, without deciding, that these comments amounted to an improper expression of opinion, we cannot conclude that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" by the jury. N.C. Gen. Stat. § 15A-1443(a) (2007). The evidence presented by the State against defendant was substantial. The victim identified defendant as one of the robbers, defendant was

found driving together with the victim's car immediately after the robbery took place, the car contained the victim's personal property, defendant had a gun in his back pocket, one of his accomplices had a gun, the third gun described by the victim was found in the trunk of the victim's car, and defendant admitted taking the property and the car (although he claimed the car was lost in a bet, and he was taking back personal property stolen from a friend). Given the evidence, we do not believe that the jury would have reached a different verdict in the absence of the trial court's remarks. Accordingly, we uphold the conviction of robbery with a dangerous weapon.

No error in part; judgment arrested as to 05 CRS 53582.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).