NO. COA12-1277
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

STATE OF NORTH CAROLINA

v. Guilford County
No. 11 CRS 024779-80
11 CRS 083730-34
12 CRS 024097-98

MICHAEL NIEVES

and

STATE OF NORTH CAROLINA

v. Guilford County
No. 11 CRS 024775-76
11 CRS 083740-44
12 CRS 024093-94

CHRISTOPHER BENJAMIN LEMONS

Appeal by Defendants from judgments entered 30 April 2012 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 10 April 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General David W. Boone, for the State, in Defendant Michael Nieves' appeal, and Assistant Attorney General LaShawn Piquant, for the State, in Defendant Christopher Benjamin Lemons' appeal.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Paul M. Green, for Defendant Michael Nieves.

Michael E. Casterline, for Defendant Christopher Lemons.

DILLON, Judge.

Michael Nieves ("Defendant Nieves") and Christopher Lemons ("Defendant Lemons") (collectively "Defendants"), appeal from judgments entered convicting each of them of three counts of robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, four counts of first degree kidnapping, and one count of first degree burglary. We find no prejudicial error at trial.

The evidence of record tends to show the following: Defendants, along with two other men, broke into the Greensboro home of Zurayah Lamar and Marcelina Lamar in the early morning hours of 24 July 2011, while wearing black masks. Four women – Zurayah, Marcelina, Giovana Zayas, and Snow Rodriquez – were asleep in the house when the four men entered. Defendants took off their masks and held Zurayah and Marcelina in Marcelina's bedroom. One of the other intruders broke into Giovana's bedroom, hit and kicked her, and pulled her into Marcelina's bedroom. Another intruder found Rodriquez hiding in the

bathroom and pulled her to Marcelina's bedroom. Defendant Lemons tied the four women's hands behind their backs with black zip ties. Defendant Nieves and another intruder struck Zurayah and Marcelina. Defendant Nieves also threatened to kill all four women and pointed a pistol at Zurayah and Marcelina's heads. Before leaving the residence, the four men took items, including money, jewelry, a camera, two cell phones, and a .38 revolver.

On 13 August 2011, Defendants and one of the other intruders were arrested in New Jersey while traveling in a car registered to Defendant Nieves' mother. Zurayah's camera was found under the front seat of the vehicle. Black zip ties were found in the back seat.

Defendants were each indicted on one count of first-degree burglary, four counts of first-degree kidnapping, three counts of robbery with a firearm, and one count of attempted robbery with a firearm. Defendants were tried jointly during the 23 April 2012 session of Guilford County Superior Court. The jury found each Defendant guilty of all charges, and the court entered judgments consistent with the jury's verdicts, sentencing each Defendant to a combined minimum term of 612

months to a combined maximum term of 818 months incarceration. From these judgments, each Defendant appeals.

I: Defendants Nieves and Lemon's Appeal[1]

A: Motion to Dismiss

On appeal, Defendants first argue that the trial court erred by denying their respective motions to dismiss all but one count of armed robbery. We find this argument without merit.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "'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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (quotation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the

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[1] Defendant Nieves and Defendant Lemons' first three arguments on appeal are identical, so we address them together; however, Defendant Lemon, individually, makes a fourth argument unique to his appeal, which we address separately.

trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

The following are the essential elements of armed robbery:

> (1) the 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. Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense.

State v. Cole, 209 N.C. App. 84, 91, 703 S.E.2d 842, 847-48, *disc. review denied*, 365 N.C. 197, 709 S.E.2d 922 (2011). "The 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, *cert. denied*, 516 U.S. 846, 133 L. Ed. 2d 83 (1995). "Thus, 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 [her] life with a dangerous weapon, does some overt act calculated to bring about this result." *Id.* (citation and quotation marks omitted).

In this case, Defendants argue that the armed taking of property from a residence, in which there are multiple persons, constituted a single crime of armed robbery. This construction, Defendants contend, is required by a strict reading of the statutory definition of armed robbery, which is as follows:

> Any person or persons who, having in possession or with the use or threatened 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 or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87 (2011). Defendants emphasize that, in this case, the evidence was sufficient to prove that Defendants took property from a residence where there were people in attendance. However, Defendants contend that "[t]here was no evidence that anything was taken from the person of any of the four named victims[,]" and, therefore, the evidence is

sufficient to support only "one armed robbery offense as a matter of law." We conclude this argument is without merit.

The "same offense" doctrine has been applied in cases such as *State v. Potter*, 285 N.C. 238, 253, 204 S.E.2d 649, 659 (1974), in which an armed robbery of two cash registers manned by separate employees of a food market were to be considered as a single verdict of guilty of armed robbery. The *Potter* Court limited its holding to a situation in which there is "the use or threatened use of a firearm incident to the theft of their employer's money or property." *Id.* at 253, 204 S.E.2d at 659.

In *State v. Johnson*, 23 N.C. App. 52, 208 S.E.2d 206, *cert. denied*, 286 N.C. 339, 210 S.E.2d 599, *cert. denied*, 286 N.C. 339, 210 S.E.2d 59 (1974), the Court declined to apply the "same offense" doctrine, stating that the "defendants threatened the use of force on separate victims and took property from each of them." *Id.* at 56, 208 S.E.2d at 209. The Court elaborated:

> [The victims] were not employees. It was not the employer who was robbed. Rather each separate victim was deprived of property. The armed robbery of each person is a separate and distinct offense, for which defendants may be prosecuted and punished.

Id.

Likewise, in *State v. Wheeler*, 70 N.C. App. 191, 319 S.E.2d 631 (1984), *cert. denied,* 316 N.C. 201, 341 S.E.2d 583 (1986),

two defendants were convicted of two counts each of armed robbery based on the following evidence:

> [The] defendants were armed with rifles when they entered the home of Frank and Mattie Brown. . . . While defendant Wheeler held the Browns at gunpoint, defendant Hammett wandered through the house, during which time Hammett drank some cough syrup that had been prescribed for Mrs. Brown. Defendant Hammett also picked up a shotgun and shells belonging to Mr. Brown, handing these items to defendant Wheeler, who took the gun and shells with him when he left.

Id. at 193-94, 319 S.E.2d at 633. The Court in *Wheeler* relied on *State v. Johnson*, 23 N.C. App. 52, 208 S.E.2d 206, to hold that each of the defendant's actions constituted two distinct offenses.

We believe *Johnson* and *Wheeler* are controlling in this case. There is substantial evidence to show that Zurayah's camera, phone, and jewelry were taken; Rodriguez' phone was taken; Marcelina's money, jewelry, and phone were taken; and Giovana's white purse was checked, but she "didn't have anything."[2]

Based on the foregoing, we conclude that there was sufficient evidence to support the essential elements of three

[2] The evidence surrounding Giovana's property only supports an attempted robbery, which Defendants do not dispute.

separate and distinct counts of armed robbery and one count of attempted armed robbery.

B: Jury Instruction; Plain Error

Defendants' next argue that the trial court committed plain error by failing to specify the property at issue in each of the four robbery counts in its instructions to the jury. We disagree.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). Generally, a "[f]ailure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

In this case, Defendants failed to object to the jury instructions. "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

Plain error arises when the error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *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. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d. 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

In this case, the trial court gave the following instruction:

> [I]f you, the jury, find from the evidence beyond a reasonable doubt that on or about the alleged date, Defendant Michael Nieves, acting either by himself or acting together with other persons, had in his possession a firearm and took and carried away property from Marcelin[a] Lamar or the presence of Marcelin[a] Lamar without her voluntary consent by endangering or threatening her life with the use or threatened use of a firearm, the defendant knowing that he was not entitled to take the property and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty of robbery with a firearm of Marcelin[a] Lamar.

Likewise, the court gave the jury similar instructions with regard to Defendant Lemons and with regard to each victim – the

instruction pertaining to Giovana's property having been modified to reflect the attempted armed robbery.

In this case, Defendants assert that "[i]n light of the 'acting in concert' and 'constructive presence' instructions, the failure to specify the property alleged to have been taken with respect to each victim allowed the jury to convict [Defendants] on all four robbery counts based on the taking [or attempted taking] . . . [of] a single item of property belonging to any one of the victims, from any part of the house, by any of the four perpetrators." We do not believe this is the case. There was evidence in this case to support each charge as to each victim, and, as such, we believe any purported error in jury instructions did not rise to the level of plain error. Defendants have not shown a probability that a different result would have occurred had the jury instructions specified the property taken from each victim.

C: Jury Instruction; Unanimity

In Defendants' third argument, they contend the trial court erred by failing to require unanimity as to every essential element of the four robbery counts. We disagree.

The North Carolina Constitution guarantees a criminal defendant the right to a unanimous verdict. N.C. Const. art. I,

§ 24. "To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged." *State v. Jordan*, 305 N.C. 274, 279, 287 S.E.2d 827, 831 (1982).

In this case, Defendants contend that "[t]he robbery instructions permit[ted] each count to be based on *any* property taken during the offense," and, resultantly, "all four verdicts are fatally ambiguous, and all four must be remanded for retrial." In this case, there was evidence that specific property was taken from three victims and the fourth victim's purse was open and "checked" for valuables. The trial court instructed the jury that "[a]ll 12 of you must agree to your verdict unanimously[;] [y]ou may not render a verdict by majority vote." Moreover, each juror was individually polled in the following manner:

> As the foreman of the jury, you have returned as the unanimous verdict of the jury in Case Number 11 CRS 24779, that defendant Michael Nieves is guilty of robbery with a firearm of Marcelin[a] Lamar; in Case Number 11 CRS 83734, that defendant Michael Nieves is guilty of robbery with a firearm of Zurayah Lamar; in Case Number 12 CRS 24097, that defendant Michael Nieves is guilty of robbery with a firearm of Snow Rodriguez; in Case Number 12 CRS 24098, that defendant Michael Nieves is guilty of attempted robbery with a firearm of Giovana Zayas[.] . . . With respect to all the

> verdicts with regard to defendant Michael Nieves, were these your verdicts?

The jurors were similarly polled with respect to Defendant Lemons. Each juror indicated that a unanimous verdict had been achieved. We find Defendants' arguments with regard to the unanimity of the verdicts unconvincing. Here, as in *Jordan*, we believe that "[w]hen the charge is read as a whole, as it must be, it is obvious that the trial court conveyed to the jury that the verdicts must be unanimous as to every essential element[,]" *Jordan*, 305 N.C. at 279, 287 S.E.2d at 831, and that specific property belonging to each victim must have been taken, or attempted to be taken, in order to sustain convictions on the armed robbery and attempted armed robbery charges. "[T]his Court must neither forget nor discount the common sense and understanding of the trial court and the jurors." *Id*. From our examination of the charge we conclude that Defendants were not deprived of their constitutional right to a unanimous jury verdict.

II: Defendant Lemon's Appeal

A: State's Reliance on False Testimony

Defendant Lemon's presents an additional argument on appeal in which he contends that the State's reliance on false or perjured testimony violated his constitutional rights under the

Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 18, 19, 23, 24, and 27 of the North Carolina Constitution. We believe, however, that this argument is without merit.

> It is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Further, with regard to the knowing use of perjured testimony, the Supreme Court has established a standard of materiality under which the knowing use of perjured testimony requires a conviction to be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Thus, when a defendant shows that testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction, he is entitled to a new trial.

State v. Williams, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 870 (1996) (alterations in original) (quotation marks and citations omitted). "[T]he knowing use of [false or] perjured testimony requires a conviction to be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *State v. Sanders*, 327 N.C. 319, 336, 395

S.E.2d 412, 424 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991).

"[T]here is a difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner. It is for the jury to decide issues of fact when conflicting information is elicited by either party." *State v. Allen*, 360 N.C. 297, 305, 626 S.E.2d 271, 279, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). "In fact, if inconsistent information is elicited from a witness, the party who called that witness may impeach him or her." *Id.*

Defendant Lemon's specifically takes issue with the State's witnesses "not [telling] the whole truth[,]" which the prosecution admitted during closing arguments:

> Now, there's something about this we all don't know. And when you go back in that jury room you're not going to know it. You read those emails. Chris's [stuff] was taken. Michael's [stuff] was taken. Thousands of dollars worth of stuff was taken. Zurayah's not telling us what it is. These two are not telling us what it is. But that's their motive. And when you read the emails, it's plain on its face that's what happened. I don't know if it's drugs. I don't know if it's money. I don't know if it's jewelry. I don't know if it's ill-gotten gains of some other type. But there's something we don't know. There is something we don't know, and we're not going to know. But that doesn't make what these guys did right. If they were wronged in some way and

> it was legitimate and it was thousands of dollars, they would have reported it to the police. They didn't do that. Instead, they conducted a combat operation[.] . . .

Defendant Lemons further contends that the testimony of the State's witnesses "contain[ed] discrepancies and contradictions[,]" and that the "State's evidence is far more likely to support the idea that Nieves was in North Carolina to retrieve property that Zurayah took from him in New York, than Zurayah's claim that she had nothing of his, and he was getting even with her for leaving him." Defendant Lemons also states that "the State offered widely different accounts of how much money may have been taken from the residence."

In this case, we are not convinced that Defendant Lemons has met his burden of demonstrating that the challenged "testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction[.]" *Allen*, 360 N.C. at 305, 626 S.E.2d at 279. Although we recognize there were variances in the testimony among the State's witnesses concerning Defendants' motives and the amount of money stolen, we believe these variances were of the type described in *Allen* as merely "conflicting information[,]" *Id.* at 305, 626 S.E.2d at 279, such that is was proper for the "jury to decide issues of fact[.]" *Id.*

NO ERROR.

Judge CALABRIA and Judge ERVIN concur.

Report per Rule 30(e).