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NO. COA10-4

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

STATE OF NORTH CAROLINA

v.

BARRON EUGENE WALLACE,
Defendant.

Cabarrus County
No. 07CRS051700, 08CRS008718, 08CRS008719

Appeal by defendant from judgments entered on or about 6 March 2009 by Judge W. David Lee in Cabarrus County Superior Court. Heard in the Court of Appeals 26 May 2010.

Attorney General Roy A. Cooper, III by Special Deputy Attorney General L. Michael Dodd, for the State.

Irving Joyner, for defendant-appellant.

STROUD, Judge.

Defendant was tried by a jury and found guilty of attempted robbery with a dangerous weapon, possession of a firearm by a felon, "First-degree Murder . . . with malice, premeditation, and deliberation" and "First-degree Murder . . . under the Felony Murder rule[.]" Defendant appeals his convictions arguing that the trial court erred in excluding certain testimony from the jury and in denying his motion to dismiss the charge of attempted robbery with a dangerous weapon. For the following reasons, we find no prejudicial error.

I. Background

The State's evidence tended to show that on 1 February 2007, Jacqueline Conley, Evyonne Rice, and defendant drove to Crowell Drive in Concord, North Carolina at the request of defendant. Defendant got out of the vehicle and told Ms. Conley and Ms. Rice to wait. Ms. Rice then saw defendant "holding a gun and . . . lights go off from the gun." Ms. Rice saw that the gun was pointed at a boy. Ms. Rice later learned that the boy was Mr. Kari Foskey. Defendant later gave a statement to the police which provided:

> Wallace stated that prior to the incident he obtained a 32-caliber pistol from Cameron Davidson. Wallace said he, Cameron Davidson, had previously had a visit from Kari Foskey in the past and only referred to Kari as his main man. Wallace stated that a couple of days before the shooting that Cameron told him that Kari had mad money. Wallace stated that Cameron sold marijuana and he bought some from him every now and then.
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> Wallace stated on the day of the shooting that Cameron was at Evyonne's house. Wallace stated that Cameron stated he was with Kari an hour and a half ago. Wallace stated he described Kari as a light brown-skinned brother. Wallace stated Cameron lives near the shooting location.
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> Wallace stated the night of the shooting Jackie and Evyonne gave him a ride to the shooting location. Wallace stated when he saw Kari walking down the street and turn, he knew that was the boy Cameron told him about. Wallace stated he only intended on taking Kari's money and did not intend on using the gun.
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> Wallace stated Jackie and Evyonne let him out of the car and they pulled way up the street. Wallace stated he approached Kari to take his money. Wallace stated prior to even saying anything to Kari, Kari attempted to pull what he believed to be a gun out. Wallace stated it appeared whatever Kari was trying to pull out was too big and he could not get it out of his waistline.
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> Wallace stated he said to Kari, "Don't do it. You're not going to win." Wallace stated

> the gun was almost out of Kari's pants. Wallace stated he began running away from Kari. Wallace stated he didn't really want to shoot Kari, but he pulled out the 32-caliber pistol Cameron gave him from his pocket and shot twice while he was running away until the gun jammed. Wallace stated he saw Kari running towards the car Jackie and Evyonne were in. Wallace stated he ran away from the scene on foot and left Jackie and Evyonne.

Defendant was tried by a jury and found guilty of attempted robbery with a dangerous weapon, possession of a firearm by a felon, "First-degree Murder . . . with malice, premeditation, and deliberation" and "First-degree Murder . . . under the Felony Murder rule[.]" Defendant appeals.

II. Evidence Regarding Mr. Jerry Reames

Defendant's first argument on appeal is that the trial court erred by excluding certain evidence which defendant tried to present; defendant argues that the excluded evidence demonstrated that another person, Mr. Jerry Reames, actually killed Mr. Foskey. Because of the nature of defendant's argument, a background of the facts from defendant's case-in-chief, in addition to the State's case-in-chief, is necessary. Accordingly, we will summarize the facts necessary to analyze defendant's first argument on appeal.

A. Defendant's Evidence

Defendant's first witness, Ms. Alicia Martinez, testified that on a night in February of 2007 she heard "loud voices coming from across the street" and gunshots, and then saw three or four people running after the shooting took place. After Ms. Martinez's testimony, a lengthy voir dire examination of multiple witnesses began, and at its conclusion, the trial court did not rule

specifically on what testimony would be allowed but directed defendant to call each witness to testify individually and to voir dire them when necessary. Defendant then called Detective Eric Morales, a detective with the City of Concord, who testified that he interviewed Ms. Martinez around 1:00 a.m. on 2 February 2007. Detective Morales corroborated most of Ms. Martinez's testimony.

Defendant next called Ms. Mary Benton to the stand; a voir dire examination of Ms. Benton was conducted. Ms. Benton testified in front of the jury that she was "jumped from behind when [she] was walking[.]" Ms. Benton went home, and her son called 911. Ms. Benton was not allowed to testify before the jury as to what "the other boy that had the gun" with her son said, including that "he was going to kill somebody[.]" Defendant then conducted a voir dire examination of Mr. William Ennis, Ms. Benton's son, and he testified in front of the jury that his mother, Ms. Benton, had been attacked. Mr. Ennis was not allowed to testify in front of the jury that Mr. Reames had a gun or anything Mr. Reames said, including that "he was going to get that person 'cause he hit [Mr. Ennis's] mamma [sic]." Lieutenant Jimmy Lentz of Cabarrus County EMS testified that on 26 January 2007 he responded to a call and that the patient's name was Mary Benton.

Ms. Janice Lynch then testified that in February of 2007 she lived on Crowell Drive and heard gunshots. Ms. Lynch was not allowed to testify before the jury as to what her boyfriend, Eddie Wilkes, said at that time. Mr. Eddie Wilkes testified that when his girlfriend heard gunshots he went outside and "walked around

the house[.]" Mr. Wilkes also testified that he witnessed Mr. Foskey attack Ms. Benton.

Next defendant conducted a voir dire examination of Mr. Ronnie Edmisten, Mr. Ennis's cousin and Ms. Benton's nephew. Mr. Edmisten testified in front of the jury about the attack on Ms. Benton and that it had upset Mr. Reames. Mr. Edmisten also stated that on 1 February 2007, Mr. Reames had a gun, "possibly a 32-caliber;" Mr. Reames left around 10:00 p.m.; Mr. Edmisten heard gunfire; and Mr. Reames returned with the gun. After further voir dire examination, Mr. Edmisten was also allowed to testify in front of the jury that before Mr. Reames left on 1 February 2007 he said he would "take care" of the person who attacked Ms. Benton. Mr. Edmisten was precluded from testifying that when Mr. Reames returned on the night of 1 February 2007 he confessed to killing a boy and told Mr. Edmisten he would kill him if "anything got out[.]"

Sergeant Brian Schiele of the Concord Police Department then testified that "six rounds of .32 auto ammunition" were mailed to the North Carolina State Bureau of Investigation crime lab, but were never actually tested. After Sergeant Schiele's testimony, Ms. Jessica Simmons testified that Mr. Reames hid a gun in the woods. Sergeant Todd McGhee of the Concord Police Department testified that the six rounds of ammunition Sergeant Schiele had previously mentioned came from Mr. Ricky Reames, Jerry Reames's father. Sergeant McGhee testified that he never compared the six rounds of ammunition to the shells found at the crime scene. Defendant then conducted a voir dire examination of Sergeant

McGhee. During the voir dire examination, Sergeant McGhee testified regarding statements made by Mr. Reames, Mr. Kenneth Bowman, Ms. Benton, Mr. Ennis, and Mr. Edmisten. The trial court determined that only Mr. Reames's statement would be allowed into evidence in front of the jury. The jury returned to the courtroom and Sergeant McGhee testified that Mr. Edmisten had told him Mr. Reames had a 32-caliber "firearm at a relevant time frame to this case[.]" Sergeant McGhee then read Mr. Reames's statement in front of the jury as follows:

> Jerry Eugene Reames, hereafter referred to as Reames, stated he began hanging around Mary and Ronnie's house on Academy Avenue around February 1st, 2007. Reames stated the first night he started hanging around Academy Avenue, he and Mary went to a residence on the west side of Academy Avenue and purchased seventy dollars' worth of powder cocaine. Reames stated after purchasing the cocaine, he and Mary returned to the residence on Academy Avenue to get high.
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> Reames stated upon returning to the residence, Ronnie told him the cops were just there; however, Reames could not remember why. Reames stated he told Ronnie, Glenn and Mary that he shot a guy twice in the chest. Reames stated he did not have a gun nor did he say what caliber gun was used. Reames stated he said that he shot someone to brag; however, he did not or has never shot anyone. Reames stated he has never had any access to a firearm other than a 25-caliber pistol and a shotgun when he was sixteen years old.
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> Reames stated he met his girlfriend, Jessica, on the 1st of February and that is when he told Ronnie the story. Reames stated he consents to a polygraph test regarding any shooting incident. Jerry stated he knows he met Jessica February 1st because he celebrated Valentine's Day with her and they had been dating two weeks prior.

Both Sergeant McGhee and Mr. Reames signed the statement.

The State cross-examined Sergeant McGhee and on redirect examination Sergeant McGhee testified that Mr. Edmisten told him that Mr. Reames threatened him by saying "'If this gets out, you will be next[.]'" As to the threat Sergeant McGhee further testified that it was "in response to a second incident" and he believed it was not made in relation to Mr. Foskey's murder. Sergeant McGhee then testified that Mr. Edmisten told him

> that Jerry was at his home; Jerry left to go buy crack cocaine. While he was gone, I'm pretty sure he said he heard gunshots. Said he came home, had three rocks. Jerry and Mary Drye were smoking the crack and that he mentioned that he shot a guy twice because he was chasing him with a stick.

Sergeant McGhee also testified that Mr. Edmisten told him he thought Mr. Reames was a Crypt gang member.

Sergeant McGhee further testified that Mr. Ennis told him

> [a] couple of days later[, after Mr. Benton's attack,] Jerry comes over and hears about this assault on Mary and uses some expletive that I can't remember without looking at the paper and says, "You should have told me. I'd have took care of the problem," storms in, gets a gun and storms out . . . .
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> . . . .
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> [Mr. Ennis] said that Jerry later came over, that he didn't see him no more that day, that he later came over and said he shot a man in the chest two times.

Sergeant McGhee said Mr. Ennis further told him that Mr. Reames said, "[H]e sure hoped the man did not die . . . if they get the evidence, he could get life." Sergeant McGhee also testified that Ms. Benton told him "that Jerry [took] off mad . . . to seek revenge in her honor" after she was attacked. Sergeant McGhee was

not allowed to testify in front of the jury that Mr. Bowman told him Mr. Reames had said he would "do Brandon like he did the guy on Academy. . . . the guy he shot twice in the chest, the one who jumped on Glenn's mom Mary."

Defendant then conducted a voir dire examination of Sergeant Skip Hanson of the Concord Police Department about a statement given by Mr. Pierre Lipscomb which indicated Mr. Foskey had won a gun playing video games. The trial court ruled that Mr. Lipscomb's statement would not be admitted into evidence in front of the jury. Defendant's attorney then commented that he no longer needed "Detective Landers, since [this witness was] to be used in tandem if admitted." Defendant made no offer of proof as to Detective Landers's testimony. The defendant then conducted a voir dire examination of Mr. Bowman. Mr. Bowman stated that Mr. Reames told him he had shot a guy twice. The trial court determined that Mr. Bowman could not testify before the jury regarding Mr. Reames's statements.

B. Analysis

Defendant first contends that the trial court erred in not allowing Ms. Benton, Mr. Wilkes, Mr. Edmisten, and Mr. Ennis to testify regarding their knowledge of Mr. Reames's possible involvement in Mr. Foskey's murder; however, as all of these witnesses did testify, defendant's argument is not that he was not allowed to present *any* evidence that Mr. Reames murdered Mr. Foskey, but rather that the trial court did not allow *all* of the evidence that he wanted. The Supreme Court

> has held that a defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible. The admissibility of another person's guilt now seems to be governed, as it should be, by the general principle of relevancy under which the evidence will be admitted unless in the particular case it appears to have no substantial probative value.

State v. Burke, 342 N.C. 113, 117-18, 463 S.E.2d 212, 215 (1995) (citation, quotation marks, and brackets omitted). "Evidence that another committed a crime is relevant and admissible as substantive evidence, so long as it points directly to the guilt of some specific person or persons and is inconsistent with the guilt of the defendant." *State v. Sneed*, 327 N.C. 266, 271, 393 S.E.2d 531, 533 (1990).

We give "great deference" to the trial court's rulings as to relevancy determinations. *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004).

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Id. (citations and quotation marks omitted).

The trial court excluded the following arguably relevant testimony, as discussed in detail above: Ms. Benton was not allowed to testify that the boy with her son said "he was going to kill somebody[;]" Mr. Edmisten was precluded from testifying that Mr. Reames told him he killed someone and if he told anyone he would kill him too; Mr. Ennis was not allowed to testify that Mr. Reames had a gun or anything Mr. Reames said, including that "he was going to get that person 'cause he hit [Mr. Ennis's'] mamma [sic]." We will analyze each witness's excluded testimony separately.

As to Ms. Benton's excluded testimony, she stated that a "boy" with her son said he was going to kill somebody, but Ms. Benton never identified Mr. Reames by name; in fact, the most specific identification we have located in the record by Ms. Benton came from the testimony of Sergeant McGhee who stated Ms. Benton was shown a photograph of Mr. Reames and was still only able to identify him as "the white boy." Defendant has made no argument that Mr. Reames was the only white individual involved, and thus Ms. Benton's testimony does not specifically identify Mr. Reames. Accordingly, testimony as to a "white boy" is not enough to "point[] directly to the guilt of some *specific* person[.]" *Sneed* at 271, 393 S.E.2d at 533 (emphasis added); *see State v. Jenkins*, 292 N.C. 179, 189, 232 S.E.2d 648, 654 (1977) ("While under certain circumstances it has been held by this Court competent for the defendant to introduce evidence tending to show that someone else than he committed the crime charged, . . . it is well settled that

such evidence is not admissible unless it points directly to the guilt of the third party, evidence which does no more than create an inference or conjecture as to such guilt is inadmissible." (citation omitted)). We conclude that the trial court did not err in excluding certain portions of Ms. Benton's testimony.

Next we consider Mr. Wilkes's testimony. Mr. Wilkes testified that Ms. Lynch told him she heard shots; the State objected, and the trial court instructed the jury that they could only consider that testimony "to the extent, if any, that it corroborates the earlier testimony of Ms. Lynch." Mr. Wilkes then repeated that Ms. Lynch told him she heard shots, and no objection was lodged. As to Mr. Wilkes's excluded testimony, "[i]t is well established that any error in the exclusion of evidence is cured when other evidence of similar import is subsequently admitted." *Id.* at 189, 232 S.E.2d at 654. The evidence as to Ms. Lynch's statements was admitted through Ms. Lynch and through Mr. Wilkes. Thus, defendant's contentions as to Mr. Wilkes's excluded testimony are without merit.

Mr. Edmisten was precluded from testifying that Mr. Reames had told him he killed someone and if he told, Mr. Reames would kill him. However, Sergeant McGhee testified about the threat Mr. Reames made to Mr. Edmisten, although, Sergeant McGhee interpreted the threat to be regarding another incident. In other words, Sergeant McGhee thought Mr. Reames had threatened Mr. Edmisten about a different incident.

Lastly, Mr. Ennis was not permitted to testify in front of the jury that Mr. Reames had a gun or anything Mr. Reames said, including that "he was going to get that person 'cause he hit [Mr. Ennis's'] mamma [sic]." However, evidence that Mr. Reames had a gun was presented through Mr. Edmisten, and Sergeant McGhee testified that Mr. Ennis told him that after Mr. Reames found out about the attack on Ms. Benton he said, "You should have told me. I'd have took care of the problem[.]" Again, "[i]t is well established that any error in the exclusion of evidence is cured when other evidence of similar import is subsequently admitted." *Id.* at 189, 232 S.E.2d at 654. We conclude the trial court did not err in excluding portions of Mr. Ennis's testimony.

Thus, the only evidence arguably excluded from the jury for which "other evidence of similar import[,]" *id.*, was not later introduced is Mr. Edmisten's testimony as to Mr. Reames's threat. Although Sergeant McGhee did testify regarding the threat, he also testified he did not believe the threat was regarding Mr. Foskey's murder; however, during Mr. Edmisten's voir dire, it appeared that the threat was regarding Mr. Foskey's murder. Mr. Edmisten's statement, in tandem with other evidence presented by defendant, does tend to support defendant's contention that Mr. Reames, not defendant, committed the murder of Mr. Foskey. *See generally Sneed* at 271, 393 S.E.2d at 533. However, we are still left with the question of prejudice, as defendant must also demonstrate that "there is a reasonable possibility that" the jury would have come to a different result if the excluded evidence had been allowed.

N.C. Gen. Stat. § 15A-1443(a) (2007) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.")

Even assuming that the trial court erred by excluding portions of Mr. Edmisten's testimony about the threat, this error was not prejudicial. In making this determination, we consider the evidence in its entirety. *See generally Beck v. Beck*, 22 N.C. App. 655, 657, 207 S.E.2d 378, 379-80 (1974) ("The defendant first objects to the allowance of a witness to relate to the court what one of the minor children had told her concerning an accident that one of the children had had. The court allowed the statement into evidence, stating that he intended to talk to the children and it would be admissible for corroborative purposes, the parties having stipulated that the court could speak to the children privately in chambers. Assuming, arguendo, that the trial court was incorrect in its ruling, it does not follow that this would be grounds for a new trial. To justify a new trial the error must be prejudicial. Clearly, this matter was not prejudicial when considered in context and with the voluminous amount of other evidence presented by each party. This assignment of error is without merit."). Defendant presented the testimony of over ten witnesses who testified in front of the jury that: Mr. Reames was upset about the attack on

Ms. Benton; Mr. Reames left with a gun, the same type which defendant confessed to using, on the same night that Mr. Foskey died; shots were heard; Mr. Reames bragged about killing Mr. Foskey; Mr. Reames made threats regarding talking to others about what had taken place; and Mr. Reames told the police he had bragged to others about killing Mr. Foskey. We do not conclude that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial" had Mr. Edmisten been allowed to testify in front of the jury regarding the excluded portions of his testimony about Mr. Reames's threat. N.C. Gen. Stat. § 15A-1443(a). Accordingly, this argument is overruled.

III. Attempted Robbery

Defendant next contends that the trial court erred in denying his motion to dismiss the charge of attempted robbery with a dangerous weapon as there was insufficient evidence presented at trial that defendant committed this crime.

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, ___ N.C. App. ___, ___, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted). "The elements of

attempted robbery with a dangerous weapon are (1) the unlawful attempted taking of personal property from another, (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means, and (3) danger or threat to the life of the victim." *State v. Wilson*, ___ N.C. App. ___, ___, 689 S.E.2d 917, 920-21 (2010) (citation and quotation marks omitted); *see* N.C. Gen. Stat. § 14-87 (2007).

Defendant argues that the State failed to show any overt action or "attempt" on the part of defendant. Defendant concedes that through his own admissions the State established intent, but argues that this is not enough to show an attempt to rob.

An attempted robbery with a dangerous weapon requires that the defendant make some "overt act" in furtherance of robbery. *See State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008), *cert denied*, ___ U.S. ___, 175 L.Ed. 2d 84 (2009).

> An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result. The overt act must go beyond mere preparation but fall short of the completed offense. A defendant may attempt robbery with a dangerous weapon even when the defendant neither demands nor takes money from the victim. For example, in *State v. Davis*, the following facts amounted to sufficient evidence of attempted robbery with a dangerous weapon: the defendants had been in a certain pawn shop two previous times on the day of the incident; the defendants entered the pawn shop for a third time just before closing and drew their pistols; one defendant said to the shop's proprietor, "Buddy, don't even try it"; and the defendants fled the shop without taking money or valuables when a gunfight

> erupted among the three. This Court determined the defendants' actions of drawing their pistols and their words, "Buddy, don't even try it," demonstrated their intent to rob and constituted an overt act in furtherance thereof.

Id. (citations, quotation marks, and brackets omitted).

Here, defendant's own statement established that he planned to rob Mr. Foskey: he got out of the vehicle, approached Mr. Foskey with a gun, and said, "Don't do it. You're not going to win." This evidence is sufficient to prove that defendant committed an "overt act" in furtherance of robbing Mr. Foskey with a dangerous weapon. *Id.* Accordingly, this argument is overruled.

IV. Conclusion

For the foregoing reasons, we find no prejudicial error as to the exclusion of certain testimony from the jury's consideration and no error as to the trial court's denial of defendant's motion to dismiss.

NO PREJUDICIAL ERROR.

Judges MCGEE and ERVIN concur.

Report per Rule 30(e).