IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-688

Filed: 3 May 2016

Guilford County, Nos. 13 CRS 100094, 100098-99, 100100-02, 14 CRS 24118, 24121

STATE OF NORTH CAROLINA

v.

ALI MAHAMED SHEIKH and ABDULKADIR SHARIF ALI, Defendants.

Appeal by defendants from judgments entered 11 August 2014 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 15 December 2015.

*Attorney General Roy Cooper, by Special Deputy Attorney General Heather Freeman, for the State (Sheikh appeal).*

*Attorney General Roy Cooper, by Special Deputy Attorney General Robert M. Curran, for the State (Ali appeal).*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant Sheikh.*

*Law Office of Bruce T. Cunningham, Jr., by Bruce T. Cunningham, Jr. and Amanda S. Zimmer, for defendant-appellant Ali.*

GEER, Judge.

Defendants Ali Mahamed Sheikh ("Sheikh") and Abdulkadir Sharif Ali ("Ali") appeal from their convictions of assault with a deadly weapon inflicting serious injury, attempted robbery with a dangerous weapon, first degree burglary, and

conspiracy to commit robbery with a dangerous weapon. On appeal, defendants primarily argue that we should vacate their convictions for attempted robbery with a dangerous weapon because their indictments for the completed offense do not support their convictions for the attempted offense. However, our legislature has provided in N.C. Gen. Stat. § 15-170 (2015) that indictments for completed offenses can support convictions for attempted offenses. Because we are unpersuaded by defendants' remaining arguments, we hold that they received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. On 19 November 2013, O'Neal Davis traveled to Greensboro, North Carolina, on a business trip. He left his hotel room that evening and went to Christie's Cabaret, where he had a few drinks and paid for private dances with the club's employees. After spending much of his time with one of the club's dancers, Jessica Salinas, he invited her to his hotel room after she got off work. While Ms. Salinas was talking with Mr. Davis at the club, she noticed he had a lot of cash with him.

After their conversation ended, Salinas discussed with two of her co-workers, Sommer Painter and Heaven Shoffner, her intention to rob Davis in his hotel room after she got off work. Painter told Salinas she knew someone who could rob Davis and split the money with them. Painter testified that this person was defendant Sheikh who was her drug dealer.

After the three dancers left work, they went to Painter's apartment, where they arrived around 3:15 a.m. or shortly thereafter. Shoffner eventually left with Salinas to drive Salinas to Davis' hotel room. Defendant Sheikh arrived later with defendant Ali, whom he introduced to Painter as his cousin. Painter came up with a plan to drive to Davis' hotel room, where Salinas would let the two defendants in to commit the robbery. After about 10 or 15 minutes had passed, Shoffner returned to Painter's apartment. Painter and defendant Sheikh then drove in his car to Davis' hotel, with defendant Ali following in a different car. Painter and Salinas were communicating through text messages at that time, planning for the robbery upon defendants' arrival at Davis' hotel.

When Salinas first arrived at Davis' hotel, she went to a side entrance where she propped a door open to allow defendants to enter. Once inside Davis' room, she went to the bathroom to exchange text messages with Painter, letting her know that she was ready to let defendants into the hotel room. When defendants arrived at the hotel, they proceeded to Davis' room, and Salinas came out of the bathroom to unlatch the door. The two men, with defendant Sheikh wearing a clown mask, but defendant Ali undisguised, then pushed their way into the hotel room.

Although the room was dark, Davis testified that he could see the two defendants standing next to the bed where he was laying. Davis claimed he heard a gun click, causing him to jump off the bed and tussle with the man with the gun.

During the struggle, the man hit Davis in the head with the gun, causing the clip of the gun to fall on the floor. Davis managed to get away to the hotel lobby where he told the receptionist to call the police -- he left a trail of blood from his hotel room. Because Davis had hidden most of his cash inside his boot, the two assailants only managed to take a duffel bag containing Davis' clothes from the room.

After the robbery, defendants Sheikh and Ali ran out of the hotel, but defendant Ali fell and "dropped a bunch of stuff" on his way to the car in which he had arrived. That car sped off as soon as he jumped inside. Defendant Sheikh, "covered in blood," got into his car where Painter was waiting. Once inside the car, he told Painter that he had struck Davis in the head with his gun, causing the clip to fall out. Salinas meanwhile exited the hotel and hid in some nearby woods until Shoffner picked her up. When Salinas arrived back at Painter's apartment, defendant Sheikh was there with a bloody mask and a duffel bag containing clothes.

After police investigated the incident, they determined that Salinas was the dancer who had visited Davis' hotel room. After arresting and questioning Salinas, she implicated Painter and Shoffner, and the two other women were also eventually arrested. Each dancer was charged with armed robbery, conspiracy to commit armed robbery, burglary, and assault with a deadly weapon inflicting serious injury. During their interrogations, Salinas, Painter, and Shoffner were able to collectively identify defendants Sheikh and Ali in photo lineups. As part of the women's plea

arrangements, each dancer pled guilty to only conspiracy to commit armed robbery. Defendants Sheikh and Ali were also eventually arrested and indicted for assault with a deadly weapon inflicting serious injury ("AWDWISI"), robbery with a dangerous weapon, first degree burglary, and conspiracy to commit robbery with a dangerous weapon.

Defendants were tried jointly. On 11 August 2014, the jury found each defendant guilty of AWDWISI, attempted robbery with a dangerous weapon, first degree burglary, and conspiracy to commit robbery with a dangerous weapon. Each defendant was sentenced to a presumptive-range term of 59 to 83 months imprisonment for attempted robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon, a consecutive presumptive-range term of 23 to 40 months imprisonment for AWDWISI, and a consecutive presumptive-range term of 59 to 83 months imprisonment for first degree burglary. Defendants timely appealed to this Court.

## Discussion

### I. Defendants' Convictions for Attempted Robbery With a Dangerous Weapon

#### A. The Sufficiency of the Indictment

Defendants first argue that their indictments for robbery with a dangerous weapon do not support their convictions of the attempted offenses and, therefore, their convictions must be vacated. We disagree.

" 'It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.' " *State v. Williams*, 318 N.C. 624, 629, 350 S.E.2d 353, 356 (1986) (quoting *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940)). Thus, a "trial court [has] no jurisdiction to try, convict or sentence defendant" for an offense not charged in an indictment. *State v. Wortham*, 318 N.C. 669, 673, 351 S.E.2d 294, 297 (1987). However, it is settled by statute that, "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or . . . of an attempt to commit the crime so charged . . . ." N.C. Gen. Stat. § 15-170.

Notwithstanding N.C. Gen. Stat. § 15-170, defendants contend the indictment for robbery with a dangerous weapon does not support the conviction of attempted armed robbery because our Supreme Court has concluded that the offenses are "different crimes comprised of different elements." *State v. White*, 322 N.C. 506, 515, 369 S.E.2d 813, 817 (1988). Defendants also cite to *State v. McCoy*, 207 N.C. App. 378, 699 S.E.2d 685, 2010 WL 3860461 at *7 (2010) (unpublished), in which this Court held that "[b]ecause 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."

We do not agree with defendants' interpretation of *White* and *McCoy*. *White* held only that the attempted and completed offenses of robbery with a dangerous weapon are different with respect to the offenses' lesser-included offenses. 322 N.C. at 516, 369 S.E.2d at 818. *McCoy*, citing to *White*, held that the defendant's indictment for attempted armed robbery could not support a conviction for attempted armed robbery when the evidence presented only supported a finding of guilt of the completed offense. 207 N.C. App. 378, 699 S.E.2d 685, 2010 WL 3860461 at *6-7. As an unpublished opinion, *McCoy* is not controlling authority, and we do not find it persuasive authority when, as here, defendants were indicted for the completed offense, whereas in *McCoy*, they were indicted for the attempted offense. *McCoy* was not called upon to apply N.C. Gen. Stat. § 15-170, which allows a conviction for an attempted offense when the defendant was indicted for the completed offense.

Defendants, however, argue that N.C. Gen. Stat. § 15-170 does not apply to all offenses, citing *State v. Rorie*, 252 N.C. 579, 114 S.E.2d 233 (1960) and *State v. Craig*, 35 N.C. App. 547, 241 S.E.2d 704 (1978). These cases address only whether an indictment for a greater offense sufficiently alleged all the elements of certain purportedly lesser offenses. *See Rorie*, 252 N.C. at 581, 582, 114 S.E.2d at 235, 236 (holding indictment for manslaughter did not allege all the elements of assault with a deadly weapon and, therefore, could not support guilty verdict of the assault offense); *Craig*, 35 N.C. App. at 550, 241 S.E.2d at 706 (holding short-form indictment

for murder did not support verdict of assault on a female because indictment did not include all the elements of charge of assault on a female). Neither case addresses or includes reasoning applicable to the question whether an indictment for a completed offense will support a conviction of the attempted offense. They do not, therefore, provide any basis for disregarding N.C. Gen. Stat. § 15-170 in this case.

Accordingly, we hold that N.C. Gen. Stat. § 15-170 applies. Under that statute, defendants could be convicted of attempted armed robbery although indicted for the completed offense of armed robbery. Defendants' convictions of attempted armed robbery were, therefore, proper under the indictments. *See State v. Barksdale*, 16 N.C. App. 559, 561, 192 S.E.2d 659, 661 (1972) ("A bill of indictment for armed robbery can support a conviction of attempted armed robbery or common law robbery, but not both for the same conduct.").

B. Sufficiency of Evidence to Support the Convictions

Defendants next argue that we should vacate their attempted robbery with a dangerous weapon convictions because the evidence established that defendants completed the offense. We disagree.

Defendants concede they failed to move for a dismissal on these grounds below and, therefore, request that this Court suspend the Rules of Appellate Procedure by employing Rule 2 of the Rules of Appellate Procedure so as to "prevent manifest injustice." Despite our discretionary authority to invoke Rule 2, our Supreme Court

has directed we do so "cautiously." *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 205 (2007). Given that we find no "manifest injustice" to defendants here, we decline to apply Rule 2.

Even if we were to invoke Rule 2, we would uphold defendants' convictions of attempted robbery with a dangerous weapon. This Court has previously decided that the variance between the allegations in an indictment for armed robbery and the proof offered at trial amounting to attempted armed robbery was not fatal to the conviction where "[p]roof was offered to support the material allegations." *State v. Cherry*, 29 N.C. App. 599, 601, 225 S.E.2d 119, 121 (1976). Even though it is true that " '[a] successful attempt to commit a crime will not support two convictions and penalties [for the completed and attempted offense] . . . . [*T*]*his does not require the unsound conclusion that proof of the completed offense disproves the attempt to commit it*.' " *State v. Primus*, 227 N.C. App. 428, 432, 742 S.E.2d 310, 313 (2013) (quoting Rollin M. Perkins and Ronald N. Boyce, *Criminal Law,* 612 (3rd ed. 1982)). Thus, even though the prosecution's evidence that defendants took Mr. Davis' duffel bag from his room after he had left the hotel room still amounted to a completed armed robbery, *State v. Tuck*, 173 N.C. App. 61, 67, 618 S.E.2d 265, 270 (2005), the State still managed to offer proof of the "material allegations" at trial, which naturally includes the attempted commission of the crime. Accordingly, we find no

manifest injustice has occurred and decline to suspend the Rules of Appellate Procedure to address this argument.

C. Jury Instructions

Defendants also jointly argue that because the gun "was used as a club, not a projectile shooter," and because the clip fell out of the gun during the robbery, the jury probably would have concluded the firearm was not used as a dangerous weapon if the jury was instructed to consider the gun was used as a club. Defendants also claim that because the gun was not used as a dangerous weapon, the jury should have received an instruction on the lesser-included offense of attempted common law robbery. We disagree with both arguments.

Defendants admit they did not object on these bases below, and for that reason, request this Court to review these issues for plain error. Our Supreme Court has held:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

Here, the instructions to the jury stated that in order to find defendant guilty of attempted armed robbery, each juror must find "that the defendant had a firearm in his possession at the time he obtained the property or that it reasonably appeared to the victim that a firearm was being used . . . ." The jury was also required to find "that the defendant obtained the property by endangering or threatening the life of that person with a firearm."

Here, the evidence indicates that even though Davis did not see a gun, he "heard the gun click," which was a sound he recognized. Thus, it appeared to Davis that his life was endangered by use of a firearm during defendants' attempt to rob him, even though the firearm was also used as a club during Davis' struggle with defendants. Accordingly, we hold these instructions were not erroneous and do not amount to plain error.

Defendants also argue plain error occurred as a result of the trial court's failing to instruct the jury on the lesser-included offense of attempted common law robbery. Our Supreme Court has held that " 'a lesser included offense instruction is required if the evidence would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater.' " *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (quoting *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989)). However, "the trial judge is not required to instruct on common law robbery when the defendant is indicted for armed robbery if the uncontradicted

evidence indicates that the robbery, if perpetrated, was accomplished by the use of what appeared to be a dangerous weapon." *State v. Tarrant*, 70 N.C. App. 449, 451-52, 320 S.E.2d 291, 294 (1984).

As discussed already, the evidence from Davis' testimony indicates that he heard the gun click as defendants entered his hotel room. Thus, it appeared to him that he was being robbed with a firearm. Subsequently, a clip that had fallen out of the gun was found in the hotel room. The dancers also confirmed that defendant Sheikh had a gun during the robbery. Pursuant to *Tarrant*, the trial court did not, therefore, err by failing to instruct the jury on the lesser-included offense of common law robbery.

II. Defendant Sheikh's Ineffective Assistance of Counsel Claim

Defendant Sheikh next contends that he was deprived of the effective assistance of counsel at trial because his attorney failed to introduce evidence the attorney promised to present in his opening statement, and also misrepresented evidence in his closing statement. We do not agree.

First, we note that although ineffective assistance of counsel claims are normally raised in post-conviction proceedings, they can be raised on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue. *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). We believe the issue can be resolved on this record.

The United States Supreme Court has adopted a two-prong test to assess whether a defendant is given effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). Under the two-prong test, "the defendant must first show that counsel's performance fell below an objective standard of reasonableness as defined by professional norms." *State v. Lee*, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998). Second, a defendant "must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error." *Id.*

However, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985). Thus, where "there is ample evidence to support the convictions" and "no reasonable possibility that but for defense counsel's alleged errors another verdict would have been reached[,]" a defendant fails to meet this second prong. *State v. Ramirez*, 156 N.C. App. 249, 254, 576 S.E.2d 714, 718, 719 (2003).

The record indicates that in his opening statements to the jury, counsel for defendant Sheikh represented that his client was stopped at 1:40 a.m. on the night of the robbery, his car was impounded, his girlfriend picked him up, and then he went

home. However, at trial, no evidence was presented that defendant Sheikh went home with his girlfriend after the traffic stop. Rather, Officer Emerson Nichols of the Greensboro Police Department testified that he gave defendant Sheikh a citation for driving without a license. He detained Sheikh until at least 2:44 a.m., but the officer could not recall who picked Sheikh up.

Furthermore, Painter testified that she, Salinas, and Shoffner arrived at her apartment between 3:15 and 3:20 a.m. and that defendant Sheikh arrived some time later. In closing arguments, defendant Sheikh's attorney suggested otherwise -- he said that Sheikh arrived at Painter's apartment between the times of 2:42 and 3:10 a.m. Thus, defendant Sheikh argues his defense counsel's failure to present the evidence forecasted in opening statements and his defense counsel's misrepresentations regarding defendant Sheikh's alibi indicate a performance falling below an objective standard of reasonableness.

However, we need not decide whether defendant has met the first prong of the test established in *Strickland*. As in *Ramirez*, the totality of the evidence presented against defendant was substantial enough to support the convictions. Specifically, the testimony of the three dancers all identifying defendant Sheikh as the perpetrator of the crime, as well as the phone records indicating his communication with Painter shortly after his release from Officer Nichols' custody, were sufficient to discredit his

alibi. Accordingly, we hold defendant Sheikh was not deprived of effective assistance of counsel.

III. Defendant Ali's Motion to Sever Trials

We next address defendant Ali's arguments that the trial court erred by not severing the trials. Defendant Ali argues that because his last name and the first name of his co-defendant are identical, there was a general confusion throughout the trial, prejudicing him in particular. He argues that the trial court's refusal to sever the trials was, therefore, an abuse of discretion.

Generally, a trial court's decision to sever criminal trials " 'is discretionary and will not be disturbed absent a showing of abuse of discretion.' " *State v. Escoto*, 162 N.C. App. 419, 424, 590 S.E.2d 898, 903 (2004) (quoting *State v. Carson*, 320 N.C. 328, 335, 357 S.E.2d 662, 666-67 (1987)). "The defendant seeking to overturn the discretionary ruling must show that the joinder has deprived him of a fair trial." *State v. Porter*, 303 N.C. 680, 688, 281 S.E.2d 377, 383 (1981). A defendant's motion to sever must be granted where "it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants[.]" N.C. Gen. Stat. § 15A-927(c)(2)a (2015).

Defendant Ali claims he was prejudiced by the judge's denial of his motion to sever because the confusion over the two defendants' similar names allowed the jurors to link defendant Ali to the conspiracy to commit robbery with a dangerous

weapon charge. We first note that in every instance in which defendant Ali argues there was confusion as to whom a witness was testifying, an effort was made to ensure the jury was clear on the matter. Specifically, vigilant efforts were continuously made to clarify with the witnesses whether they were referring to "Mr. Ali Sheikh," identified as the defendant "in the white shirt," or Mr. Abdulkadir Ali, identified as "the guy in the blue shirt who [Sheikh] introduced as his cousin." These efforts rebut defendant Ali's argument that he was prejudiced by the court's failure to sever defendants' trials.

Secondly, we find that because there was ample evidence linking defendant Ali to the conspiracy, he fails to show the trial court's decision not to sever the trials prejudiced him in regard to the conspiracy charge. Painter, Salinas, and Shoffner testified that defendant Ali was informed of the robbery plans, was present at Painter's apartment with defendant Sheikh before the robbery, was present at Davis' hotel during the robbery, and again was present at Painter's apartment after the robbery. Accordingly, we reject defendant Ali's arguments that the trial court abused its discretion in denying his motion to sever trials.

IV. Defendant Ali's Sentencing

As a final matter, we address defendant Ali's two challenges to his sentence. Defendant Ali argues that (1) the trial court violated his rights to due process by considering evidence in his sentencing hearing that disturbed the presumption of

innocence, and (2) that the sentence he received violated the Eighth Amendment's ban on cruel and unusual punishment. We do not agree with either argument.

While the trial court asked questions about information he believed he saw in defendant Ali's court file, defendant has failed to show that the trial court actually based the sentence imposed on defendant Ali on any improper factor. We note with respect to any other argument regarding the basis for the sentence that a defendant who has been found guilty has a direct right to appeal his sentence "only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense." N.C. Gen. Stat. § 15A-1444(a1) (2015); *State v. Daniels*, 203 N.C. App. 350, 354, 691 S.E.2d 78, 80 (2010). Because defendant's sentence falls within the presumptive range, he may not appeal the sufficiency of the evidence to support his sentence.

Defendant Ali also argues that his sentence violates the Eighth Amendment. "Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). Here, the facts indicate defendant Ali was a willing participant in the serious crimes of which he was convicted. No unusual circumstances require our further review of this issue. Accordingly, we find no error in defendant Ali's sentence.

NO ERROR.

Judges BRYANT and McCULLOUGH concur.

Report per Rule 30(e).