IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-375

Filed 20 February 2024

Cabarrus County, Nos. 21 CRS 412, 51890

STATE OF NORTH CAROLINA

v.

DAMARLO JAMON PERRY a/k/a DEMARLO JAMON PERRY, Defendant.

Appeal by Defendant from judgment entered 1 September 2022 by Judge David L. Hall in Cabarrus County Superior Court. Heard in the Court of Appeals 3 October 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stacey A. Phipps, for the State.

The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for defendant-appellant.

MURPHY, Judge.

It is well established that a reasonable jury may infer a defendant's intent from the nature of his acts. The reverse, however, is not true: a reasonable jury may not infer a defendant's acts from his intent or other mental state alone or in conjunction with an opportunity for the act.

Defendant appeals his conviction of robbery with a dangerous weapon on the grounds that the State did not present substantial evidence that he took the victim's

property. We hold the circumstantial evidence in this case—the victim's missing property, Defendant's opportunity to commit the crime, and Defendant's intent or plan to rob—even in the light most favorable to the State, is not sufficient to sustain Defendant's conviction under our Supreme Court's caselaw. We therefore conclude the trial court erred by failing to grant Defendant's motion to dismiss the robbery with a dangerous weapon charge and reverse Defendant's conviction of that crime.

BACKGROUND

Damon Scott visited the apartment of Shenika Lynch on the night of 18 May 2021, bringing his phone, house key, and $250.00. Sometime after Scott's arrival, an unidentified woman hit Scott in the head with a gun, knocking him to the ground. Defendant then appeared and hit Scott in the head with his gun and began, along with others, stomping on Scott, causing Scott to pass out. Sometime later, Scott woke up in or near the road, injured and missing some of his possessions. Scott flagged down a driver who drove him home, where his niece was present. She later brought him to the hospital.[1] Scott's injuries required a long-term hospital stay and three surgeries, and resulted in lasting pain.

[1] Defendant argues, "[o]nly after reaching the hospital did [] Scott realize any of his items were missing." At trial, Scott testified he realized he was missing his possessions after his arrival at the hospital. In a statement not admitted for substantive purposes, Detective John Cramer of the Kannapolis Police Department testified to a transcribed statement by Scott from 30 June 2021. In that statement, Scott claimed his property was already missing by the time the driver picked him up.

Defendant was indicted for robbery with a dangerous weapon and assault inflicting serious bodily injury in connection with his attack on Scott. The trial court permitted the State to present evidence of Defendant's participation in a prior armed robbery as evidence of Defendant's mental state. The trial court offered a limiting instruction in accordance with Rule 404(b) of the North Carolina Rules of Evidence. *See* N.C.G.S. § 8C-1, R. 404(b) (2022). It instructed

> [e]vidence was received tending to show that . . . Defendant conspired to rob another person while using a firearm as blunt force. This evidence was received solely for the purposes of showing, one, that [] Defendant had the intent which is a necessary element of . . . robbery with a dangerous weapon and assault inflicting serious bodily injury; or second, that there existed in the mind of [] Defendant, a plan, scheme, system, or design involving one of those two crimes, in this case robbery with a dangerous weapon or assault inflicting serious bodily injury, or the absence of an accident or mistake relative to those two crimes, robbery with a dangerous weapon and assault inflicting serious bodily injury.

That evidence showed that, in the early morning hours of 21 May 2012, Defendant and two others asked a man for money and struck him in the head with a gun. The man threw his wallet, which Defendant retrieved before fleeing.

Defendant moved to dismiss all charges at the close of the State's evidence, but the trial court denied the motion. Defendant did not present evidence, then renewed his motion to dismiss, which the court again denied. He was convicted of both charges, then pleaded guilty to being a habitual felon. On appeal, he makes arguments related only to the robbery with a dangerous weapon conviction.

ANALYSIS

Defendant raises the sole issue of whether the trial court erred by denying his motion to dismiss the robbery with a dangerous weapon charge. He argues the State did not present substantial evidence for a reasonable jury to find that he or someone acting in concert took Scott's personal property. We agree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62 (2007).

> When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of [the] defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied. . . .
>
> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed. This is true even though the suspicion so aroused by the evidence is strong.
>
> . . . .
>
> The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial or both.

State v. Earnhardt, 307 N.C. 62, 65-66, 68 (1982) (marks and citations omitted). In other words,

> [c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 379 (2000) (third alteration in original) (marks and citation omitted).

"When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State, resolving all conflicts in the evidence in favor of the State and giving it the benefit of all reasonable inferences." *State v. Tirado*, 358 N.C. 551, 582 (2004). "Both competent and incompetent evidence must be considered. In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *Fritsch*, 351 N.C. at 379 (marks and citation omitted).

"The elements of [robbery with a dangerous weapon, in violation of N.C.G.S. § 14-87 (2022)] are: (1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *State v. Call*, 349 N.C. 382, 417 (1998). Defendant argues the fact that he assaulted Scott and Scott's personal property disappeared only raised a suspicion

or conjecture that Defendant took Scott's property. The State argues these facts, along with Defendant's participation in the 2012 robbery, "when examined in totality remove the issue from [the] realm of suspicion and conjecture[.]"

Defendant's assault on Scott and the disappearance of Scott's property, standing alone, do not permit a reasonable jury to infer he took Scott's property. "Under well-settled caselaw, evidence of a defendant's mere opportunity to commit a crime is not sufficient to send the charge to the jury." *State v. Campbell*, 373 N.C. 216, 221 (2019).

In *State v. Moore*, evidence that the defendant assaulted a victim who discovered her property missing thereafter merely showed the defendant had the opportunity to take the victims' property and, therefore, could not sustain the defendant's conviction of robbery with a dangerous weapon where any nearby would-be thief also had such an opportunity. *State v. Moore*, 312 N.C. 607, 613 (1985). There, the defendant sexually assaulted a store employee at knifepoint in the store's bathroom before leaving the bathroom but remaining in the store. *Id.* at 609. The victim emerged from the bathroom once she could no longer hear the defendant and fled the store to seek help, leaving the store unlocked and unattended for 40 to 45 minutes until police arrived. *Id.* at 609, 612. Upon returning to the store two hours after the attack, the victim discovered her wallet missing from her purse near the cashier's counter. *Id.* at 609-10. Our Supreme Court—without identifying any evidence that anyone other than the defendant and victim actually entered the

store—reasoned the period when the store was unlocked and unattended meant that "[a]nyone in the vicinity . . . *could have* entered the store during this time and taken the wallet." *Id.* at 613 (emphasis added).[2] It held the evidence "disclose[d] no more than an opportunity for [the] defendant, as well as others, to have taken the money" and was "insufficient . . . to sustain [the] defendant's conviction of robbery with a dangerous weapon."[3] *Id.*

However, an opportunity, in conjunction with additional circumstances, could permit a reasonable jury to infer a taking of property. In *State v. Baker*, our Supreme Court distinguished *Moore* to hold the circumstantial evidence in that case was sufficient to "support[] an inference that a common-law robbery was committed and [the] defendant was the perpetrator." *State v. Baker*, 338 N.C. 526, 561 (1994). There, early in the morning, a truck driver briefly observed the defendant and another man

---

[2] The Court noted this was "a vicinity in which [the victim's] sense of insecurity caused her to keep the store's *front* door locked during business hours[.]" *Moore*, 312 N.C. at 613. Cases distinguishing *Moore* have taken this to mean the store in *Moore* was located in a high crime area. *E.g.*, *State v. Baker*, 338 N.C. 526, 561 (1994); *State v. Skinner*, 162 N.C. App. 434, 443 (2004). Moreover, *Moore* itself did not characterize the vicinity as a high crime area, despite its discussion of the victim's "sense of insecurity[.]" *See Moore*, 312 N.C. at 608-09, 613.

[3] We note that *Moore* relied on two prior North Carolina Supreme Court cases—*State v. Murphy*, 225 N.C. 115 (1945) and *State v. Holland*, 234 N.C. 354 (1951)—to bolster its conclusion, *Moore*, 312 N.C. at 612-13; one of which, *Holland*, aberrated from the proper standard of review for the sufficiency of circumstantial evidence. *Holland*, 234 N.C. at 359 (suggesting circumstantial evidence need not merely permit an inference of guilt, but rather must be inconsistent with innocence); *see also State v. Stephens*, 244 N.C. 380, 383-84 (1956) (discussing North Carolina's then-inconsistent standards of review for the sufficiency of circumstantial evidence and clarifying the proper standard).

Nevertheless, this does not raise caution for our reliance on *Moore*. The other case *Moore* cited, *Murphy*, applied our current standard of review. *Murphy*, 225 N.C. at 116. Moreover, *Holland* itself relied on *Murphy*, suggesting *Holland* would have reached the same outcome under our current standard. *See Holland*, 234 N.C. at 359. Finally, our Supreme Court continues to favorably cite both *Moore* and *Murphy*. *E.g.*, *Campbell*, 373 N.C. at 221-23. Thus, we see nothing in *Moore* or its reasoning that does not bind our consideration.

holding the victim outside her place of business. *Id.* at 534-35. Shortly after, a regular customer and dairy supplier each arrived at the store to find it empty but unlocked and with the lights and coffee maker turned on. *Id.* at 533. The pair became concerned that the victim's car was present and still warm, but she was nowhere to be found. *Id.* A law enforcement officer, called to the scene, discovered the store's cash register open and empty. *Id.* The store's owner arrived to discover additional money missing from a safe to which only he and the victim had access. *Id.* at 533. Altogether, witness testimony established that "around thirty minutes" had elapsed between the defendant holding the victim outside the store and the discovery of the missing money. *Id.* at 560. This was in contrast to the "some two hours" between the assault and discovery of missing property in *Moore*, a time when the property "was left unattended in the store, whose back door was unlocked." *Id.* at 561. Ruling the trial court did not err in denying the defendant's motion to dismiss his robbery charge, the Supreme Court concluded that the evidence was "easily distinguishable from *Moore*" and noted "[the victim's] forceful abduction and the taking of the money [were] so closely related in time as to form a continuous chain of events." *Id.* at 560-61.

We have also had occasion to distinguish *Moore*. In *State v. Skinner*, the victim, "a 76-year-old widow living alone" returned home from the eye doctor, "put her pocketbook [containing $75.00] on the kitchen table[,] and went out to shut her chicken coop. When she walked back in her house, she was struck on her head seven or eight times with what may have been a hammer." *State v. Skinner*, 162 N.C. App.

434, 436 (2004). She recognized her attacker as the defendant, a neighbor who had known her his whole life, who then left. *Id.* at 436, 438. The victim "staggered into her den where she slipped and fell, hitting her head on a chair." *Id.* at 436. Approximately three hours later, a different neighbor "came to the house and discovered her covered in blood" and "called for emergency assistance[.]" *Id.* A law enforcement officer then discovered the victim's pocketbook, which "had been moved to a chair near the den[,]" was empty. *Id.* at 436, 444. We rejected the defendant's argument, based on *Moore*, that "the evidence disclosed no more than an opportunity for [the] defendant or others to have taken the victim's money." *Id.* at 443. Like our Supreme Court in *Baker*, we noted, "in *Moore*, the victim discovered that her wallet was missing two hours after her encounter with the defendant[,]" during which time it "was left unattended in a store whose back door was unlocked." *Id.* We further noted, "[t]here [was] no evidence that anyone other than [the] defendant entered her house or had an opportunity to steal her money." *Id.* at 444. We held this "was sufficient evidence of each element of [larceny] and of defendant being the perpetrator." *Id.*

We hold the evidence here is more akin to that in *Moore* than that in *Baker* or *Skinner*. As in *Moore*, Defendant's assault on Scott discloses nothing more than the mere opportunity for Defendant to have taken Scott's property. Unlike in *Baker*, the evidence here did not establish for how long Scott laid unconscious in the road before he awoke to discover his property missing; therefore, there is no evidence to support

an inference that Defendant's "forceful [assault] and the taking of the money [were] so closely related in time as to form a continuous chain of events." *Baker*, 338 N.C. at 561. During the period Scott laid unconscious, anyone in the vicinity could have happened upon him and opportunistically seized his possessions from his person. Notably, Scott's location in the road placed the vulnerable property in a public location inviting to passersby—like the store in *Moore* and unlike the private residence in *Skinner*. These circumstances, without more, raise only a suspicion and do not permit a reasonable jury to infer Defendant took Scott's property and therefore cannot sustain a conviction of robbery with a dangerous weapon.

This does not end our inquiry, however, as the State argues that Defendant's prior participation in a robbery rescues these circumstances "from [the] realm of suspicion and conjecture[.]" Although the State does not explain how such evidence would do so, it does characterize the trial court's limiting instruction as "appropriate[.]" Thus, we understand the State to argue this was evidence of Defendant's mental state[4] and consider whether that, combined with Defendant's opportunity to commit the crime, would permit a reasonable jury to infer Defendant's guilt.

[4] The trial court's instruction also permitted the jury to consider Defendant's prior participation in a robbery as evidence of "the absence of an accident or mistake relative to" the assault and alleged robbery. This can only refer to potential mistake or accident on the part of Defendant and not on the part of Scott. *State v. Fluker*, 139 N.C. App. 768, 772 (2000) (alteration in original) ("Just as the considerations of 'motive, opportunity, intent, preparation, plan, knowledge, [and] identity,' in Rule 404(b) pertain to the accused, the same is true for 'absence of mistake, entrapment or accident.'").

Several cases have held that an opportunity, combined with both evidence of the defendant's mental state and evidence suggesting the defendant possessed the victim's property could permit a reasonable jury in infer the defendant took the victim's property, as required for convictions of robbery with a dangerous weapon or common law robbery. *E.g.*, *State v. Dover*, 381 N.C. 535, 548-51 (2022) (concluding the evidence supported a reasonable inference that the defendant murdered and robbed the victim where the defendant's financial need created a motive and the defendant possessed more cash than usual after the crime, despite lacking legitimate financial resources); *Call*, 349 N.C. at 418 (concluding "there was sufficient evidence . . . to support the taking element of armed robbery" where the defendant "told [a friend] about his plan to rob [the victim]" and "suddenly had enough money to give [the friend] $210.00 and to pay for a hotel room . . . in cash"); *State v. Williams*, 201 N.C. App. 161, 177-78 (2009) (finding "substantial evidence of a taking" where "[the] defendant's interactions with [the victim] and [] other victims . . . indicate[d] that he intended to rob the victims [of money]" and "[the] defendant was found in possession of some property, [a] crack pipe, bearing [the victim's] DNA"). Here, however, there is no evidence that Defendant possessed Scott's missing property after the assault.

Thus, we must consider whether opportunity and mental state alone permits a reasonable jury to infer the taking element of robbery with a dangerous weapon. We conclude it does not. Evidence of a defendant's intent or plan to take property does not itself support the inference that he followed through when presented with

an opportunity. *Cf. State v. Evans*, 279 N.C. 447, 452 (1971) (emphasis added) ("[A] defendant's presence in a place of business, his possession therein of a firearm *and his intent to commit the offense of robbery* is not sufficient to support a conviction [of robbery with a dangerous weapon] for it omits the essential elements of (1) a taking or attempt to take personal property, and (2) the endangering or threatening of the life of a person.").[5]

This is particularly true where, as here, the inference of the defendant's mental state is based on a prior act or wrong, which is axiomatically not logical evidence of the defendant's conduct in conformity therewith. Of course, we consider "[b]oth competent and incompetent evidence[,]" *Fritsch*, 351 N.C. at 379, but a prior act is not merely *incompetent* evidence of the defendant's conduct, *see* N.C.G.S. § 8C-1, R. 404(b) (2022) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."), but further is *illogical* when offered for that purpose. *State v. McClain*, 240 N.C. 171, 173-74 (1954) ("Logically, the commission of an independent offense is not proof in itself of the commission of another crime."). In other words, while evidence of a defendant's other crime, wrong, or act might permit a jury to infer the defendant's

[5] Arguably, this statement is dicta in that it does not reflect the facts of *Evans*. *Evans*, 279 N.C. at 454-55 (noting evidence that "would be evidence of an intent" but also that "the State's evidence does not stop there" and "is utterly inconsistent with an attempt to rob"). However, the statement's "reasoning is nevertheless sound and persuasive." *State v. Roulhac*, 273 N.C. App. 396, 400 (2020).

intent or plan, it cannot, as a matter of logic, support an inference of the defendant's later acts.

The State attempts to rely on evidence of Defendant's prior participation in a robbery to "remove the issue from [the] realm of suspicion and conjecture." As a prior act, however, this evidence did not permit the jury to infer Defendant's conduct, including the alleged act of taking Scott's property when presented with the opportunity.[6] Therefore, although the State's evidence shows Defendant had the opportunity, and perhaps even the intention, to take Scott's property, it raises no more than suspicion and conjecture that he actually did so, rather than abandoning his intent and leaving Scott vulnerable to interloping thieves or unexplained loss. Without further evidence—such as anything suggesting the assault and alleged taking were closely related in time or that Defendant, or those acting in concert with him, possessed Scott's property after the assault—this cannot satisfy the taking element of robbery with a dangerous weapon and cannot sustain Defendant's conviction for that crime. The trial court should have allowed Defendant's motion to dismiss his robbery with a dangerous weapon charge.

CONCLUSION

[6] Although this evidence permitted other inferences, such as those regarding Defendant's mental state, and a reasonable jury can certainly make inferences on top of inferences, *State v. Childress*, 321 N.C. 226, 232 (1987), a secondary inference that Defendant acted according to his intent merely indirectly infers Defendant's conduct from his prior acts. Since such a direct inference is not logical, *McClain*, 240 N.C. at 173-74, and the State does not suggest further circumstances to support a jury inference of Defendant's intent, we do not consider this chain of inferences any more logical than the direct inference would be.

The State's evidence suggesting Defendant had the opportunity and intent or plan to take Scott's property was not substantial evidence that he actually did so. As substantial evidence of a taking was required to convict Defendant of robbery with a dangerous weapon, the trial court erred by denying Defendant's motion to dismiss as to his robbery with a dangerous weapon charge. We reverse its ruling as to that charge and vacate Defendant's conviction of robbery with a dangerous weapon.

REVERSED.

Judges STROUD and ZACHARY concur in result only.

Report per Rule 30(e).