NO. COA10-691

NORTH CAROLINA COURT OF APPEALS

Filed: 1 March 2011

STATE OF NORTH CAROLINA

v. Onslow County
Nos. 09 CRS 001338-39
08 CRS 055854

LELAND ULONZO PIERCE

Appeal by defendant from judgments entered 7 October 2009 by Judge James F. Ammons Jr. in Onslow County Superior Court. Heard in the Court of Appeals 15 November 2010.

Roy Cooper, Attorney General, by Donald W. Laton, Assistant Attorney General, for the State.

Paul F. Herzog, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged in indictments with two counts of robbery with a dangerous weapon, attempted robbery with a dangerous weapon, two counts of felony conspiracy, and two counts of second-degree kidnapping. On the State's motion, the charges were joined for trial.

The following evidence was presented at defendant's trial. On 25 July 2008, shortly before 1:30 a.m., two men entered a Walgreens store located at a corner of Western Boulevard and Country Club Road in Jacksonville, North Carolina. One carried a black gun and wore a red bandanna folded in a triangle and tied around his head

covering his face from the end of his nose down, a white T-shirt, and dark jeans. Two employees were working in the photo lab at the time and, upon seeing the men enter, hid behind the counter. The man wearing the red bandanna walked around the counter, "pulled the top part" of the gun back so that the gun made a "clicking noise," pointed it at an employee's head, and told her "to get the F up." The employee "assumed [the gun] was a 9mm." The man demanded money from the registers. As one employee retrieved money from the back register, the other went to the front of the store and, at that time, noticed another man wearing a black bandanna, a black shirt, and dark jeans. He told her to put the money from the front register into a bag he provided. Approximately $350.00 was taken from the store that night.

The employees were able to identify the man wearing the red bandanna because he had distinctive, "light-colored eyes" like defendant, and because defendant was a regular customer and had been involved in an assault in the Walgreens parking lot a week before the robbery. An employee described defendant as being tall with light-colored skin and described the man wearing the black bandanna as shorter with darker-colored skin. An officer who viewed the video recording of the robbery testified that the firearm was a "semiautomatic" "handgun" and that a satchel with a drawstring was used during the robbery.

Also on 25 July 2008, at approximately 10:40 p.m., an employee of the Golden Dragon, a nearby Chinese takeout and delivery restaurant, was robbed. Just before the restaurant closed for the

night, the employee received a phone order requesting delivery. Shortly thereafter, as she knocked on the door of the residence to which the delivery was to be made, she was approached from behind by three men. One said, "Give me the food, give me the money." She saw a gun, which she described as a "black pistol" or "handgun." The man with the gun had a dark complexion. The other man, tall and lighter-complected, wore a red bandanna over his face in the shape of an "upside down triangle," a white shirt, and dark jeans. As the employee began to walk away, one man grabbed her by the left shoulder, pulled her, and said, "Oh, no." She continued to walk to her car, and was struck in the head by the gun. When she reached her car and tried to open the door, it was slammed on her arm. After she was able to get into her car and shut the door, the three men began hitting her car, two on the driver's side and one on the passenger side. One man tried to get inside the car on the driver side, and one opened the passenger side door. She was able to drive off by cutting through a neighboring yard. The employee had never before seen defendant. A responding officer collected fingerprints from the employee's car, and, following defendant's arrest, an analyst concluded that they matched defendant's.

Just over twenty-four hours later, between 12:15 a.m. and 12:30 a.m. on 26 July 2008, a neighboring Lone Star Steakhouse restaurant was robbed after it had closed for the night. As a manager finished his closing duties and two contractors began working, two men entered the back door of the restaurant, one

carrying an aluminum baseball bat and one a black gun, which, according to the manager, "first appear[ed] to be . . . a military-issued .45," but later "resembled a 9mm." The men wore red bandannas, which covered their faces from the bridges of their noses down. One said, "You know what we want. You know why we're here." The manager was directed to unlock the office door and the safe. A "plastic bag or a satchel type bag" was thrown down to the manager. The shorter man threatened to hit the manager with the baseball bat if he "didn't start moving faster" and the other replied, "No. Don't bother. I'll just shoot him." Approximately $3700.00 and a cell phone were taken from the restaurant. The manager recognized defendant as having been formerly employed as a host at Lone Star. In his statement to police following the robbery, the manager identified defendant by name.

On 31 July 2008, officers searched defendant's residence. They discovered two nylon bags with drawstrings, a KJ Works BB pistol box, one tube of Daisy BB's, a black bandanna, and two red bandannas, among other items. An officer testified that the BB gun depicted on the box was a replica of a semiautomatic gun and that it would have the appearance that a round was being chambered when used, similar to the description provided by the Walgreens employee.

Defendant and another suspect, Akeem Steele, were questioned that day. Although defendant initially offered alibis and denied that he and Akeem Steele were involved in the robberies, after further questioning, defendant confessed to having committed the

Walgreens and Lone Star robberies. Defendant claimed that he used a borrowed BB gun in the Walgreens robbery, and that he purchased a BB gun the next day, which he used during the Lone Star robbery. Defendant stated that "[he] and Akeem used that BB gun and also a bat to rob Lone Star." He stated that, after the Lone Star robbery, he ran to a residence located on Myrtle Wood Circle, near the Lone Star, where he stayed the night.

During a search of the residence at Myrtle Wood Circle, officers collected a burned BB gun, debris from a grill where it appeared the BB gun had been burned, a BB gun magazine, a red bandanna, and a baseball bat. The burned BB gun, which resembled a semiautomatic gun, was found in the woods behind the residence. Video surveillance from Walgreens showed defendant and Akeem Steele purchasing bandannas the day before the Walgreens robbery.

At the close of the State's evidence, the court granted defendant's motion to dismiss one count of second-degree kidnapping and the jury acquitted defendant of the remaining count of second-degree kidnapping and found him guilty of attempted robbery with a dangerous weapon, two counts of robbery with a dangerous weapon, and two counts of felony conspiracy. The trial court sentenced defendant to three consecutive terms of 77 to 102 months in the custody of the North Carolina Department of Correction. Defendant appeals.

Defendant first argues that the trial court erred by granting the State's motion to consolidate the charges and by denying his

motion for severance. Defendant concedes that his charges resulting from the Walgreens and Lone Star robberies were properly joined, but asserts that it was error to join the charge of attempted robbery with a dangerous weapon of the Golden Dragon employee with these charges. We disagree.

N.C.G.S. § 15A-926(a) provides that "[t]wo or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on *a series of acts or transactions connected together* or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2009) (emphasis added). "In considering a motion to join, the trial judge must first determine if the statutory requirement of a transactional connection is met." *State v. Williams*, 355 N.C. 501, 529, 565 S.E.2d 609, 626 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

> A mere finding of the transactional connection required by the statute is not enough, however. In ruling on a motion to consolidate, the trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial; if consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated.

State v. Silva, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). "In determining whether defendant has been prejudiced, the question posed is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to an accused." *State v. Wilson*, 57 N.C. App. 444, 448, 291 S.E.2d 830, 833 (internal quotation marks omitted), *disc. review denied*, 306 N.C. 563, 294 S.E.2d 375 (1982). "A motion to

consolidate charges for trial is addressed to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion." *State v. Effler*, 309 N.C. 742, 751, 309 S.E.2d 203, 208 (1983). "If, however, the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law." *Id.*

"In considering whether a transactional connection exists among offenses, our courts have taken into consideration such factors as the nature of the offenses charged, commonality of facts, the lapse of time between offenses, and the unique circumstances of each case." *State v. Herring*, 74 N.C. App. 269, 273, 328 S.E.2d 23, 26 (1985) (citations and internal quotation marks omitted), *aff'd*, 316 N.C. 188, 340 S.E.2d 105 (1986). "[T]he correctness of joinder must be determined as of the time of the trial court's decision." *Silva*, 304 N.C. at 127, 282 S.E.2d at 453. However, N.C.G.S. § 15A-927(b) allows a defendant to "protect his right to a fair determination of the charges against him by making a pre-trial motion for severance." *Id.* at 128, 282 S.E.2d at 453. "If this motion is overruled, the defendant may preserve his challenge to the joinder by renewing his motion before or at the close of all evidence." *Id.* If a defendant does so, a reviewing court may determine whether, because of subsequent developments at trial, the transactional link between offenses was negated and joinder became improper as a matter of law. *Id.*

The offenses in the present case are similar in nature and share common facts. The robberies occurred during a forty-eight-

hour period on three consecutive nights within about one-quarter mile of one another on Western Boulevard in Jacksonville. The perpetrators were either two or three African-American males. During each robbery, at least one man wore a folded red bandanna over his face and one man carried what the victims described as a black handgun. The perpetrators were dressed similarly in the three robberies, and all three robberies involved stealing cash from businesses. We note that, under similar facts, emphasizing the "commonality of facts," our Supreme Court held that joinder of offenses was proper:

> [t]he evidence in the three cases shows a similar modus operandi and similar circumstance in victims, location, time and motive. All the offenses occurred within ten days on the same street in Wilmington. All occurred in the late afternoon. In each case, two black males physically assaulted the attendant of a small business and took petty cash from the person of the victim or the cash box of the business. The assaults were of a similar nature. Each was without weapons, involved an element of surprise and involved choking, beating and kicking the victim. In each case, the robbers escaped on foot.

State v. Bracey, 303 N.C. 112, 118, 277 S.E.2d 390, 394 (1981); *see State v. Breeze*, 130 N.C. App. 344, 355, 503 S.E.2d 141, 148, *disc. review denied*, 349 N.C. 532, 526 S.E.2d 471 (1998).

For these reasons, we hold that the offenses in the present case arose out of "a series of acts or transactions connected together." *See* N.C. Gen. Stat. § 15A-926(a). We are unpersuaded by defendant's attempts to draw distinctions between the Golden Dragon robbery and the other robberies. The circumstances in the robberies were sufficiently similar to establish the necessary

transactional connection. The trial court did not abuse its discretion by joining the offenses. *See Silva*, 304 N.C. at 127, 282 S.E.2d at 453. Further, defendant makes no showing that subsequent developments during his trial made severance necessary to ensure a fair determination by the jury on each offense. *See Effler*, 309 N.C. at 752, 309 S.E.2d at 209.

Defendant argues the trial court erred by denying his motion to dismiss the charge of attempted armed robbery with a dangerous weapon for insufficient evidence. We disagree.

"In ruling on a motion to dismiss, all evidence admitted must be considered in the light most favorable to the State, giving the State the benefit of all reasonable inferences to be drawn therefrom." *State v. Fleming*, 148 N.C. App. 16, 20, 557 S.E.2d 560, 563 (2001) (internal quotation marks omitted). "Defendant's motion to dismiss is properly denied if the evidence, when viewed in the above light, is such that a rational trier of fact could find beyond a reasonable doubt the existence of each element of the crime charged." *Id.* (internal quotation marks omitted).

Defendant argues that the presence of his fingerprints on the Golden Dragon employee's car was insufficient evidence to withstand a motion to dismiss. Our Courts have held that, to survive a motion to dismiss for insufficient evidence of the identity of the accused where the identity is based solely on fingerprint evidence, there must be "testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused" in addition to "substantial evidence of circumstances

from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed." *State v. Miller*, 289 N.C. 1, 4, 220 S.E.2d 572, 574 (1975); *see State v. Bass*, 303 N.C. 267, 271-72, 278 S.E.2d 209, 212 (1981). However, in this case, evidence apart from defendant's fingerprints on the Golden Dragon employee's car also tended to prove he was the perpetrator. As discussed, the perpetrator of the Golden Dragon robbery employed a modus operandi similar to the other robberies to which defendant confessed. Further, the Golden Dragon robbery was committed in close proximity to the others and was close in time to the others. We also note that, in addition to the other evidence of the identity of the perpetrator, the victim of the robbery had never seen defendant. Thus, there is no merit to defendant's contention that the presence of his fingerprints on the employee's car was insufficient evidence of his identity to send the charge to the jury, and the trial court did not err by denying defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon for insufficient evidence.

Defendant also argues that the trial court erred by denying his motion to dismiss the charge of robbery with a dangerous weapon for the Walgreens robbery for insufficient evidence. Defendant argues that, because there was affirmative evidence indicating the weapon used during the robbery was a BB gun, the State was obligated to produce evidence that the BB gun was an instrument likely to cause death or great bodily harm under the circumstances of its use; that the State failed to do so; and that, therefore,

his motion to dismiss should have been granted. This argument is misplaced.

"When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, *in the absence of any evidence to the contrary*, the law will presume the instrument to be what his conduct represents it to be——a firearm or other dangerous weapon." *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979) (emphasis added). "The mandatory presumption [that an instrument is what the victim believed it to be] . . . merely requires the defendant to come forward with some evidence (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic [fact that the robbery was accomplished with what appeared to the victim to be a firearm or other dangerous weapon] and the elemental fact[] [that a life was endangered or threatened]." *State v. Williams*, 335 N.C. 518, 521, 438 S.E.2d 727, 729 (emphasis and internal quotation marks omitted). If evidence rebuts the presumption, the State is entitled to the benefit of a *permissive inference* that an "instrument which appears to be a weapon capable of inflicting a life-threatening injury is in law a dangerous weapon." *State v. Allen*, 317 N.C. 119, 124, 343 S.E.2d 893, 897 (1986). Only where "all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, [should] the armed robbery charge . . . not be submitted to the jury." *Fleming*, 148 N.C. App. at 22, 557 S.E.2d at 564.

In this case, evidence that a BB gun was used during the Walgreens robbery rebutted the mandatory presumption that the instrument was what the victims believed it to be. *See State v. Alston*, 305 N.C. 647, 651, 290 S.E.2d 614, 616 (1982) ("The testimony of [the State's witness], on the other hand, that the rifle was a BB rifle constituted affirmative evidence to the contrary and indicated that the victims' lives were not endangered or threatened in fact by his possession, use or threatened use of the rifle."). However, the evidence here does not demonstrate conclusively that the instrument was not a firearm or other dangerous weapon. Therefore, the jury was entitled to, and the trial court instructed that it could, draw a permissive inference that the instrument used during the commission of the Walgreens robbery was what it appeared to the victims to be. *See State v. Summey*, 109 N.C. App. 518, 529, 428 S.E.2d 245, 251 (1993). We overrule defendant's argument on this point.

Defendant also argues that the trial court erred when it allowed the State to amend Count I of the indictment charging the Lone Star robbery before the conclusion of the State's evidence by adding the allegation of the weapon being a "baseball bat." We disagree.

N.C.G.S. § 15A-923(e) provides that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2009). Our Courts have interpreted this statute to mean that an indictment may not be amended in a way that would "substantially alter the charge

set forth in the indictment." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996).

In *State v. Joyce*, this Court held that, where the defendants robbed a convenience store, the amendment on the first day of the trial of the indictment charging one of the defendants with robbery with a dangerous weapon by changing the word "knife" to "firearm" was not error. *State v. Joyce*, 104 N.C. App. 558, 573, 410 S.E.2d 516, 525 (1991), *cert. denied*, 331 N.C. 120, 414 S.E.2d 764 (1992). The change did not "alter the burden of proof or constitute a substantial change which would justify returning the indictment to the grand jury," and the defendant could not "demonstrate how he suffered any prejudice due to th[e] amendment." *Id.*

In the present case, defendant confessed in a written statement to having committed the Walgreens and Lone Star robberies and stated that, during the Lone Star robbery, he used a BB gun and his accomplice, Akeem Steele, used a baseball bat. Count II of the indictment charged defendant with "conspir[ing] with Akeem Steele to commit the felony of Robbery with Dangerous Weapon." Thus, defendant was aware that he would be defending against a theory of acting in concert with Akeem Steele, and that evidence would be introduced at trial that Akeem Steele used a baseball bat to accomplish the Lone Star robbery. Under these circumstances, it was not error to amend the indictment. *See id.*; *see also State v. Bollinger*, 192 N.C. App. 241, 246-47, 665 S.E.2d 136, 139-40 (2008) (holding there was no prejudicial error where "the jury was instructed it could find defendant guilty only upon a finding that

defendant 'intentionally carried and concealed . . . *one or more knives*' . . . while the indictment alleged only that defendant unlawfully carried a concealed weapon 'to wit: *a Metallic set of Knuckles*'"), *aff'd per curiam*, 363 N.C. 251, 675 S.E.2d 333 (2009).

Finally, we address defendant's argument that the trial court erred by failing to instruct the jury on the lesser-included offense of attempted common law robbery for the attempted robbery of the Golden Dragon employee. Because defendant failed to object when the trial court submitted the instructions for attempted robbery with a dangerous weapon or not guilty to the jury, he has waived appellate review of this issue. *See* N.C.R. App. P. 10(a)(2). Defendant argues, however, that the trial court's failure to instruct the jury on the lesser-included offense of attempted common law robbery amounted to plain error under Appellate Rule 10(a)(4). We disagree.

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.),

cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)) (alterations and omission in original) (internal quotation marks omitted). "In deciding whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Id.* at 661, 300 S.E.2d at 378-79 (internal quotation marks omitted).

We do not believe the trial court's failure to instruct the jury on attempted common law robbery amounted to plain error because any instructional error that may have occurred did not have a probable impact on the jury's finding of guilt. For the Walgreens and Lone Star robberies, the jury was instructed on robbery with a dangerous weapon, common law robbery, and not guilty. Despite the presence of evidence indicating that a BB gun was used in those robberies, the jury nevertheless found beyond a reasonable doubt that defendant used a firearm or other dangerous weapon. Although the jury's verdict finding defendant guilty of the Lone Star robbery charge could have been based on a finding that the baseball bat used by Akeem Steele was a dangerous weapon, in the Walgreens robbery, the jury either rejected evidence that the instrument used was a BB gun and instead inferred that the instrument was what it appeared to the victims to be, or found that the BB gun was capable of causing death or serious bodily injury. Because the evidence the jury rejected in finding defendant guilty of robbery with a dangerous weapon for the Walgreens robbery was the same evidence that defendant claims supported submission of the

lesser-included offense of attempted common law robbery for the Golden Dragon robbery, we cannot conclude that the result at defendant's trial probably would have been different if the jury had been instructed on attempted common law robbery. Thus, any error in failing to instruct the jury on the lesser-included offense of attempted common law robbery for the Golden Dragon robbery fails to amount to plain error.

No error.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).