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NO. COA04-490

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 02 CRS 102742, 102747

NICHOLAS TYRONE COLEMAN

Appeal by defendant from judgments entered 21 November 2003 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 29 November 2004.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Marilyn G. Ozer for defendant-appellant.

STEELMAN, Judge.

Defendant, Nicholas Tyrone Coleman, appeals his convictions for attempted robbery with a dangerous weapon and conspiracy to commit robbery with a firearm. For the reasons discussed herein we find no error and affirm the judgments of the trial court.

The evidence at trial tended to show that defendant, Sammy Lee Mebane, Jr., Kenyatta Daye, and Leanne Cervantez attempted to commit two armed robberies while driving around Guilford County and Alamance County, North Carolina on the morning of 29 September 2002. They first attempted to rob the Tru Buy Exxon store at the

intersection of Burlington Road and Rock Creek Dairy Road in Guilford County. Two hours later, they in fact robbed a convenience store in Alamance County.

Cheryl Rogers, a cashier at the Tru Buy Exxon, testified that two men entered the store between 7:30 a.m. and 8:00 a.m. After one of the men used the restroom, they approached the front counter. Rogers described her ensuing exchange with the men as follows:

[T]he one, he looked at me and he said what would you say if I told you to give me all your money. And I told him no. So, then he said, well, give me all your money and I told him no. Well, he turned around and he opened his jacket up. . . . And he had a sawed-off [shotgun] stuck inside of his jacket. He said with this, he said, give me all your money. And I told him no.

Believing that Roger's manager had taken the money to the back of the store, the men told Rogers "to call her out here." As Rogers yelled for her manager, they exited the store. The gunman's associate, clad in a black hooded sweatshirt, "stuck his head back in the door" and told Rogers that they were "just joking." Rogers called the police. A videotape of the incident was recorded by the store's surveillance camera and shown to the jury. Although Rogers was unable to identify the would-be robbers, she described the gunman's jacket as tan or white with a "big flag on the back." Her manager, Rebecca Vance, also testified about the incident but was unable to identify the assailants.

Mebane testified that he, defendant, and, Cervantez met at Daye's residence in Graham, North Carolina at approximately 11:00 p.m. Because defendant had no money, they decided to go out

"looking for somebody to rob." Mebane drove the group in his car with Cervantez setting next to him, and defendant and Daye sitting in the back seat. After riding around Burlington, they proceeded to Greensboro. They drove "[a]bout all night" without seeing anyone to rob, before coming to an Exxon store. Defendant and Daye went into the store, and Mebane stayed in the car as the driver. Defendant was armed with a twelve-gauge pump shotgun and was wearing Mebane's Averex jacket to conceal the gun. Daye was wearing Cervantez's "hoodie[.]" When defendant and Daye were unable to get any money from the cashier, the group decided "to try again." They proceeded to Burlington, "looking for a store where it wasn't too crowded." Approximately two hours after leaving the Exxon, they found a suitable target. Defendant, Daye, and Mebane went into the store. Defendant "pointed the gun at the man and told him to give us all the money." They grabbed the cash register, left the store, and returned to Daye's residence to divide the money.

Cervantez offered an account of events largely consistent with Mebane's testimony. She claimed the group went out in Mebane's car intending "to hit a lick" or "scor[e] some money." Before arriving at the first store, they decided that she would remain in the car with Mebane while defendant and Daye went inside. They arrived at the store at "about seven something in the morning[,]" and discussed "[w]ho was going to go in, who was going to carry the gun. You know, how it was going to go down." Cervantez described Mebane's Averex jacket, which defendant wore to conceal the gun, as

"a little tan" and bearing an eagle or "[s]ome type of symbol on the back of it." Soon after Daye and defendant left the car, Daye returned and said that defendant had "asked the cashier politely to give him the money or something." As defendant ran to the car, Daye went "back to the store and tells the lady he's just playing." After they drove away, Daye made fun of defendant for being so polite to the cashier. The group then proceeded to Alamance County, where defendant, Daye and Mebane "actually did rob a store." Although Daye was carrying the gun when the two entered the store, defendant, who returned to the car first, had both the gun and the money.

Defendant testified he was incarcerated after pleading guilty to the robbery of the Shack's Mobile convenience store in Alamance County on 29 September 2002. He participated in the Alamance County robbery only because Mebane, Daye and Cervantez threatened to beat or shoot him if he refused. Defendant entered the store with Mebane and Daye and grabbed the cash register at Mebane's direction while Mebane held the clerk at gunpoint.

Defendant denied planning to rob the Guilford County Exxon or participating in the attempted robbery. When Mebane suggested robbing the Exxon, defendant replied, "[N]o, man." Mebane and Daye went into the store without him, with Mebane carrying the shotgun. As to whether he agreed to commit the robbery, defendant averred, "I ain't have no agreement with them. I disagreed with the whole thing. I wasn't on that type of stuff." While Mebane and Daye were in the Exxon, defendant argued with Cervantez in the car.

After two or three minutes, Mebane and Daye returned to the car, and the group drove to Alamance County. After the Alamance robbery, Mebane drove defendant home.

In defendant's first and only assignment of error he contends the trial court erred in denying his motion *in limine* to exclude evidence of the Alamance County robbery. Pursuant to Rule 404(b) of the Rules of Evidence, the court found the facts of the subsequent robbery admissible "to show intent and preparation." In addition to challenging the court's ruling under Rule 404(b), defendant insists the evidence was unfairly prejudicial and thus, subject to exclusion under Rule 403 of the Rules of Evidence.

Rule 404(b) provides:

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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2004). It has long been established that:

[T]his rule is a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Washington, 141 N.C. App. 354, 366, 540 S.E.2d 388, 397 (2000) (citing *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427

(2001). Otherwise relevant evidence should not be admitted "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403. The trial court enjoys broad discretion to admit or exclude evidence under Rule 403, and will be reversed "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310 (1999) (internal quotation marks and citations omitted).

Evidence that defendant, Daye, and Mebane committed an armed robbery of a convenience store in Alamance County just two hours after defendant and Daye attempted to rob the Guilford County Exxon was admissible under Rule 404(b) to show defendant's intent to rob the Exxon, rebutting other evidence that he was "just kidding" when he displayed the shotgun to Rogers and demanded money. See *State v. Floyd*, 148 N.C. App. 290, 293-94, 558 S.E.2d 237, 240 (2002). Evidence of this second crime further served to establish defendant's entry into an agreement with Daye, Mebane, and Cervantez to commit robbery with a firearm, as was required to support the conspiracy charge. See *State v. Love*, 131 N.C. App. 350, 356-57, 507 S.E.2d 577, 582 (1998), *cert. denied*, 528 U.S. 944, 145 L. Ed. 2d 280 (1999). Such evidence which is probative to the state's case, will necessarily be adverse to a defendant. *Anderson*, 350 N.C. at 175, 513 S.E.2d at 310. However, the probative value of the testimony here, which was necessary to prove essential elements of the crime charged, outweighs any prejudice.

Moreover, inasmuch as defendant committed the Alamance County robbery with the same co-conspirators, using the same weapon, and during the same car trip as his Guilford County offense, we find no abuse of the trial court's discretion under Rule 403.

Defendant also asserts, without additional argument or citation to authority, that the admission of this evidence violated his right to due process under the state and federal constitutions. Assignments of error for which no reason in support of the argument is stated or authority cited to, are deemed abandoned. N.C. R. App. R. 28(b)(6).

The record on appeal contains additional assignments of error not addressed by defendant in his brief to this Court. These assignments of error are also deemed abandoned. See *id.*

NO ERROR.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).