IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-707

Filed: 5 January 2016

Cleveland County, Nos. 14 CRS 736; 12 CRS 1566

STATE OF NORTH CAROLINA

v.

BRANDON SENTELL WILSON

Appeal by defendant from judgments entered 21 January 2015 by Judge Yvonne Mims Evans in Cleveland County Superior Court. Heard in the Court of Appeals 28 December 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Amy L. Bircher, for the State.

Leslie C. Rawls for defendant-appellant.

BRYANT, Judge.

Where the State adduced substantial evidence of defendant's participation in the charged conspiracy and the trial court properly instructed the jury on the essential elements of the offense, we hold that defendant received a fair trial free from prejudicial error.

Evidence tended to show that on the morning of 12 April 2012, Scott Shepherd ("Shepherd") borrowed Erin Leann Hornbuckle's ("Hornbuckle") black Nissan

Maxima, telling her that he was taking Antwain Dawkins ("Dawkins") to either his mother's home or his friend's home. Although Shepherd "was only supposed to be gone about 30 minutes[,]" he returned the car to Hornbuckle at his mother's house between 2:00 and 3:00 PM. Prior to Shepherd borrowing Hornbuckle's car both Hornbuckle and Shepherd went to Shepherd's mother's house. Hornbuckle remained at Shepherd's mother's house until Shepherd returned.

When Shepherd entered the house with Dawkins, Hornbuckle saw that they "had a bunch of money on [th]em and they had drugs[.]" Shepherd handed $300 to Hornbuckle before going into another room with his mother and Dawkins. When the men emerged from the room, Hornbuckle accompanied them outside and watched Shepherd, Dawkins, and a third man leave in her car. Shepherd soon returned to his mother's house and surrendered the car to Hornbuckle. After speaking with Shepherd, Hornbuckle contacted a police officer and proceeded to the Shelby Police Department to report what she had seen. At trial, she identified defendant as the man she saw in her car with Shepherd and Dawkins on 12 April 2012.

Between 11:30 AM and 1:30 PM on 12 April 2012, 81-year-old Bonnie Putnam ("Putnam") was confronted by two gunmen while working at Putnam's Used Cars. Putnam served as the business's financial officer and handled the payments received from car sales. She was alone in her office at the time of the invasion, her fellow employees having left the premises for their lunch break.

One of the gunmen, later identified as Dawkins, wore a ski mask. Taking Putnam's cell phone from her hand, he put his gun to her head and demanded money. The second gunman, whom Putnam identified as defendant, grabbed the phone and threw it to the floor before ordering Putnam to stand up. When Putnam said that she was unable to stand without assistance, the men shoved her to the floor. Dawkins took some bank bags from beneath a table in Putnam's office. After obtaining the bags, which contained approximately $160,000 in cash, the two intruders fled. Putnam "crawled on [her] side to the front of the house and called [her husband] and 9-1-1."

Shelby Police Officer Carl Duncan ("Officer Duncan") responded to the robbery call at Putnam's Used Cars and viewed the store's surveillance video, which showed two men armed with handguns "enter[ing] in through the basement door . . . . The shorter of the two had what appeared to be an orange mask or toboggan over his head. The [other] male did not appear to have any mask on[.]" A copy of the surveillance footage depicting the robbers was admitted into evidence and played for the jury. The State also presented video footage of the area outside of Putnam's Used Cars at the time of the robbery from surveillance cameras located at Campus Car Wash, directly across the street.

Officer Duncan interviewed Hornbuckle at approximately 5:50 PM on 12 April 2012. She identified her car in still images taken from a surveillance video. Following

the interview, officers obtained and executed a warrant to search Shepherd's residence and found $38,463.00 in cash in the back of a stereo speaker in his bedroom closet. Police detained Shepherd at his father's residence and found $4,123.00 in his wallet. Dawkins was located in South Carolina months after the robbery.

At the time of defendant's trial, Shepherd and Dawkins were serving prison time for robbery with a dangerous weapon. Testifying under subpoena by the State, both men purported not to remember the events of 12 April 2012. Defendant was sentenced to consecutive prison terms of 97 to 129 months and 38 to 58 months upon his conviction of robbery with a dangerous weapon ("RWDW") and conspiracy to commit RWDW. Defendant appeals.

On appeal, defendant claims that the trial court (I) erred in denying his motion to dismiss the conspiracy charge and (II) committed plain error by instructing the jury on the charge of conspiracy to commit RWDW.

I

Defendant first argues that the trial court erred in denying his motion to dismiss the conspiracy charge because the indictment alleged conspiracy to commit robbery of Bonnie Putnam, and not Putnam's Used Cars. Specifically, defendant argues that because the evidence tended to show defendant acted with others to commit robbery of *Putnam Auto Sales* in the presence of its employee, and no evidence

supported a conspiracy to rob *Putnam herself*, the evidence was insufficient as a matter of law to support a conspiracy to rob Putnam. We find no merit to this claim.

This Court reviews *de novo* the trial court's denial of a motion to dismiss. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). We must determine whether the State presented substantial evidence that defendant committed each essential element of the charged offense. *Id.* (citation omitted). "Substantial evidence" is defined as "that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Scott*, 356 N.C. 591, 597, 573 S.E.2d 866, 869 (2002) (citation omitted). In making our determination, we view the evidence in the light most favorable to the State, according the State the benefit of all favorable inferences that may reasonably be drawn therefrom. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted).

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. The essence or gist of the crime of conspiracy is the agreement itself[.]" *State v. Billinger*, 213 N.C. App. 249, 255, 714 S.E.2d 201, 206 (2011) (citations and internal quotation marks omitted). Accordingly,

> a conspiracy indictment need not describe the subject crime with legal and technical accuracy because the charge is the crime of conspiracy and not a charge of committing the subject crime. An indictment is legally sufficient if it informs the defendant of the charge against him with enough certainty to enable him to prepare his defense and

> to protect him from subsequent prosecution for the same offense.

State v. Nicholson, 78 N.C. App. 398, 401, 337 S.E.2d 654, 657 (1985) (citations and internal quotation marks omitted). " 'Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.' " *State v. Worthington*, 84 N.C. App. 150, 158, 352 S.E.2d 695, 701 (1987) (quoting *State v. Taylor*, 290 N.C. 273, 276, 185 S.E.2d 677, 680 (1972)).

We begin by noting that the intended victim of the RWDW is not an essential element of the crime of conspiracy to commit RWDW. "The essential elements of robbery with a dangerous weapon are '(1) the unlawful taking or 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. Bellamy*, 159 N.C. App. 143, 147, 582 S.E.2d 663, 667 (2003) (quoting *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991)); *Cf. State v. Roberts*, 176 N.C. App. 159, 167, 625 S.E.2d 846, 852 (2006) (upholding the defendant's conviction of conspiracy to commit RWDW where "[t]here was no evidence that the agreement . . . consisted of more than that of robbing *someone* on that night" (emphasis added)); *cf. also State v. Lorenzo*, 147 N.C. App. 728, 734, 556 S.E.2d 625, 628 (2001) (Although an indictment for sale of a controlled substance must allege "the name of the person to whom the sale was made or that his name is unknown[,]" "an indictment for *conspiracy* to sell or deliver a controlled

substance need not name the person to whom the defendant conspired to sell or deliver.").

Contrary to defendant's argument on appeal, the State was not required to adduce substantial evidence of an agreement to rob Putnam specifically in order to withstand defendant's motion to dismiss. Therefore, the indictment's naming of Putnam as the intended victim of the charged conspiracy was mere surplusage. *See Worthington*, 84 N.C. App. at 158, 352 S.E.2d at 701.

While we reject the premise of defendant's argument, we further find the State's evidence sufficient to show a conspiracy to commit RWDW against Putnam. Unlike the offense of larceny discussed by defendant in his brief to this Court, RWDW is a crime of violence. *See State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375 (1972) ("In respect of 'armed robbery' as defined in G.S. 14-87, '[f]orce or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense.' " (quoting *State v. Mull*, 224 N.C. 574, 576, 31 S.E.2d 764, 765 (1944))). Accordingly, the victim of RWDW is not the owner of the subject property but the person who is threatened with a deadly weapon into surrendering the property. *See State v. Burroughs*, 147 N.C. App. 693, 696, 556 S.E.2d 339, 342 (2001) ("While an indictment for robbery (or attempted robbery) with a dangerous weapon need not allege actual legal ownership of property, the indictment must at least name a person

who was in charge or in the presence of the property at the time of the robbery, if not the actual, legal owner." (citations omitted)).

The State's proffer in this case supports a reasonable inference that defendant entered into at least a tacit agreement with Dawkins to obtain money from Putnam by threatening her with their handguns. *See generally State v. Bindyke*, 288 N.C. 608, 615–16, 220 S.E.2d 521, 526 (1975) ("A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense." (citation and internal quotation marks omitted)); *State v. Armstead*, 149 N.C. App. 652, 654–55, 562 S.E.2d 450, 452 (2002) (noting that an indictment may properly charge alternative bases of liability in the conjunctive). Accordingly, defendant's first argument is overruled.

II

Defendant next contends the trial court committed plain error by instructing the jury on the charge of conspiracy to commit RWDW, absent evidence that he entered into an agreement with Shepherd and Dawkins to commit RWDW "against Bonnie Putnam[,]" as alleged in the indictment, rather than against Putnam's Used Cars. In assigning plain error, defendant concedes he did not request that Putnam be named in the conspiracy instruction or object to the trial court's instruction as given. *See* N.C. R. App. P. 10(a)(2), (4). He further concedes that the court's instruction tracked the language in the pattern jury instruction for conspiracy, *see*

N.C.P.I. – Crim. 202.80 (June 2008), which "do[es] not offer a blank for the victim's name." Defendant nonetheless argues that the omission of Putnam's name from the instruction "led to a probability that some jurors returned guilty verdicts for a conspiracy to rob Putnam Used Cars despite the fact that [he] was never charged with such a conspiracy."

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "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.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

We find no error or plain error here. As previously discussed, the essential elements of conspiracy to commit RWDW do not include naming the particular victim of the agreed-upon robbery. *See Nicholson*, 78 N.C. App. at 401, 337 S.E.2d at 657; *see also Roberts*, 176 N.C. App. at 167, 625 S.E.2d at 852. Therefore, the trial court did not err by relying on the pattern jury instruction. Moreover, the offense of RWDW is committed against the person threatened, not necessarily against the property owner. *See Burroughs*, 147 N.C. App. at 696, 556 S.E.2d at 342 ("In an indictment for robbery with firearms or other dangerous weapons (G.S. 14-87), the gist of the offense is not the taking of personal property, but a taking or attempted taking by

force or putting in fear by the use of firearms or other dangerous weapon." (citations and quotation marks omitted)). As the State's evidence showed that defendant and Dawkins committed RWDW against Putnam and not the business entity that owned the bank bags, we find no likelihood that the challenged instruction somehow misled the jury into returning its guilty verdict.

NO ERROR.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).