NO. COA10-10

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v. Gaston County
No. 09 CRS 051708
No. 09 CRS 051711
No. 09 CRS 051714

RICKY JABAR MCCOY,
Defendant.

Appeal by defendant from judgments entered 16 July 2009 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 30 August 2010.

Roy Cooper, Attorney General, by Alexandra M. Hightower, Assistant Attorney General, for the State.

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

MARTIN, Chief Judge.

Defendant Ricky Jabar McCoy appeals from judgments entered upon his convictions by a jury for first-degree burglary in violation of N.C.G.S. § 14-51, attempted robbery with a dangerous weapon in violation of N.C.G.S. § 14-87, and larceny of a firearm in violation of N.C.G.S. § 14-72.

The evidence tended to show that, on 28 January 2009, around 10:00 p.m. on the evening of his 55th birthday, Kevin Harold Johnson was asleep in his 700-square-foot, two-bedroom apartment at

1134 West Davidson in Gastonia, North Carolina. According to his testimony, after locking the front and back doors of his apartment, Mr. Johnson was awakened by "a big noise" like "a boom, a big sound," followed by the sounds of "some guys" shouting, "[W]e're in here, we're in here," from his living room. When Mr. Johnson emerged from his bedroom, he came upon three African-American males in his living room, one of whom was "in [Mr. Johnson's] face" and "had [a] gun pointing at [him]" so that Mr. Johnson "thought he was going to shoot [him] in the head." At that point, Mr. Johnson did not know whether the two other males also had guns.

Mr. Johnson then backed up into his bedroom to retrieve the .410/.45 Cobray pistol he kept in his bedroom dresser. According to Mr. Johnson, after he got his pistol but before he could exit his bedroom, "they came in" and "they just started shooting, you know, just started shooting, just started shooting [him]." Mr. Johnson was shot three times in the stomach and once in the leg. As Mr. Johnson lay bleeding on the floor, one of the men picked him up and "then just threw [him], you know, just pushed [him] over to the side." The intruders then ransacked his bedroom and ran out of Mr. Johnson's back door with Mr. Johnson's pistol, about $350 in cash, and a bottle of whiskey. Because they wore ski masks or bandanas to cover their faces, Mr. Johnson was not able to identify any of the intruders. In response to a 911 call reporting the shooting at Mr. Johnson's apartment, officers arrived at the scene and arranged for Mr. Johnson to be taken to a local hospital for

medical treatment; he was then airlifted to Charlotte, where he was treated and released several days later.

About twenty minutes after Mr. Johnson was shot, officers in the area were advised by dispatch that an anonymous caller reported seeing three African-American males running into Apartment B at 845 Glenn Street, which was located less than two blocks from Mr. Johnson's residence. Police officers secured the Glenn Street apartment so that no persons could enter or leave the premises, and then obtained and executed a search warrant for the premises. Upon entering the apartment, officers found the 21-year-old defendant, as well as his 17-year-old cousins Deonte Young and James Floyd, seated on the living room couch. A search of the back bedroom of the apartment yielded a Ruger P95DC 9-millimeter handgun, a Hi-Point .380 automatic handgun, and a .410/.45 Cobray pistol, which was later identified as the pistol taken from Mr. Johnson's residence. Defendant, Young, and Floyd were taken to the police station for questioning and were later arrested.

Defendant was indicted for first-degree burglary, attempted robbery with a dangerous weapon, and larceny of a firearm. Young and Floyd testified against defendant at trial as a part of plea bargains reached with the State. They both testified that they, together with defendant, planned to rob Mr. Johnson, that defendant helped provide the weapons that were to be used to rob Mr. Johnson, that Young and Floyd forced open the front door of Mr. Johnson's residence, and that defendant followed Young and Floyd into his residence in order to carry out their plan to rob him. Young and

Floyd also testified that after Floyd fired his weapon at Mr. Johnson, the three left Mr. Johnson's apartment through the back door with Mr. Johnson's .410/.45 Cobray pistol.

Defendant testified on his own behalf that he neither planned to rob Mr. Johnson with his cousins nor entered Mr. Johnson's apartment on the night of the shooting. On cross-examination, however, defendant acknowledged that he had made a statement to the police on the evening of the incident, in which he admitted that he followed Young and Floyd into Mr. Johnson's apartment after he "saw [Young] and [Floyd] kick the door in."

Defendant's motions to dismiss the charges at the close of the State's evidence and at the close of all of the evidence were denied. The jury found him guilty of first-degree burglary, attempted robbery with a dangerous weapon, and larceny of a firearm, and further also found that each of the three offenses was aggravated because "defendant joined with more than one person in committing the offense." The trial court sentenced defendant to two consecutive sentences in the aggravated ranges of 75 to 99 months of imprisonment for the convictions of attempted robbery with a dangerous weapon and first-degree burglary, and 8 to 10 months imprisonment for the conviction of larceny of a firearm, to run concurrently with the burglary conviction.

I.

Defendant first contends the trial court erred by denying his motion to dismiss the first-degree burglary charge because the

State failed to present sufficient evidence that defendant committed a "breaking." Specifically, defendant argues the evidence did not establish that defendant himself committed the "breaking," and asserts that the State's failure to request an instruction on acting in concert with respect to the first-degree burglary charge rendered the State's evidence insufficient to establish the "breaking" element of the offense. We must agree.

"Upon defendant's motion for dismissal, the question for the Court 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. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "It is an established principle of law that upon a motion to dismiss in a criminal action, all of the evidence, whether competent or incompetent, must be considered in the light most favorable to the [S]tate, and the [S]tate is entitled to every reasonable inference therefrom." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "The trial court in considering such motions is concerned only with the sufficiency of the evidence to carry the case to the jury . . . ." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. Accordingly, "[t]he Due Process Clause . . . requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed." *State v. Roberts*, 176 N.C. App. 159, 162-63, 625 S.E.2d 846, 849 (2006); *see also State v. Helton*, 79 N.C. App.

566, 568, 339 S.E.2d 814, 816 (1986) ("'[A] defendant may not be convicted of an offense on a theory of his guilt different from that presented to the jury.'") (quoting *State v. Smith*, 65 N.C. App. 770, 773, 310 S.E.2d 115, 117, *modified and aff'd*, 311 N.C. 145, 316 S.E.2d 75 (1984)).

"The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996); *see also* N.C. Gen. Stat. § 14-51 (2009) ("If the crime [of burglary] be committed in a dwelling house . . . and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree."). A "breaking" in the law of burglary "constitutes any act of force, however slight, 'employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed.'" *State v. Jolly*, 297 N.C. 121, 127-28, 254 S.E.2d 1, 5-6 (1979) (quoting *State v. Wilson*, 289 N.C. 531, 539, 223 S.E.2d 311, 316 (1976)). "A breaking may be actual or constructive." *Id.* at 128, 254 S.E.2d at 6. "A defendant commits a constructive breaking when the opening is made by a person other than the defendant, if that person is acting at the direction of, or in concert with, the defendant." *Helton*, 79 N.C. App. at 568, 339 S.E.2d at 816 (citing *Smith*, 311 N.C. at 150, 316 S.E.2d at 78). A defendant may be

convicted under the theory of concerted action or "acting in concert" when 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." *See State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

In the present case, during the charge conference, the court asked the State whether the law on acting in concert should be included in the jury instructions for each of the three charged offenses. While the State requested that the acting in concert instruction be given with respect to the larceny and attempted armed robbery charges, with respect to the burglary charge, the prosecutor responded, "I'm not sure acting in concert is necessary on the burglary, because I think the evidence——our evidence is that he went in." Accordingly, while reviewing the instructions it planned to give the jury, the court stated: "I'm also going to give the acting-in-concert instruction with regards to the attempted robbery and the larceny. And the [S]tate's requested that I not give it on the burglary, so I will not do that." Thus, on the charge of first-degree burglary, the court did not include any instruction on the law of acting in concert, but instead instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date *the defendant broke* and entered into an occupied dwelling house without the tenant's consent during the nighttime and at that time intended to commit robbery with a dangerous weapon, it would be your duty to return a verdict of guilty of first-degree burglary.

(Emphasis added.) In contrast, when giving the instructions on the charges of attempted robbery with a dangerous weapon and larceny of a firearm, after instructing the jury on the law of acting in concert, as well as on the definitions of the two remaining offenses and their respective essential elements, the court stated:

> Members of the jury, if you find from the evidence beyond a reasonable doubt that on or about the alleged date *the defendant, acting either by himself or acting together with other persons*, [committed each of the enumerated elements of attempted robbery with a dangerous weapon and larceny of a firearm,] it would be your duty to return a verdict of guilty.

(Emphasis added.)

In the present case, Young testified, "I started bamming on [Mr. Johnson's front door]. . . . Like, I kicked the door twice. It budged. Then me and Mr. Floyd just used our shoulders to open the door. When it came open we went in there." Floyd also testified, "Young knocked on the door and [sic] see if [Mr. Johnson] was going to answer. He didn't answer. [Young] kicked the door, like, two times, the door didn't come open. Then I hit the door with my shoulder and the door came open." Additionally, in defendant's signed statement to police, given several hours after the shooting, defendant stated, "I saw [Young] and [Floyd] kick the door in." Thus, the State's evidence established only that Young and Floyd actually forced open the door to Mr. Johnson's apartment. While the State's evidence also established that defendant was with Young and Floyd at the time they forced open the door, and that there was sufficient evidence, taken in the light

most favorable to the State, that defendant, acting in concert with Floyd and Young, committed the "breaking" element of first-degree burglary, as we stated above, "a defendant may not be convicted of an offense on a theory of his guilt different from that presented to the jury." *See Helton*, 79 N.C. App. at 568, 339 S.E.2d at 816 (internal quotation marks omitted). Because the trial court specifically instructed the jury on the law of acting in concert only with respect to the felonious larceny and attempted armed robbery charges, "the State was required to prove that *defendant personally committed each essential element* of the offense of burglary, including an actual breaking." *See id.* (emphasis added) (citing *State v. Cox*, 303 N.C. 75, 86, 277 S.E.2d 376, 383 (1981)). Since the State appears to concede in its brief that there was no evidence offered which showed that defendant himself in any way "broke" open Mr. Johnson's front door prior to entering the apartment behind Young and Floyd, we must conclude that the State failed to present sufficient evidence to establish that defendant personally committed each element of first-degree burglary under the theory upon which the State sought to prove his guilt, and defendant's conviction for first-degree burglary must be vacated.

While the State's evidence does not support a conviction for first-degree burglary, it does support a conviction for felonious breaking or entering in violation of N.C.G.S. § 14-54(a). Felonious breaking or entering is a lesser-included offense of burglary, and "is defined as the breaking *or* entry of any building with intent to commit any felony or larceny therein." *Jolly*,

297 N.C. at 127, 254 S.E.2d at 5 (emphasis added). "For conviction of felonious breaking or entering, a violation of G.S. 14-54(a), it is not necessary that the State show both a breaking and an entering; proof of either is sufficient if committed with the requisite felonious intent." *Helton*, 79 N.C. App. at 569, 339 S.E.2d at 816 (citing *State v. Myrick*, 306 N.C. 110, 114, 291 S.E.2d 577, 579 (1982)). Here, "[i]n finding defendant guilty of [first-degree] burglary, the jury necessarily had to find th[at] defendant entered [Mr. Johnson's apartment], without h[is] consent, and with the intent to commit the felony of larceny, elements sufficient to establish defendant's guilt of felonious breaking or entering." *See id.* Moreover, defendant concedes in his brief that the State offered sufficient evidence to establish each element of felonious breaking or entering.[1] Therefore, we leave the verdict undisturbed, vacate the judgment entered upon the guilty verdict of first-degree burglary, and remand this case to the superior court for entry of judgment as upon a verdict of guilty of felonious breaking or entering in violation of N.C.G.S. § 14-54(a). *See, e.g.*, *Jolly*, 297 N.C. at 130, 254 S.E.2d at 7; *Helton*, 79 N.C. App. at 569, 339 S.E.2d at 816.

II.

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[1]In his second argument on appeal, in which defendant contends the trial court erred by denying his request to instruct the jury on the lesser-included offense of felonious breaking or entering, defendant argues that "[t]he trial court should have instructed on felony breaking or entering" because such an instruction "w[as] supported by the evidence."

Defendant also contends the trial court erroneously refused to submit instructions to the jury on the lesser-included offense of misdemeanor breaking or entering in violation of N.C.G.S. § 14-54(b). Defendant argues the trial court was required to provide the instruction because there was "sharply conflicting evidence" offered as to whether defendant entered Mr. Johnson's apartment with the intention to rob him. Specifically, while Young and Floyd both testified that they, with defendant, planned to rob Mr. Johnson prior to entering Mr. Johnson's apartment on the evening of 28 January 2009 and that defendant helped secure weapons to effect this plan, defendant asserts there was also evidence presented, through his own testimony, that he "denied that he ever planned to rob Mr. Johnson," and that he only followed Young and Floyd into Mr. Johnson's apartment after they broke in through the front door to ask Young and Floyd, "What are ya'll doing?" However, "mere denial of the charges by the defendant does not require submission of a lesser included offense." *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988) (citing *State v. Horner*, 310 N.C. 274, 283, 311 S.E.2d 281, 288 (1984)). When, as here, "the defendant denies having committed the complete offense for which he is being prosecuted, and evidence is presented by the State of every element of the offense, and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, then no lesser included offense need be submitted." *See State v. Shaw*, 106 N.C. App. 433, 439, 417 S.E.2d 262, 266 (citing *State v. Williams*, 314 N.C. 337, 352–53,

333 S.E.2d 708, 719 (1985)), *disc. reviews denied*, 333 N.C. 170, 424 S.E.2d 914 (1992). Therefore, since defendant concedes, and the evidence shows, that the State presented evidence of every element of the offense of felonious breaking or entering, and the only evidence contradicting the State's evidence of defendant's intention to rob Mr. Johnson was defendant's own testimony, we hold the trial court properly refused to instruct the jury on misdemeanor breaking or entering and overrule this assignment of error.

III.

Defendant next contends the trial court erred by denying his motion to dismiss the charge of attempted robbery with a dangerous weapon in violation of N.C.G.S. § 14-87. Specifically, defendant argues that, because the State's evidence showed that a completed taking occurred, the evidence offered by the State could not be sufficient to support defendant's conviction for *attempted* robbery with a dangerous weapon. We agree.

N.C.G.S. § 14-87(a) provides that any person or persons who, "with the use . . . of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, *unlawfully takes or attempts to take* personal property from another . . . at any time . . . shall be guilty of a Class D felony." N.C. Gen. Stat. § 14-87(a) (2009) (emphasis added). "The purpose of the statute was to increase the punishment for common law robbery when firearms or other dangerous weapons were used to commit a robbery, whether or not the robber succeeded in the effort

to take personal property." *State v. White*, 322 N.C. 506, 514, 369 S.E.2d 813, 817 (1988). "The statute's thrust was . . . to provide that an attempted taking with a dangerous weapon *be punished as severely* as a completed taking under the same circumstances, and that both be punished more severely than forceful takings committed without dangerous weapons." *Id.* at 515, 369 S.E.2d at 817 (emphasis added). Thus, "[a]ttempted armed robbery, although defined in N.C.G.S. § 14-87 along with armed robbery, is clearly a separate offense." *Id.* at 515, 369 S.E.2d at 818. In other words, "N.C.G.S. § 14-87(a) defines two crimes: armed robbery, which requires an actual taking, and attempted armed robbery, which requires an attempted taking." *Id.* at 516, 369 S.E.2d at 818.

The parties direct our attention to *State v. Canup*, 117 N.C. App. 424, 451 S.E.2d 9 (1994), a case in which the defendant was found guilty by a jury of attempted second-degree rape, although the defendant contended "the evidence submitted indicated that only the greater charge of second degree rape should have been submitted to the jury." *Canup*, 117 N.C. App. at 426, 428, 451 S.E.2d at 10, 12. In *Canup*, this Court stated, "[e]vidence that this defendant continued to pursue his malevolent purpose and achieved penetration does not decriminalize his prior overt acts[; t]he completed commission of a crime must of necessity include an attempt to commit the crime." *Id.* at 428, 451 S.E.2d at 11. Accordingly, we recognized that, while "'[a] successful attempt to commit a crime will not support two convictions and penalties, one for the attempt

and the other for the completed offense[,] . . . *this does not require the unsound conclusion that proof of the completed offense disproves the attempt to commit it.*'" *Id.* at 428, 451 S.E.2d at 11-12 (quoting Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 612 (3rd ed. 1982)). Consequently, we found that the evidence in *Canup* "would have supported the defendant's being charged [and convicted] with either second degree rape or attempted second degree rape," and determined that "[t]he fact that the State elected to prosecute the defendant [and the jury returned a guilty verdict] for the lesser crime of attempted second degree rape . . . did not prejudice the defendant." *Id.* at 428, 451 S.E.2d at 12. Thus, we concluded that, "*if* there were error, it was favorable to the defendant and harmless." *Id.* (emphasis added).

Nevertheless, unlike the offenses of attempted second-degree rape and second-degree rape at issue in *Canup*, as we discussed above, attempted robbery with a dangerous weapon is *not* a lesser-included offense of robbery with a dangerous weapon. Further, it has long been recognized that "[t]he two elements of attempted robbery with a dangerous weapon are: (1) an intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation *but falls short of the completed offense*." *State v. Davis*, 340 N.C. 1, 12, 455 S.E.2d 627, 632 (emphasis added) (citing *Smith*, 300 N.C. at 79, 265 S.E.2d at 169-70), *cert. denied*, 516 U.S. 846, 133 L. Ed. 2d 83 (1995). Here, as the State concedes, the evidence established that defendant, Young, and Floyd succeeded in their attempt to take Mr.

Johnson's .410/.45 Cobray pistol without Mr. Johnson's consent by endangering his life with a firearm. Because there was no evidence from which the jury could find that defendant *fell short* of completing the offense of robbery with a dangerous weapon, defendant's conviction for attempted robbery with a dangerous weapon must be vacated.

IV.

Finally, defendant contends, and the State concedes, the trial court erred by sentencing defendant on the mutually exclusive offenses of attempted robbery with a dangerous weapon in violation of N.C.G.S. § 14-87 and larceny of a firearm in violation of N.C.G.S. § 14-72. Our disposition vacating defendant's conviction for attempted robbery with a dangerous weapon renders it unnecessary to address this argument. Accordingly, we overrule this assignment of error and leave undisturbed defendant's conviction for larceny of a firearm.

09 CRS 051708, First-degree Burglary——Vacated and Remanded for Entry of Judgment and Sentencing for Felonious Breaking or Entering.

09 CRS 051711, Attempted Robbery with a Dangerous Weapon——Vacated.

09 CRS 051714, Larceny of a Firearm——No Error.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).