

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-226

Filed: 7 November 2017

Guilford County, No. 14 CRS 71535-36, 71540-42, 71544, 71555-57, 71559-64

STATE OF NORTH CAROLINA

v.

ANTONIO LAMAR STIMPSON

Appeal by defendant from judgments entered 28 April 2016 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David P. Brenskelle, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

TYSON, Judge.

Antonio Lamar Stimpson (“Defendant”) appeals from judgments entered after a jury convicted him of discharging a firearm into an occupied property, discharging a firearm into an occupied vehicle, five counts of conspiracy to commit robbery with a firearm, six counts of robbery with a firearm, and two counts of attempted robbery with a firearm. Defendant has abandoned his appeal on all convictions and judgments, except for four of the five conspiracy convictions. We find no error in any of Defendant’s convictions and judgments.

I. Factual Background

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A. The Crimes

1. Smith

In the early morning hours of 22 March 2014, Debra Smith left a hair salon on Summit Avenue in Greensboro and entered her vehicle. A dark colored Jeep Cherokee vehicle swiftly pulled up and blocked her from leaving. Ms. Smith testified she saw two men exit the Jeep, with one man carrying a pump shotgun. The men wore masks and dark clothing. Ms. Smith was ordered to exit her vehicle and instructed to “give us your money.”

Ms. Smith testified she was “scared for her life” when a gunshot was fired near her head. She fell onto the pavement as she exited from her vehicle. Ms. Smith told the men she did not have any money. One of the men with a shotgun began to taunt her. The other man stated, “Come on, man, take the vehicle” and the men got into Ms. Smith’s car and drove it away.

2. Eban and Nie

On the same morning at about 5:45 a.m., Kler Eban was watching from the front door of his home on Sunrise Valley Road in Greensboro, as his wife walked to her car to leave for work. He saw three men walk past his house. Mr. Eban testified the men returned and two went behind his wife’s car and one came toward the door of his house and shouted at him to open the door. Mr. Eban testified the men’s faces were covered. One of the men pointed a gun wrapped in cloth at Mr. Eban.

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Mr. Eban heard a gunshot and attempted to get out of the door to assist his wife. Mr. Eban's wife, Lieu Nie, testified a red Jeep was parked behind her car. The men had shot at her through the driver's side window while she was sitting in the driver's seat.

Two shots were also fired in Mr. Eban's direction. Ms. Nie crawled over the front seat and escaped through the rear door. The robbers entered Ms. Nie's car and stole a shopping bag of new cooking utensils. Mr. Eban testified one of the men got into the Jeep and two of them got into his wife's car and drove it away.

3. Nareau

Around 6:30 a.m., John Nareau drove his car into a parking space at his workplace on Norwalk Street in Greensboro. As he exited his vehicle, a male got in front of him and raised what appeared to be a sawed-off shot gun. Mr. Nareau was told "don't try anything. There's two in the back." Mr. Nareau testified the man wore a mask and demanded his wallet and cellphone. After handing over his wallet and phone, Mr. Nareau ran away and watched the men get into a dark colored Jeep and drive away.

4. Tomlin, White, Wilkerson, and Mork

At a little before 7:00 a.m. on the same date, four friends, Elizabeth Tomlin, Brinson White, Clair Wilkerson and Wesley Mork, were loading luggage in the trunk of their rental car, when three men yelled at them "to turn around, mother f—ker;" and "get down mother f—ker." Ms. Tomlin saw the men exit from a red Jeep parked

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30-40 feet away. The men wore masks and dark clothing and carried guns. One of the guns appeared to be a sawed-off shotgun. The two women were chased by one man, while Mr. Carter and Mr. Mork were detained on the ground by the other two men from the Jeep. Mr. Mork's wallet and cash were stolen and cash was stolen from Mr. Carter.

During the pursuit, Ms. Tomlin's and Ms. Wilkerson's bags were taken. One of the attackers yelled "get in the car and take the car." The keys to the rental car were not in the vehicle, so all three men ran back to the Jeep and left.

5. Holland

Nicholas Holland was the final victim of the related crimes that occurred that morning. As Mr. Holland left his residence on Tremont Street in Greensboro, he noticed two males walk past the house. Mr. Holland observed a Jeep vehicle quickly pull up in front of his house. A masked male with a handgun demanded, "Give me what you have." Mr. Holland offered his brief case and car keys and attempted to run away. One of the men chased him until the same Jeep pulled up and the man climbed inside. The Jeep sped away.

B. Investigations

In response to the robberies, Greensboro Police Detective Devin Allis received a dispatch with a description of the dark colored Jeep Cherokee being involved. Detective Allis pursued the Jeep and apprehended the driver, Aaron Spivey, after a chase. Mr. Spivey was arrested with Mr. Mork's wallet in his possession.

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After Spivey's arrest, officers located Defendant and LeMarcus McKinnon walking in a nearby area. Defendant and McKinnon ran as the officers approached and had identified themselves. Defendant was apprehended by Lieutenant Larry Patterson. When arrested, Defendant was wearing a dark colored T-shirt, dark blue jeans and grey sneakers. He had cash, Mr. Nareau's cellphone and the keys to Ms. Nie's car in his possession.

When interviewed by police, Defendant initially denied any involvement in the robberies. Eventually Defendant admitted he had been present in the dark Jeep Cherokee with Spivey and McKinnon. Defendant stated he and McKinnon were cousins and were "tight." Defendant acknowledged he had met Spivey the previous week. Defendant also told police he had handled one of the guns a few days before the robberies.

Defendant told police officers he had been a passenger in the Jeep and witnessed the robberies perpetrated by the others. Defendant admitted driving the Jeep from the scene of the robbery of Ms. Nie and to later meeting Spivey and McKinnon for the subsequent robberies.

Officers recovered three pair of gloves, a blue toboggan, a black and grey bandana and a black headband or neckwarmer from inside the passenger area of the Jeep Cherokee. The handbags and briefcase belonging to the various victims were also recovered from inside the Jeep.

II. Jurisdiction

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Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015) and N.C. Gen. Stat. § 15A-1444(a) (2015).

III. Issue

Defendant asserts the trial court erred by failing to dismiss four of the conspiracy charges and argues the State's evidence supported only a single charge.

IV. Standard of Review

"We review the trial court's denial of a motion to dismiss *de novo*." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010). Under a *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.*

In ruling on a motion to dismiss for insufficiency of the evidence,

the trial court *must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor*. All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. . . . [S]o long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence. The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both.

State v. Bradshaw, 366 N.C. 90, 92-93, 728 S.E.2d 345, 347 (2012) (emphasis supplied) (internal citations and quotation marks omitted).

V. Analysis

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A. State's evidence

“A criminal conspiracy is an agreement between two or more persons to do an unlawful act” *State v. Massey*, 76 N.C. App. 660, 661, 334 S.E.2d 71, 72 (1985). The agreement to commit the unlawful act may be established by circumstantial evidence. *State v. Brewton*, 173 N.C. App. 323, 327-28, 618 S.E.2d 850, 854-55 (2005).

A conspiracy ordinarily “ends with the attainment of its criminal objectives” *State v. Tirado*, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004), *cert. denied sub nom, Queen v. N.C.*, 544 U.S. 909, 161 L. Ed. 2d 286 (2005) (citation omitted). “The question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury.” *Id.* (citation omitted).

The State alleged Defendant, Mr. Spivey and Mr. McKinnon conspired to commit the robberies of Ms. Smith, Ms. Lie, Mr. Nareau, Ms. Tomlin, Ms. Wilkerson, Mr. Mork and Mr. Holland. The State proceeded on five indictments alleging each incident as a separate conspiracy. The State did not offer the testimony of Spivey or McKinnon, Defendant's alleged co-conspirators. The only witnesses called by the State were the victims of the robberies and the police officers involved in the investigation of the crimes.

We all agree the evidence supports the conclusion that Defendant, Spivey and McKinnon conspired to commit the robberies. The State's evidence showed Defendant and his compatriots were all wearing dark clothing. Implements

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indicating planning in advance and to assist committing robberies were recovered from inside the Jeep: head and face coverings, gloves, and weapons.

Defendant testified concerning his relationship with McKinnon, his cousin, and that he had met Spivey the week prior to the crimes, and had handled a shotgun used in the robberies a few days before the robberies and admitted being present inside the Jeep Cherokee when the crimes occurred. All three men had been together on the afternoon of 21 March 2014. Defendant testified he, Spivey and McKinnon had been drinking and taking drugs together during the evening before and into the morning of the robberies and that all three men had headed out and traveled together in the early morning hours in the Jeep.

B. Single Conspiracy Cases

Defendant argues all of the above facts present only evidence of a single conspiracy to commit robberies on the morning of 22 March 2014. Defendant asserts *State v. Medlin*, 86 N.C. App. 114, 357 S.E.2d 174 (1987) and the cases which follow it, control the outcome of his case. See *State v. Fink*, 92 N.C. App. 523, 375 S.E.2d 303 (1989); *State v. Wilson*, 106 N.C. App. 342, 416 S.E.2d 603 (1992) and *State v. Griffin*, 112 N.C. App. 838, 437 S.E.2d 390 (1993). We address each in turn.

1. State v. Medlin

In *Medlin*, the defendant and two others were charged with break-ins and thefts of seven retail stores over the period of four months. *Medlin*, 86 N.C. App. at 115, 357 S.E.2d at 175. Defendant-Medlin operated a thrift store where co-

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conspirators Cox and Williams would “hang out.” *Id.* at 118, 357 S.E.2d at 177. Cox and Williams testified the break-ins were Medlin’s idea. The State’s evidence showed all the break-ins occurred in essentially the same manner: Cox and Williams would break a store window, climb through the hole and carry away items. The defendant would drive his truck to the stores to assist the others in carrying away the stolen goods. The participants met after the break-ins to divide the stolen items and to discuss the next break-in. *Id.* at 122, 357 S.E.2d at 179. For each of the break-ins, the defendant was charged and convicted under separate indictments for conspiring with Cox and Williams to commit the ten felonious break-ins. *Id.* at 121, 357 S.E.2d at 178.

This Court recognized “[w]hen the evidence shows a series of agreements or acts constituting a *single* conspiracy, a defendant cannot be prosecuted on multiple conspiracy indictments consistent with the constitutional prohibition against double jeopardy.” *Id.* (emphasis in original) (citing *United States v. Kissel*, 218 U.S. 601, 54 L. Ed. 1168 (1910)). While the offense “is complete upon the formation of the unlawful agreement, the offense continues until the conspiracy comes to fruition” *Id.* at 122, 357 S.E.2d at 179.

While there is no simple test for determining whether there was one conspiracy or multiple conspiracies, the Court acknowledged several factors impact the determination of the number of conspiracies, including: “time intervals, participants, objectives, and number of meetings.” *Id.*; see also *Tirado*, 358 N.C. at 577, 599 S.E.2d

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at 533 (“The nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings are all factors that may be considered.”).

2. State v. Fink

In *Fink*, the conspiracies charged had occurred within hours of each other. *Fink*, 92 N.C. App. at 533, 375 S.E.2d at 309. The participants in the first conspiracy alleged were the defendant-Fink, his brothers, and one of their “select” customers; the participants in the second conspiracy alleged were Fink and his brothers. *Id.* A panel of this Court found that while “the amount of cocaine varied in the first and second alleged conspiracies, the objective was the same: to traffic in cocaine.” *Id.* Furthermore at trial, the State argued “there was a ‘*continuing conspiracy*’ among the defendants.” *Id.* This Court recognized a single conspiracy is not necessarily “transformed into multiple conspiracies simply because . . . the same acts in furtherance of it occur over a period of time.” *Id.* at 532, 375 S.E.2d at 309. The Court in *Fink* held evidence showed there was only one “mutual, implied understanding among the brothers to commit the unlawful act of trafficking in cocaine.” *Id.* at 530, 375 S.E.2d at 308.

3. State v. Wilson

In *State v. Wilson*, 106 N.C. App. 342, 344, 416 S.E.2d 603, 604 (1992), “a series of robberies occurred in and around Durham during a two week period in December 1988.” One of the participants in the robberies in *Wilson* was a witness for the State.

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He testified that a few days before their first robbery, “defendant told him that cash money . . . was what it was all about and the onliest [sic] way to get cash money was in armed robberies.” *Id.* at 346, 416 S.E.2d at 605. The co-conspirator also testified that once they started committing the robberies, the men did not want to stop “robbing places.” *Id.*

This Court found the facts of *Wilson* “to be legally indistinguishable from *Medlin*” and stated, “evidence that a common scheme of a single conspiracy to commit armed robberies to acquire cash existed.” *Id.* at 346, 416 S.E.2d at 605.

4. *State v. Griffin*

This Court also reached a similar conclusion in *State v. Griffin*, 112 N.C. App. 838, 437 S.E.2d 390 (1993). In *Griffin*, the State failed to prove more than one conspiracy, where the offenses occurred over a one month period, the indictments alleged the defendant had conspired with the same participants for each conspiracy count and with the same objective. *Id.* at 841, 437 S.E.2d at 392.

Furthermore, “the State presented no evidence concerning the number of meetings which took place between [the] defendant and the other participants.” *Id.* “[W]hen the State elects to charge separate conspiracies, it must prove not only the existence of at least two agreements, but also that they were separate.” *Id.* at 840, 437 S.E.2d at 392; *see also State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 (vacating defendant’s additional conspiracy counts where multiple overt acts arising

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from a single agreement to sell large amounts of cocaine do not permit prosecutions for multiple conspiracies), *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984).

Here, Defendant argues none of the other perpetrators testified at trial and the State offered no direct evidence of any planning or conversations before or between each event. The State offered no testimony concerning any discussions between the co-participants before, during or after each robbery. Defendant argues the State's evidence was sufficient to allow the jury to infer only a single conspiracy had occurred based upon the implements found in the Jeep, the victims' belongings found on all of the culprits, and Defendant's own statements that he had met up with the co-conspirators before their crime spree began. We disagree.

C. Multiple Conspiracies

The State asserts the facts before us are distinguishable from the line of cases above. Unlike the facts in *State v. Medlin*, no evidence shows any meeting took place between Defendant and the other two robbers subsequent to any of the robberies to plan additional robberies in furtherance of any prior agreement to engage in as many crimes as possible, only that the three men were drinking and doing drugs together the evening and morning before the crimes were committed. There was no evidence that the Defendant and his co-conspirators conspired to engage in as many robberies as they could. They agreed and engaged in random robberies as the opportunities appeared before them.

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The dissenting judge asserts the State “impliedly” admits it did not prove five separate agreements. We disagree. On brief, the State acknowledges there was no proof of any meeting about or discussion between Defendant and the other perpetrators *to plan to commit a series of robberies*. Evidence was offered by the State and by Defendant of meetings and interactions with Defendant and the other conspirators, before and between each robbery, but no evidence of the conversations.

The facts in *Wilson* are also dissimilar to the instant case. No evidence shows any meeting being held between Defendant and the other robbers prior to the robberies to discuss or plan the robberies, or the specific property to be stolen during the course of the robberies. Unlike the facts in *Fink* and *Griffin*, there is no evidence of a meeting between Defendant and the other two perpetrators to devise a single plan to engage in a series of robberies.

The dissent finds Defendant’s case to be most similar to *Medlin*. However the State’s evidence showed defendant-Medlin initiated the idea and suggested to his co-conspirators the plan to break in and steal the televisions and radios that he could sell in his thrift store. *Medlin*, 86 N.C. App. at 119, 357 S.E.2d at 177. The multiple break-ins were part of a single plan to steal merchandise to be sold at Medlin’s thrift store. *Id.* at 122, 357 S.E.2d at 179. Here, the crimes were ones of opportunity, where differing victims were accosted and items were stolen from them as Defendant and his co-conspirators happened to come upon them.

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No evidence limits Defendant as engaged in a one-time, pre-planned and organized, ongoing and continuing conspiracy to engage in robbery and the other crimes. In particular, the random nature and happenstance of the robberies and related crimes here do not indicate a one-time, pre-planned conspiracy. The victims and property stolen were not connected. The victims and crimes committed arose at random and by pure opportunity. Each of the series of crimes on the various victims was committed and completed before Defendant and his co-conspirators moved on and happened upon and mutually agreed to rob and commit other crimes on their next targets and victims of opportunity. Defendant's argument is overruled.

1. *State v. Roberts*

In *State v. Roberts*, 176 N.C. App. 159, 625 S.E.2d 846 (2006), the defendant was convicted of two counts of conspiring to commit first degree burglary and robbery with a dangerous weapon for burglaries and robberies which occurred on two consecutive nights. On the first night, the defendant and others discussed "robbing someone." *Id.* at 161, 625 S.E.2d at 848. The conspirators then burglarized and robbed two separate victims. *Id.* On the second night, the defendant took an active part in another burglary and robbery of different victims, but there was no testimony that the agreement of the first night covered the acts of the second. *Id.*

This Court determined the State had shown separate conspiracies where the defendant and two men agreed to rob someone and nothing else showed subsequent similar criminal acts were committed as part of their initial agreement. *Id.* at 167,

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625 S.E.2d 852. Viewed in the light most favorable to the State, sufficient evidence was presented to allow the jury to find the defendant was involved in two separate conspiracies. *Id.*

2. State v. Glisson

A recent case before this Court addressed the defendant's argument that he had engaged in a single conspiracy to complete three separate transactions. *State v. Glisson*, __ N.C. App. __, 796 S.E.2d 124 (2017). In *Glisson*, the defendant sold oxycodone to an undercover police officer in three separate controlled drug transactions with each transaction being a month or more apart. *Id.* at __, 796 S.E.2d at 126. No evidence was offered to suggest that the defendant planned the transactions as a series. An informant or the police initiated each sale. *Id.* at __, 796 S.E.2d at 129.

This Court held "evidence was sufficient to support a reasonable inference that the defendant planned each transaction in response to separate, individual requests by the buyers" *Id.* "While the objectives of each [crime] may have been similar, the agreed upon amount differed and none of the transactions contemplated future transactions." *Id.*

Considering the totality of the circumstances in the present case, and reviewing the evidence in the light most favorable to the State, sufficient evidence supports a reasonable inference for the jury to consider and conclude that Defendant was involved in five separate conspiracies to commit armed robbery.

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While the dissenting opinion sets forth our same standard of review on motions to dismiss, it appears to ignore its application to the motion to dismiss in the case before us. “In ‘borderline’ or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals.” *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citations omitted) *review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986). “The question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury.” *Tirado*, N.C. App. at 577, 599 S.E.2d at 533 (citation omitted). The trial court did not err by denying Defendant’s motion to dismiss and properly submitted all five conspiracy counts to the jury.

VI. Conclusion

In a motion to dismiss, the trial court must consider the evidence of multiple conspiracies in the light most favorable to the State and give the State every reasonable inference to be drawn from the evidence presented. *Bradshaw*, 366 N.C. at 92-93, 728 S.E.2d at 347. We find no error in Defendant’s convictions or the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judge STROUD concurs.

Judge ELMORE dissents with separate opinion.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority’s decision to affirm the trial court’s denial of defendant’s motions to dismiss four of the five counts of conspiracy to commit robbery with a firearm. The State failed to present substantial evidence of multiple agreements between defendant and his co-conspirators as required to prove more than one conspiracy. Applying the four factors from *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 (1984), the State only proved that defendant engaged in one conspiracy. Accordingly, I respectfully dissent.

I. Standard of Review

A trial court’s denial of a motion to dismiss is accorded *de novo* review. *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010). A trial court properly denies a defendant’s motion to dismiss if “there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of defendant’s being the perpetrator of such offense.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) Whether evidence is substantial “is a question of law for the court and is reviewed *de novo*. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Glisson*, ___ N.C. App. ___, ___, 796 S.E.2d 124, 127–28 (2017) (internal citations and quotation marks omitted). On a motion to dismiss, a trial court must consider the evidence in a light most favorable to the State. *State v. Stone*, 323 N.C. 447, 451, 373 S.E.2d 430, 433

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(1988). A motion to dismiss is properly denied when the evidence gives rise to a reasonable inference of guilt and is properly allowed when the evidence only raises a suspicion or conjecture as to the defendant's guilt. *Id.* at 452, 373 S.E.2d at 433.

Criminal Conspiracy

“A criminal conspiracy is an agreement between two or more people to do an unlawful act [T]o prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice.” *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (internal citation omitted). When the State charges a defendant with two or more conspiracies, “it must prove not only the existence of *at least two agreements* but also that they were *separate*.” *State v. Griffin*, 112 N.C. App. 838, 840, 437 S.E.2d 390, 392 (1993) (emphasis added). “A single conspiracy may, and often does, consist of a series of different offenses.” *Id.* at 841, 437 S.E.2d at 392. However, a series of different offenses “arising from a single agreement [does] not permit prosecutions for multiple conspiracies.” *Rozier*, 69 N.C. App. at 52, 316 S.E.2d at 902; *see also State v. Howell*, 169 N.C. App. 741, 749, 611 S.E.2d 200, 205–06 (2005) (arresting judgment for one of two drug conspiracy convictions when there was only evidence of “*one agreement or mutual understanding*” and multiple overt acts (emphasis added)). Such prosecutions are inconsistent with the constitutional prohibition against double jeopardy. *State v. Medlin*, 86 N.C. App. 114, 121, 357 S.E.2d 174, 178 (1987) (citing *United States v. Kissel*, 218 U.S. 601, 31 S. Ct. 124, 54 L. Ed. 1168 (1910)). “It is the

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number of separate agreements, rather than the number of substantive offenses agreed upon, which determines the number of conspiracies.” *State v. Worthington*, 84 N.C. App. 150, 163, 352 S.E.2d 695, 703, *disc. rev. denied*, 319 N.C. 677, 356 S.E.2d 785 (1987) (citations omitted).

Nevertheless, it is difficult to determine whether a single or multiple conspiracies are involved in a particular case. This Court in *Rozier* established four factors to consider when determining whether a defendant has committed single or multiple conspiracies. 69 N.C. App. at 52, 316 S.E.2d at 902. Those factors are (1) the time intervals between the crimes, (2) the specific participants involved, (3) the conspiracy’s objectives, and (4) the number of meetings among the participants. *Id.* On appeal, defendant argues that applying the *Rozier* factors to his case reveals a single conspiracy, not five. I agree. To support his argument, defendant cites to four decisions from this Court that applied the *Rozier* factors and found a single conspiracy.

III. Summary of *Rozier* Cases

A. *State v. Medlin*

In *State v. Medlin*, the State’s evidence showed that the defendant participated in ten break-ins of retail stores across Durham from May to August of 1985. 86 N.C. App. at 121, 357 S.E.2d at 178. The robberies were conducted in a similar manner; various electronics were stolen from each location and the defendant and his co-conspirator, Walter Cox, participated in all ten robberies while a third co-conspirator

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participated in three. *Id.* at 117–21, 357 S.E.2d at 176–78. Cox testified that he and the defendant would meet after each break-in to plan the next one. *Id.* at 122, 357 S.E.2d at 179. The defendant was convicted of seven counts of conspiracy to break or enter and appealed the judgment, arguing that the State’s evidence showed only “a single scheme or plan to commit an ongoing series of felonious breakings or enterings.” *Id.* at 121, 357 S.E.2d at 178.

The *Medlin* panel, applying the *Rozier* factors, “[found] ample evidence of a single conspiracy.” *Id.* at 122, 357 S.E.2d at 179. The panel first determined the break-ins were conducted over a short time period of four months, “some within ten days of each other.” *Id.* Second, these crimes were committed by the same three participants, despite the third co-conspirator not being present for some of the robberies. *Id.* Third, the participants had the common objective to steal televisions and radios from Durham retail stores. *Id.* Finally, the panel considered the number of meetings among the participants. Although the defendant met with his co-conspirators generally after each break-in, the purpose of the meetings was to “divide the spoils and discuss the next break-in.” *Id.* The panel summarized the fourth *Rozier* factor as follows:

The gist of the meetings was to plan subsequent break-ins in furtherance of the original unlawful agreement made sometime before the first break-in. We are hard pressed to find facts more clearly telling of an

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ongoing series of acts in furtherance of a single conspiracy to break or enter. Rather than show ten separate conspiracies to break or enter on ten separate occasions as the State contends, these facts show one unlawful agreement to break or enter as many times as the participants could get away with.

Id. Accordingly, the *Medlin* panel vacated the defendant's seven conspiracy convictions and remanded for entry of a judgment on one conspiracy conviction, with instructions to resentence the defendant on this single conspiracy conviction. *Id.* at 123, 357 S.E.2d at 179.

B. *State v. Wilson*

In *State v. Wilson*, the State's evidence showed the defendant participated in a series of residential and retail robberies that occurred in Durham over two weeks in December 1988. 106 N.C. App. 342, 344, 416 S.E.2d 603, 604 (1992). The robberies were similar in nature and either two or three perpetrators in ski masks committed each one. *Id.* The defendant was convicted of, *inter alia*, four counts of conspiracy to commit armed robbery. *Id.* at 345, 416 S.E.2d at 604. The defendant appealed the judgment, arguing that three of the conspiracy convictions should be vacated because the evidence only supported one conspiracy. *Id.*

On appeal, the *Wilson* panel concluded the facts were "legally indistinguishable" from *Medlin*. *Id.* at 346, 416 S.E.2d at 605. Applying the *Rozier*

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factors, the panel first determined that the time period for these robberies was a mere two weeks — even shorter than in *Medlin*. *Id.* Second, the participants were generally the same in each robbery. *Id.* “The fact that in two of the robberies the conspirators solicited the assistance of a third man is inconsequential.” *Id.*; *see, e.g., State v. Overton*, 60 N.C. App. 1, 13, 298 S.E.2d 695, 702–03 (1982), *disc. rev. denied*, 307 N.C. 580, 299 S.E.2d 652 (1983). Third, there was a common objective based on the similar nature of the robberies and one participant’s testimony that the purpose was to acquire cash. *Id.* at 346–47, 416 S.E.2d at 605–06. Finally, the panel determined that, unlike *Medlin*, there was no evidence of meetings among the participants between each robbery. *Id.* at 346, 416 S.E.2d at 605. As a result, the panel held there was evidence of one conspiracy “to break or enter as many times as the participants could get away with.” *Id.* at 347, 416 S.E.2d at 606 (quoting *Medlin*, 86 N.C. at 122, 357 S.E.2d at 179). The panel vacated three of the defendant’s conspiracy convictions and remanded with instructions to resentence. *Id.*

C. *State v. Griffin*

In *State v. Griffin*, the defendant was indicted on eight counts of conspiracy to provide an inmate with a controlled substance. 112 N.C. App. at 838, 437 S.E.2d at 391. The State’s evidence showed that the defendant conspired with civilians and other inmates to smuggle various prescription drugs into the prison so the defendant could make a profit, and drugs were smuggled into the prison as a part of this conspiracy on at least four separate occasions in June 1991. *Id.* at 839–40, 437 S.E.2d

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at 391–92. The defendant was convicted of four counts of conspiracy and appealed, arguing there was only a single scheme to bring drugs into the prison. *Id.* at 840, 437 S.E.2d at 392.

The *Griffin* panel applied the *Rozier* factors and held that this amounted to one conspiracy, not four. *Id.* at 841, 437 S.E.2d at 392. First, the panel determined the one-month span was a short time interval. *Id.* Second, there were four common participants based on who the State named in its indictments. *Id.* Third, the common objective of each conspiracy was to deliver controlled substances to an inmate to sell for a profit. *Id.* “Finally, the State presented no evidence concerning the number of meetings which took place between [the] defendant and the other participants.” *Id.* Thus, the panel vacated three of the defendant’s four conspiracy convictions and remanded for resentencing. *Id.* at 842, 437 S.E.2d at 393.

D. *State v. Fink*

In *State v. Fink*, the State’s evidence revealed that the defendant and his brothers sold cocaine from their house. 92 N.C. App. 523, 525, 375 S.E.2d 303, 304 (1989). One of the buyers was an undercover SBI agent who purchased cocaine from the defendant over the course of several months. *Id.* at 525, 375 S.E.2d at 305. The basis of the State’s two conspiracy charges of trafficking in cocaine occurred on the evening of 19 February and the morning of 20 February 1987. *Id.* at 525–26, 375 S.E.2d at 305. The undercover agent conducted a drug buy at the defendant’s residence on the 19th and executed a search warrant the next morning, and cocaine

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was found on both occasions. *Id.* The defendant was convicted of two counts of conspiracy and one count of trafficking in cocaine. *Id.* at 527, 375 S.E.2d at 305–06. The defendant appealed, arguing that there was evidence of only one conspiracy. *Id.* at 532, 375 S.E.2d at 308.

On appeal, the *Fink* panel held that the two charged conspiracies “were so overlapped as to comprise one continuing conspiracy.” *Id.* at 533, 375 S.E.2d at 309. Applying the *Rozier* factors, the panel first determined that the two conspiracies occurred within hours of each other. *Id.* Second, the participants (i.e., the defendant and his brothers) were the same, with the exception of a middle man for the drug buy on 19 February 1987. *Id.* Third, the common objective was to traffic in cocaine, notwithstanding the varying amounts of cocaine for each conspiracy. *Id.* Finally, despite no evidence of meetings, the State argued at trial that this was a “continuing conspiracy.” *Id.* The panel vacated one of the conspiracy convictions and remanded for resentencing on the remaining conspiracy conviction. *Id.* at 534, 375 S.E.2d at 310.

IV. Analysis

I agree with defendant that the four *Rozier* cases are similar to the present case. Each relevant factor is addressed in turn.

A. Application of *Rozier* Factors

i. Time Intervals

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The first *Rozier* factor is the time interval between each crime. It is implied that time is a crucial factor because a short time interval between crimes signifies a low possibility that an agreement can be made between each crime.

The panel in each of the four *Rozier* cases found the respective time intervals to be short. *Griffin*, 112 N.C. App. at 841, 437 S.E.2d at 392 (one month); *Wilson*, 106 N.C. App. at 346, 416 S.E.2d at 605 (two weeks); *Fink*, 92 N.C. App. at 533, 375 S.E.2d at 309 (less than 24 hours); *Medlin*, 86 N.C. App. at 122, 357 S.E.2d at 179 (four months). Although the defendants in the *Rozier* cases had plenty of time to meet or make an agreement in between the crimes, the State did not present evidence of meetings or agreements that occurred in between the crimes in those cases. Moreover, the panels in those cases did not infer the presence of meetings or agreements based on the time intervals.

Here, the time interval in which the five robberies occurred is two to three hours — much shorter than in any of the four *Rozier* cases. Notably, the longest time interval cited by any of the *Rozier* cases is four months, yet the *Medlin* panel still held that application of the *Rozier* factors resulted in a single conspiracy. Nevertheless, the majority fails to credit the time interval of two to three hours in this case.

ii. Participants

The second *Rozier* factor is the specific participants involved in each crime. This factor is significant because when the participants to each crime are completely different, the State must prove separate conspiracies for each crime. However, when

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the participants are the same, there could potentially be one conspiracy to commit several crimes.

In *Medlin* and *Wilson*, the same two individuals participated in each crime, but a third individual participated in some but not all of the crimes. In *Fink*, the defendant and his brother participated in each alleged crime, despite the SBI's use of a middle man to make the drug purchase. Regardless, the *Wilson* panel determined that the addition or absence of one participant was "inconsequential."

That scenario is not present in this case. Here, as in *Griffin*, the participants are the exact same in each of the five robberies.

iii. Objectives

The third *Rozier* factor is the objective of each alleged conspiracy. 69 N.C. App. at 52, 316 S.E.2d at 902. When the objective of each alleged conspiracy is different, this leans toward separate conspiracies. But when the objective of each alleged conspiracy is same, this leans toward a single conspiracy.

Each panel in the *Rozier* cases determined that the objective of each alleged conspiracy was the same. The *Medlin* panel determined that the conspirators had the common goal to "break or enter as many times as [they] could get away with." The *Wilson* panel concluded there was a common objective to acquire cash during the several robberies, which was determined based on the nature of the robberies and the testimony of a participant.

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Defendant's case is most similar to *Medlin*. Here, the participants committed a string of robberies early one morning over the course of a few hours before they were caught by the police. Unlike *Wilson*, there was no testimony from a participant about the objective, but the objective here can be determined based on the nature and similarity of the crimes. Thus, the objective of each alleged conspiracy is to commit an armed robbery, which leans toward a single conspiracy.

iv. Meetings

The final *Rozier* factor is the number of meetings among the participants. This factor is crucial to determining the number of conspiracies because it tends to reflect the number of agreements among the participants. To prove a single conspiracy, the State must show an express or implied understanding of an agreement. *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835. To prove two or more conspiracies, the State must prove two or more separate agreements. *Griffin*, 112 N.C. App. at 840, 437 S.E.2d at 392. When the State proves multiple separate meetings among the participants, a jury could infer multiple implied understandings, and thus multiple conspiracies. *See State v. Choppy*, 141 N.C. App. 32, 40–41, 539 S.E.2d 44, 50 (2000), *disc. rev. denied*, 353 N.C. 384, 547 S.E.2d 817 (2001).

In *Griffin*, *Wilson*, and *Fink*, the State presented no evidence of any meetings among the conspirators before, during, or after the crimes that would allow the jury to infer implied understandings of agreements. Although the *Medlin* panel determined that the participants met between the robberies, the purpose of the

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meetings was to divide the spoils and plan the next robbery “in furtherance of the original unlawful agreement.” One similarity in each *Rozier* case is that no panel held that an implied understanding could be shown by the participants’ actions.

As the majority notes, the State “offered no testimony concerning any discussions between the co-participants before, during, or after each robbery,” similar to *Griffin*, *Wilson*, and *Fink*. However, there is evidence that defendant spent the evening prior to the robberies with the other two perpetrators. Although this may be enough for a jury to find an implied understanding of an agreement for a single conspiracy, I respectfully disagree with the majority’s conclusion that there is no error in defendant’s convictions.

The State failed to present substantial evidence of four meetings or agreements among the participants. The State charged defendant with five conspiracies and, under *Griffin*, was required to prove five separate meetings or agreements between the participants. Defendant established an implied understanding for one agreement when he testified that he and his fellow perpetrators met the night before the robbery. This single meeting is only enough for the jury to infer a single conspiracy, and the burden was on the State to present evidence of four other separate meetings or agreements. However, the State impliedly admits that it failed to do this by arguing on appeal that “[i]ndeed, there is *no* evidence present that any meetings ever took place between the defendant and any of his fellow perpetrators.” (Emphasis added.) Because the State did not present *any* evidence – substantial or not – of the

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agreement element for four of the five conspiracies, the trial court should have granted defendant's motion to dismiss. The State argues there was an implied understanding to commit each robbery based on the action of committing each robbery. However, the panels in the *Rozier* cases did not find an implied understanding based on the participants' actions, and I believe it would be unwise to depart from that precedent now.

B. "Continuing Conspiracy"

The *Fink* panel, like *Wilson* and *Griffin*, determined there was no evidence of any meetings between any co-conspirator prior to or during the crimes. It held, however, that there was a "continuing conspiracy" to commit a crime. Here, the majority does not believe this is a continuing conspiracy because each crime was "committed and completed before [d]efendant and his co-conspirators moved on and happened upon and *mutually agreed* to rob and commit other crimes on their next targets . . ." (Emphasis added.) I respectfully disagree. The five robberies at issue here were completed in an exceedingly short time interval, the same participants were involved in each robbery, there was a common objective to commit each crime, and the State did not present evidence of five separate agreements between the co-conspirators. Furthermore, the majority concludes that the participants mutually agreed to commit these crimes without evidence of five separate agreements.

C. Multiple Conspiracy Cases

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The majority cites to two cases from this Court to support its conclusion that there were multiple conspiracies here. Both, however, are distinguishable from the instant case.

i. *State v. Roberts*

In *State v. Roberts*, the State's evidence showed the defendant engaged in two robberies on consecutive nights in December 2002. 176 N.C. App. 159, 160–61, 625 S.E.2d 846, 848 (2006). Both robberies involved three masked perpetrators, and each night, one perpetrator brandished a shotgun while another forced their victim to perform fellatio on him. *Id.* at 161, 625 S.E.2d at 848. The State's evidence also revealed that, on the night of the first robbery, the defendant met with the other two individuals from that robbery. *Id.* at 167, 625 S.E.2d at 852. It is unclear if those two individuals were the same or different participants in the second robbery. The defendant was convicted of, *inter alia*, four counts of conspiracy to commit the offenses of first degree burglary and robbery with a dangerous weapon. *Id.* at 161–62, 625 S.E.2d at 848–49. The defendant appealed, arguing the State only proved a single conspiracy. *Id.* at 166, 625 S.E.2d at 851.

On appeal, the *Roberts* panel mentioned the *Rozier* factors but did not apply them. *Id.* at 167, 625 S.E.2d at 852. Instead, the panel determined there was no evidence that the agreement made among the defendant and his co-perpetrators was meant to extend beyond the first robbery. *Id.* The panel stated that “[t]he mere fact that the defendant was involved in a similar crime the next night does not indicate

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the two crimes were committed as part of the agreement made on” the night of the first robbery. *Id.* The *Roberts* panel ultimately overruled the defendant’s assignment of error on the conspiracy convictions. *Id.*

The majority cites to *Roberts* to show that our Court has upheld multiple conspiracy convictions, but fails to see that *Roberts* indicates that defendant here should have been charged with one conspiracy. In *Roberts*, the defendant was charged with two counts of two different conspiracies, which required the State to prove separate elements for each different conspiracy. It is not clear whether the defendant in *Roberts* participated in each robbery with the same two perpetrators. Assuming *arguendo* that the defendant was the only common perpetrator in each robbery, then the defendant would have had to make two separate agreements.

Here, the perpetrators in the five robberies were all the same, and defendant was charged with five counts of conspiracy to commit robbery with a firearm. This means the State had to prove each element of this conspiracy five separate times, but the evidence only established the “agreement” element once. Thus, *Roberts* is distinguishable from the case at bar, and I would not apply it.

ii. *State v. Glisson*

In *State v. Glisson*, the defendant sold oxycodone to an undercover officer on three separate occasions. ___ N.C. App. at ___, 796 S.E.2d at 126. The first drug buy in August 2012 was initiated by an informant with an undercover officer present, while the second and third drug buys in September and December 2012 were initiated

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by the undercover officer. *Id.* The defendant also brought the same third party to each drug buy. *Id.* The trial court convicted the defendant of conspiracy to sell opium, conspiracy to deliver opium, and conspiracy to possess with the intent to sell or deliver opium. The defendant appealed, arguing that she engaged in one continuing conspiracy. *Id.* at ___, 796 S.E.2d at 127–28.

On appeal, the *Glisson* panel applied the *Rozier* factors and found multiple conspiracies. *Id.* at ___, 796 S.E.2d at 128–29. First, the panel found that one month passed between the first and second drug buys and two months passed between the second and third. *Id.* at ___, 796 S.E.2d at 129. Second, even though the informant was only present for the first drug buy, the participants were the same: the defendant, her third party, and the undercover officer. *Id.* Third, even though the objectives may have been similar, the amount of drugs varied. *Id.* Finally, and most significantly, there was no meeting among the participants to engage in each drug buy, and the defendant did not plan the next drug buy since each was initiated by either the informant or the undercover officer. *Id.* This shows the defendant could not have anticipated future drug buys and therefore had to separately agree to each transaction. *Id.* Thus, the *Glisson* panel concluded there were multiple conspiracies. *Id.*

Again, the majority cites to *Glisson* to support its contention that our Court has previously found multiple conspiracies, but it fails to acknowledge the factual differences between the two cases. First, as in *Roberts*, the defendant in *Glisson* was

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charged with three conspiracies related to three different incident offenses, which required the State to prove separate elements for each conspiracy. Here, defendant was charged with five counts of conspiracy for the same incident offense. Second, even though the *Glisson* panel applied the *Rozier* factors, the “meeting” factor is significantly different. In *Glisson*, it was determined there were no meetings between the participants, except for the drug buys themselves, because the defendant did not initiate the transactions and thus could not have anticipated the future drug buys. Here, defendant spent the night prior to the robberies with his fellow perpetrators, and a jury could infer that the purpose of this meeting was to plan and agree to commit as many robberies as possible. Additionally, the State presented no evidence of any other meetings prior to or during the robberies. Coupled with the other *Rozier* factors, this indicates a single conspiracy. This case is therefore distinguishable from *Glisson*.

V. Conclusion

The majority declines to apply *Rozier* and its progeny to this case, effectively overlooking years of precedent from this Court. I, however, would apply the *Rozier* factors to defendant’s case. First, the time interval was a few hours – much shorter than in *Medlin*, *Wilson*, *Griffin*, or *Fink*. Second, the participants in the five robberies appear to be the same: defendant and the two men he met earlier that night. Third, the objective of each crime is the same: to commit robbery with a dangerous weapon. Finally, the State presented no evidence of any meetings between defendant

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and the co-conspirators prior to or during the robberies. Although the jury could find an implied understanding to commit a robbery based on defendant's testimony that he spent the evening prior to the robberies with the other two perpetrators, this only supports one conspiracy conviction; the State failed to present evidence of four other *separate* meetings or agreements. Similar to *Medlin*, the facts here show one agreement to commit as many robberies as possible.

Applying *Rozier*, I believe defendant committed only one conspiracy. I would therefore hold that the trial court erred by failing to dismiss the four other counts of conspiracy to commit robbery with a firearm, and I would vacate four of defendant's five conspiracy convictions and remand for resentencing on the remaining one. *See, e.g., Rozier*, 69 N.C. App. at 54, 316 S.E.2d at 903 (holding that the earliest conspiracy conviction should stand when more than one conspiracy is charged but only one is proven). I respectfully dissent from the majority's decision to uphold four of defendant's conspiracy convictions.