NO. COA14-452
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

IN THE MATTER OF: K.J.C. Robeson County
No. 13 JB 62

Appeal from order entered 19 November 2013 by Judge Herbert L. Richardson in Robeson County District Court. Heard in the Court of Appeals 10 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Vanessa N. Totten, for the State.

Mary McCullers Reece for juvenile-appellant.

ELMORE, Judge.

The district court adjudicated juvenile K.J.C. delinquent for the offense of robbery with a dangerous weapon ("RWDW"). The court imposed a Level 2 disposition with special conditions, which, *inter alia*, included twelve months of supervised probation. Juvenile filed timely notice of appeal from the adjudication order.

Complainant L.M. testified that on the afternoon of 18 February 2013, he noticed a group of four boys behind him as he walked home from school listening to music on his iPhone. Two of the boys, juvenile and D.D., "separate[d] from the other two" and "came up and confronted" complainant. Complainant previously attended middle school with juvenile and D.D. and had known both of them for several years.

With juvenile standing "two feet behind him[,]" D.D. tried without success to take complainant's iPhone. D.D. then pointed a black handgun at complainant and threatened to shoot him if he did not surrender the phone. When complainant refused, D.D. "backed up and shot at [him] two times" before approaching complainant again and taking the phone. Juvenile ran, followed by D.D. The two other boys, who had been behind D.D. and juvenile, had already fled. Complainant briefly gave chase before running home and telling his parents what had happened. He went to the police station with his step-father to report the robbery but never recovered his phone.

Maxton Police Detective William Davis, who spoke to complainant at the police station on 18 February 2013, testified that complainant "advised me he had just been robbed by [D.D.] and [juvenile]." Because he knew juvenile's grandmother,

Officer Davis went to her residence to ask juvenile about the incident. Juvenile denied knowing D.D. Officer Davis advised the trial court that he was "very familiar" with juvenile and D.D., and that "[t]hey knew each other."

Complainant's step-father, Mr. M., testified that on the afternoon of 18 February 2013, he and a co-worker were at a store approximately two blocks from the alleged robbery when "[t]wo shots rang out, pow pow." Soon thereafter, Mr. M. received "a frantic phone call from [his] stepson" asking him to "come home now[.]" Mr. M. drove home and accompanied complainant to the police station.

An investigator appointed to assist juvenile testified that he canvassed the area of the alleged robbery on two occasions and "was unable to locate anyone" who had heard gunfire or observed any unusual activity on the afternoon of 18 February 2013.

After hearing the parties' evidence, the trial court adjudicated both juvenile and D.D. delinquent for RWDW, finding D.D. to be "the principle [sic] participant" in the robbery and juvenile to be responsible for "acting in concert with him."

In his lone argument on appeal, juvenile challenges the trial court's denial of his motion to dismiss the RWDW charge

for insufficient evidence. He concedes that he failed to preserve this issue for appellate review by renewing his motion to dismiss at the conclusion of all the evidence. *See In re K.T.L.*, 177 N.C. App. 365, 369, 629 S.E.2d 152, 155 (2006) (citing N.C.R. App. P. 10(b)(3)). However, juvenile claims that his counsel's failure to renew the motion violated his right to effective assistance of counsel.

In order to establish that a violation of one's right to effective assistance of counsel occurred, an individual must show both unreasonably deficient performance by his counsel and prejudice arising therefrom. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). If juvenile cannot demonstrate a reasonable probability of a more favorable outcome but for his counsel's alleged error, we need not address the reasonableness of counsel's performance. *Id.* at 563, 324 S.E.2d at 249.

A juvenile in a delinquency proceeding is "entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults." *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985). In ruling on a juvenile's motion to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential

element of the offense charged, . . . and (2) of [the juvenile's] being the perpetrator[.]" *In re S.M.*, 190 N.C. App. 579, 581, 660 S.E.2d 653, 654-55 (2008) (citation and quotation marks omitted). "[T]he evidence must be considered in the light most favorable to the State, which is entitled to every reasonable inference that may be drawn from the evidence." *In re B.D.N.*, 186 N.C. App. 108, 111-12, 649 S.E.2d 913, 915 (2007).

The elements of RWDW are "(1) an 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." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). Juvenile does not deny that D.D. unlawfully took complainant's iPhone at gunpoint but argues "the evidence was insufficient to show that [juvenile] shared in the plan to take the phone or participate in any criminal activity" with D.D.

The district court based its adjudication on the doctrine of concerted action, under which "[a] person may be found guilty of committing a crime if he is at the scene acting together with another person with a common plan to commit the crime, although

the other person does all the acts necessary to commit the crime." *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993). Similar to the crime of aiding and abetting, "[t]he theory of acting in concert does not require an express agreement between the parties. All that is necessary is an implied mutual understanding or agreement to do the crimes."[1] *State v. Hill*, 182 N.C. App. 88, 93, 641 S.E.2d 380, 385 (2007) (citation and quotation marks omitted).

In challenging the State's evidence, juvenile cites the decision in *State v. Gaines*, 260 N.C. 228, 132 S.E.2d 485 (1963). In *Gaines*, Billy Hill entered a jewelry store with co-defendants Andrews and Gaines. *Id.* at 229, 132 S.E.2d at 486. Hill reached over the store counter, stole a box of diamonds, and turned to face his two associates. *Id.* The three men then ran from the store and drove away in a car parked nearby. *Id.* at 229-30, 132 S.E.2d at 486. The store owner "testified she did not see Gaines or Andrews 'do anything to encourage or

[1]It is not necessary that juvenile "had intent to use a dangerous weapon" in order to be adjudicated delinquent for RWDW, so long as the evidence showed that he "acted in concert to commit robbery and that [D.D.] used the dangerous weapon in pursuance of that common purpose to commit robbery." *State v. Johnson*, 164 N.C. App. 1, 12-13, 595 S.E.2d 176, 183, *appeal dismissed and disc. review denied*, 359 N.C. 194, 607 S.E.2d 658, 659 (2004).

entice or assist Billy Hill in taking the diamonds[.]'" *Id.* at 230, 132 S.E.2d at 486. Moreover, "[t]he State offered in evidence the statements made by Billy Hill, Gaines and Andrews to the effect that Gaines and Andrews had nothing to do with the theft and had no knowledge that Billy Hill entered the store with intent to steal[,]" but instead thought "that he had gone in to buy a ring for his girl friend[.]" *Id.* at 231, 132 S.E.2d at 487. Absent any evidence contradicting these exculpatory statements, the court deemed the State to be bound thereby. *Id.* at 232, 132 S.E.2d at 487. The court therefore concluded that Gaines' and Andrews' presence in the store and flight with Hill were insufficient to show that they aided and abetted the larceny. *Id.* at 232, 132 S.E.2d at 487-88.

The case *sub judice* is distinguishable from *Gaines*. Unlike the unrebutted testimony that Gaines and Andrews were unwitting witnesses to Hill's crime, the record suggests no innocent purpose for juvenile to have approached complainant with D.D. Moreover, juvenile made no attempt to abort the robbery or otherwise assist complainant. *See In re R.P.M.*, 172 N.C. App. 782, 784, 616 S.E.2d 627, 629 (2005). In addition to fleeing the scene, juvenile falsely denied knowing D.D. when questioned by Officer Davis. In view of these circumstances, we conclude

that by separating from the other boys in the group in order to "confront" complainant with D.D., and by standing within arm's length of D.D. as he demanded complainant's phone at gunpoint, juvenile evinced his unwillingness "to lend assistance when and if it should become necessary." *Id.* at 783-84, 616 S.E.2d at 630 (citation and quotation marks omitted). The evidence thus supports a reasonable inference that juvenile acted in concert with D.D. to commit the robbery.

Because we conclude that the State adduced sufficient evidence to withstand a motion to dismiss, we further hold that counsel's failure to renew juvenile's motion at the conclusion of the evidence cannot support a claim of ineffective assistance of counsel. *See Braswell*, *supra*. Accordingly, we affirm the district court's order.

Affirmed.

Judges STEELMAN and DILLON concur.

Report per Rule 30(e).