IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-556

Filed: 3 March 2020

Forsyth County, No. 17 CRS 56929

STATE OF NORTH CAROLINA

v.

CORY WILSON

Appeal by defendant from judgment entered 25 October 2018 by Judge V. Bradford Long in Forsyth County Superior Court. Heard in the Court of Appeals 3 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State.

Richard Croutharmel for defendant-appellant.

ZACHARY, Judge.

Defendant Cory Wilson appeals from a judgment entered upon a jury's verdict finding him guilty of attempted robbery with a dangerous weapon. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

In the early hours of 18 July 2017, Defendant entered a Walmart in Winston-Salem, pointed a gun at an employee, and demanded to be taken to the store's safe. The employee, Brandy Moye, led him to the store's breakroom. Upon seeing the other employees in the breakroom, Defendant fled the store. Moye immediately called 911, and law enforcement officers arrived within three minutes. Defendant was arrested later that day, and charged with attempted robbery with a dangerous weapon.

On 23 October 2018, Defendant's case came on for trial before the Honorable V. Bradford Long in Forsyth County Superior Court. At the conclusion of the trial, the jury found Defendant guilty of attempted robbery with a dangerous weapon. The trial court sentenced Defendant to 90-120 months in the custody of the North Carolina Division of Adult Correction. Defendant gave oral notice of appeal in open court.

Discussion

Defendant argues that the trial court erred by: (1) excluding statements that should have been admitted under the present sense impression exception to the hearsay rule; and (2) failing to instruct the jury on attempted common law robbery.

I.

Officer J.F. Bross, a police officer with the Winston-Salem Police Department, responded to Moye's 911 call. At trial, Defendant asked Officer Bross during cross-examination whether the 911 dispatcher mentioned that Defendant's gun might have

been fake. Officer Bross's notes indicated that the dispatcher stated that Defendant was wielding a "smaller gun," and that the dispatcher was "UTA [unable to advise] if it is real." The trial court excluded the testimony as inadmissible hearsay, but allowed the jury to consider Officer Bross's report of the dispatcher's statements "for the purpose of determining [their] effect on the listener[.]"

On appeal, Defendant argues that the trial court erred by not admitting the 911 dispatcher's statements as recorded in Officer Bross's notes for substantive purposes under Evidentiary Rule 803(1).

A. Standard of Review

This Court reviews de novo "the trial court's determination of whether an out-of-court statement is admissible pursuant to" the present sense impression exception to the rule against hearsay. *State v. Wilson*, 197 N.C. App. 154, 159, 676 S.E.2d 512, 515, *disc. review denied*, 363 N.C. 589, 684 S.E.2d 158 (2009). Under this standard of review, "the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation omitted).

B. Evidentiary Rule 803(1): Present Sense Impression

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2019). "A 'statement' is (1) an

oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." *Id.* § 8C-1, Rule 801(a).

Although hearsay is ordinarily inadmissible at trial, *id.* § 8C-1, Rule 802, there are exceptions to the rule. The "present sense impression" exception provides that "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" may be admitted. *Id.* § 8C-1, Rule 803(1). This exception recognizes that the "substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." *Id.* cmt. Precise contemporaneity is not required for admission under Rule 803(1); "a slight lapse is allowable." *Id.* cmt. Moreover, the immediacy of perception alleviates the concern of faulty memory and provides insufficient time for intentional deception. *State v. Blankenship*, ___ N.C. App. ___, ___, 814 S.E.2d 901, 912 (2018), *disc. review denied*, 372 N.C. 295, 827 S.E.2d 98 (2019); N.C. Gen. Stat. § 8C-1, Rule 803 cmt. As a further safeguard, the present sense impression exception is limited to a description or explanation of the event or condition being perceived. N.C. Gen. Stat. § 8C-1, Rule 803(1).

C. Analysis

Here, Defendant contends that because Officer Bross arrived at the Walmart within three minutes of Moye's call to 911, the 911 dispatcher's statements to Officer Bross must have been made within the same three minutes. Thus, in that they were

made mere moments after speaking with Moye, the dispatcher's statements should have been admitted as falling within the present sense impression exception to the hearsay rule. We disagree.

The 911 dispatcher did not perceive the attempted robbery or have firsthand knowledge of Defendant's actions. This is critical, because "[i]n a hearsay situation, the declarant is, of course, a witness, and neither this Rule nor Rule 804 dispenses with the requirement of firsthand knowledge." *Id.* cmt. While Moye's statements to the 911 dispatcher arose from firsthand observation, the dispatcher could only provide a *secondhand* account of the attempted robbery. Therefore, the 911 dispatcher's statements could not properly be admitted under the present sense impression exception, regardless of the immediacy of their conveyance to Officer Bross.

Nevertheless, Defendant exhorts this Court to view the facts of this case through the lens of *Wooten v. Newcon Transportation, Inc.*, 178 N.C. App. 698, 632 S.E.2d 525, *disc. review denied*, 361 N.C. 704, 655 S.E.2d 405 (2007), a workers' compensation case in which the plaintiff introduced a 911 report of an automobile accident into evidence. "The rules of evidence do not strictly apply in worker's compensation cases," and "even if they did," the 911 dispatch report was excepted from the general hearsay ban. *Wooten*, 178 N.C. App. at 703, 632 S.E.2d at 529. There, the Industrial Commission "determined that the 911 calls were admissible in

their entirety pursuant to the hearsay exceptions of Rule 803(1), (2), (6) and (8)." *Id.* Applying Evidentiary Rule 805—"[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules"—we determined that "the Commission did not err" by "admitting the 911 dispatch report into evidence." *Id.* Thus, Defendant's reliance on *Wooten* is unsound insofar as he has only asserted that the dispatcher's report is admissible under the present sense impression exception.

Because the 911 dispatcher's lack of firsthand knowledge precludes admissibility of the statements under the present sense impression exception, Defendant's argument lacks merit.

II.

Defendant next argues that the trial court erred in failing to instruct the jury on the lesser-included offense of attempted common law robbery. In accordance with our determination that the 911 dispatcher's comments were properly excluded as substantive evidence, we disagree.

A. Standard of Review

We review de novo a trial court's decision not to instruct the jury on attempted common law robbery as a lesser-included offense of attempted armed robbery with a dangerous weapon. *See State v. Clevinger*, 249 N.C. App. 383, 391, 791 S.E.2d 248, 255 (2016).

B. Analysis

Robbery with a dangerous weapon is "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *Id.* at 392, 791 S.E.2d at 255. "Common law robbery is a lesser-included offense of robbery with a dangerous weapon. The difference between the two offenses is that robbery with a dangerous weapon is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *Id.* (citations and internal quotation marks omitted).

Defendant maintains that Officer Bross's inability to tell whether the gun was fake entitled him to an instruction on attempted common law robbery. This argument rests on *State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986), in which our Supreme Court explained that

> [i]n an armed robbery case the jury may conclude that the weapon is what it appears to the victim to be in the absence of any evidence to the contrary. If, however, there is any evidence that the weapon was, in fact, not what it appeared to the victim to be, the jury must determine what, in fact, the instrument was.

317 N.C. at 125, 343 S.E.2d at 897.

Just as Defendant's reliance on *Wooten* cut against him in his first argument, so too does his reliance on *Allen*. As previously established, Officer Bross's testimony—that Defendant had a smaller gun that might not have been real—was

correctly excluded for the truth of the matter asserted. Thus, there was no substantive evidence that the gun was fake. *See Clevinger*, 249 N.C. App. at 392, 791 S.E.2d at 255 ("If . . . the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser[-]included offense, it is not error for the trial judge to refuse to instruct on the lesser offense." (internal quotation marks omitted)). Indeed, Moye testified that she felt that she "was going to die" because she thought Defendant's gun was real.

Additionally, our case law "permit[s] the [S]tate to rely on a mandatory presumption that an instrument which appears to the victim to be a firearm . . . capable of threatening or endangering the victim's life is in law such a weapon . . . when there is no evidence in the case to the contrary." *Allen*, 317 N.C. at 125, 343 S.E.2d at 897.

> [I]n a case where the instrument used to commit a robbery is described as appearing to be a firearm or other dangerous weapon capable of threatening or endangering the life of the victim and there is no evidence to the contrary, it would be proper to instruct the jury to conclude that the instrument was what it appeared to be. The jury should not be so instructed if there is evidence that the instrument was not, in fact, such a weapon, but was a toy pistol or some other instrument incapable of threatening or endangering the victim's life even if the victim thought otherwise.

Id.

Bereft of any evidence that the gun was fake, the trial court properly declined to instruct the jury on attempted common law robbery. *See State v. Locklear*, 259 N.C. App. 374, 377, 816 S.E.2d 197, 201 (2018) ("[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial.").

Conclusion

For the reasons stated herein, the trial court did not err by (1) excluding the 911 dispatcher's statements, and (2) declining to instruct the jury on attempted common law robbery.

NO ERROR.

Chief Judge McGEE and Judge DIETZ concur.

Report per Rule 30(e).