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NO. COA10-258

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v.

EMMANUELLE KHNAK DANCY,
Defendant.

Guilford County

Nos. 08 CRS 78000
08 CRS 78089-92
08 CRS 78332
08 CRS 78341-42
08 CRS 78349-50

Appeal by defendant from judgments entered 8 September 2009 by Judge V. Bradford Long in Guilford County Superior Court. Heard in the Court of Appeals 29 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

Robert W. Ewing for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Emmanuelle Khnak Dancy appeals from his convictions for five counts of robbery with a dangerous weapon and five counts of conspiracy to commit robbery with a dangerous weapon. Defendant's principal argument on appeal is that the trial court erred in denying his motion to dismiss four of the conspiracy charges as the evidence was sufficient to show only one continuous conspiracy encompassing all five robberies. We conclude, however, that the State presented sufficient evidence that defendant entered into five separate conspiracies to commit the five robberies. The

trial court, therefore, properly denied defendant's motion to dismiss.

Facts

The State's evidence at trial tended to establish the following facts: On 27 September 2006, defendant met with Christopher Collins, Christopher's half-brother, Anthony Payne, and Sabrina Phillips at Anthony's apartment in Greensboro, where they made a "plan" to rob the Friendly Avenue branch of the MidCarolina Bank. Later that same day, while Sabrina was conducting counter-surveillance, defendant, Christopher, and Anthony entered the MidCarolina Bank wearing dark clothes and visors or "hoodies" over their heads. Christopher, who had gone in first, pointed a handgun at the bank manager and ordered her to open the bank vault and put the money into a white bag. Defendant, who was also carrying a gun, and Anthony went to the teller stations and ordered the tellers to put their money inside a bag. The three men then ran out of the bank and drove away in a black SUV. The group went back to Anthony's apartment where they divided the money and "went [their] separate ways[.]"

On 15 March 2007, Eric Payne, Anthony's brother and Christopher's half-brother, received a phone call from Christopher and Sabrina as he was driving down to Greensboro from Virginia to visit his mother. When Eric got into town, he drove to defendant's apartment where he met Christopher, Sabrina, and defendant. Although Christopher, Sabrina, and defendant had already begun "discuss[ing]" a plan to rob the SunTrust branch on West Market

Street, Eric "join[ed]" the discussion and "agree[d] to go along with th[e] bank robbery[.]" Eric drove defendant and Christopher to the bank, where they got out of the car and went inside the bank with their faces covered. Christopher, who was carrying a semiautomatic, went with one of the tellers and retrieved money from the vault while defendant pointed a silver revolver at another teller and ordered her to open up the teller drawers and empty them into a blue bag. After getting the money from the vault and teller stations, the two men ran out of the bank and got into Eric's car. After discovering that they were being followed, Christopher and defendant jumped out of the car with the money and Eric drove back home to Virginia.

On 10 August 2007, defendant, Anthony, Christopher, and Sabrina met at Anthony's apartment. Later that day, defendant, Anthony, and Christopher drove in Sabrina's black Infiniti SUV to Piedmont Aviation Credit Union, where defendant and Christopher got out of the vehicle and entered the bank wearing black ski masks. Christopher, who was carrying a black semiautomatic handgun, entered the manager's office and ordered her to get the money out of the bank's vault. Defendant walked up to a teller, pointed a silver revolver at his chest, and threw a bag onto the counter for the teller to fill with money. When the two men had collected the money, they "bolt[ed] out the front door," got into Sabrina's SUV, and drove away. The group returned to Anthony's apartment, where they distributed the money.

On 25 October 2007, defendant, Anthony, Christopher, and Sabrina met again at Anthony's apartment. Later that morning, while Sabrina drove separately to do counter-surveillance, the three men drove in Sabrina's black SUV to the Airpark branch of SunTrust Bank in High Point. Defendant and Anthony entered the bank holding guns; defendant yelled "this [i]s a robbery" and told everyone to "put [their] hands up." While defendant went to the back of the bank to get money out of the vault, Anthony stayed in the lobby. When defendant returned to the lobby with a bag of money, the two men exited the bank, got into the black SUV where Christopher was waiting, and drove away. The men met Sabrina back at Anthony's apartment, where they counted and distributed the money.

On 16 January 2008, defendant met with Anthony, Christopher, and Sabrina at Daniella Smith's apartment. Although the group discussed several options, eventually they "unanimous[ly]" agreed to rob the Friendly Avenue MidCarolina branch a second time. Later that day, Daniella and Sabrina drove to separate locations near the bank to watch for "police officers coming during the robbery" and the three men drove to the bank in Christopher's silver Volvo. Anthony waited in the car and defendant and Christopher entered the bank. Both men were armed and had their faces covered. As he entered the bank, Christopher yelled: "'Hands up.'" The men corralled the bank employees in the teller station and ordered them to empty the drawers into a bag. After getting the money from the teller stations, defendant and Christopher exited out of a side

door where Anthony was waiting with the car. Daniella, Sabrina, and the three men returned to Daniella's apartment, changed clothes, divided up the money, and then "went [their] separate ways."

Based on surveillance tapes from the banks and witness accounts, officers with the Greensboro Police Department obtained and executed an arrest warrant for Christopher as well as search warrants for his and Sabrina's vehicles and apartments. After questioning Christopher, police obtained arrest warrants for defendant, Anthony, Daniella, Eric, and Sabrina. Defendant was indicted for five counts of robbery with a dangerous weapon and five counts of conspiracy to commit robbery with a dangerous weapon. Defendant pled not guilty and the case proceeded to trial. At the close of the State's evidence, defendant moved to dismiss all 10 charges for insufficient evidence. The trial court denied the motion. The jury convicted defendant of all 10 counts and the trial court sentenced defendant to five consecutive presumptive-range sentences of 64-86 months imprisonment for the robbery convictions, followed by five consecutive presumptive-range sentences of 25-39 months imprisonment for the conspiracy convictions. Defendant timely appealed to this Court.

I

Defendant first argues that "the evidence at trial showed that the defendant was guilty of only one conspiracy to commit robbery with a dangerous weapon rather than five separate conspiracies." Thus, defendant contends, the trial court should have granted his

motion to dismiss four of the five conspiracy charges. We note, as an initial matter, that defendant's contention on appeal does not correspond with the basis for his motion to dismiss at trial. At trial, defendant moved to dismiss all five conspiracy charges due to "the lack of evidence as to conspiracy *in each and every indictment*" (Emphasis added.) Defendant did not argue, as he does on appeal, that the State's evidence was sufficient to establish only one continuing conspiracy encompassing all five armed robberies. As our Supreme Court has explained, "where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount'" on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

Assuming, however, that defendant properly preserved this contention for appellate review, the trial court properly denies the defendant's motion to dismiss "[i]f there is substantial evidence – whether direct, circumstantial, or both – to support a finding that the offense charged has been committed and that the defendant committed it" *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). Substantial evidence is that amount of relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In ruling on a motion to dismiss, the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences

from the evidence in favor of the State." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Pursuant to N.C. Gen. Stat. § 14-2.4(a) (2009), defendant was charged with conspiring: (1) with Christopher Collins and Sabrina Phillips to rob the MidCarolina Bank on 27 September 2006 (08 CRS 78332); (2) with Christopher, Sabrina, and Eric Payne to rob the SunTrust Bank on 15 March 2007 (08 CRS 78341); (3) with Christopher, Sabrina, and Anthony Payne to rob the Piedmont Aviation Credit Union on 10 August 2007 (08 CRS 78342); (4) with Christopher, Sabrina, and Anthony to rob the SunTrust Bank on 25 October 2007 (08 CRS 78349); and (5) with Christopher, Sabrina, Anthony, and Daniella Smith to rob the MidCarolina Bank on 16 January 2008 (08 CRS 78350).

A "criminal conspiracy" is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. Gell*, 351 N.C. 192, 209, 524 S.E.2d 332, 343 (2000). "To constitute a conspiracy it is not necessary that the parties should have come together and agreed in express terms to unite for a common object: 'A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.'" *State v. Bindyke*, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975) (quoting *State v. Smith*, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953)). While

"[t]he existence of a conspiracy may be established by direct or circumstantial evidence[,] " direct evidence is "rarely obtainable" and thus a conspiracy generally is "established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, . . . point unerringly" to the conspiracy's existence. *State v. Whiteside*, 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933).

In North Carolina, "multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies." *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902, cert. denied, 312 N.C. 88, 321 S.E.2d 907 (1984); accord *State v. Wilson*, 106 N.C. App. 342, 345, 416 S.E.2d 603, 605 (1992) ("Because the crime of conspiracy lies in the agreement itself, and not the commission of the substantive crime, a defendant can, under certain fact situations, be convicted of a single conspiracy when there are multiple acts or transactions." (internal citation omitted)). Thus, where, as here, the State elects to charge multiple conspiracies, it must prove the existence of separate and distinct agreements to commit the substantive offense or offenses. *State v. Dalton*, 122 N.C. App. 666, 672, 471 S.E.2d 657, 661 (1996). Although the court, in determining whether a single or multiple conspiracy exists, should consider the "totality of the circumstances[,] " 16 Am. Jur. 2d *Conspiracy* § 11 (2010), "[t]he 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[,]” *State v. Tirado*, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). Typically, “[t]he question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury.” *Tirado*, 358 N.C. at 577, 599 S.E.2d at 533.

Defendant contends that, “[a]llthough there were five separate meetings,” one before each of the bank robberies, “[g]iven the close proximity of the time and place of the five robberies transactions [sic], the remarkable similarity between the transactions, the identity of parties in each transaction, and common objective behind all five transactions, the evidence does not allow a reasonable inference that multiple agreements to commit armed robbery existed between defendant and his co-defendants.”

Viewed in the light most favorable to the State, as is required in reviewing the denial of a motion to dismiss, the evidence is sufficient to permit a jury to reasonably infer the existence of separate and distinct conspiracies to commit each of the five bank robberies. With respect to the number and nature of the agreements, the evidence tends to show that defendant, Christopher, and at least one other person met on five separate occasions. During each meeting, the group would “unanimous[ly]” decide to rob a particular bank, and then determine each participant’s role in the robbery. The evidence indicates that none of these discussions went further than agreeing to rob a

particular bank and planning the details of the robbery, which were always executed later the same day.

Defendant, in his brief, emphasizes the fact that the "common objective" of each of the agreements was the same: bank robbery. This Court has held, however, that multiple agreements to commit similar criminal acts does not necessarily preclude a finding of multiple conspiracies. See *State v. Roberts*, 176 N.C. App. 159, 167, 625 S.E.2d 846, 852 (2006) ("Here, the State presented evidence showing the first conspiracy was formed on the evening of 15 December 2002 when defendant agreed with Rafael Purdie and Darrell Meyers to rob someone. There was no evidence that the agreement formed on 15 December 2002 consisted of more than that of robbing someone on that night. The mere fact that the defendant was involved in a similar crime the next night does not indicate the two crimes were committed as part of the agreement made on 15 December 2002. Viewing the evidence in the light most favorable to the State, evidence was presented allowing the jury to find that defendant was involved in two separate conspiracies.").

Moreover, a conspiracy ordinarily "'ends with the attainment of its criminal objectives" *Tirado*, 358 N.C. at 577, 599 S.E.2d at 533 (quoting *State v. Gary*, 78 N.C. App. 29, 37, 337 S.E.2d 70, 76 (1985), *disc. rev. denied*, 316 N.C. 197, 341 S.E.2d 586 (1986)). The evidence in this case tends to show that after each robbery, the participants met up, divided the money, and "went [their] separate ways[.]"

With respect to the time intervals between the agreements, the evidence shows that they occurred sporadically over a period of approximately 16 months, with roughly six months between the first and second robberies; five months between the second and third robberies; two-and-a-half months between the third and fourth robberies; and two-and-a-half months between the fourth and fifth robberies. See *State v. Choppy*, 141 N.C. App. 32, 40, 539 S.E.2d 44, 50 (2000) (concluding that "significant amount of time" between attacks was "important evidence concerning the number of conspiracies").

As for the number of participants, the evidence tends to show that although defendant and Christopher participated in the planning and execution of all five bank robberies, only two of the robberies involved the same combination of individuals. Anthony and Sabrina were involved in four of the robberies and Eric and Daniella were each involved in only one robbery. While it is true that "[t]he entering and exiting of various participants in an otherwise ongoing plan to commit a particular felonious act does not convert a single conspiracy into several[,]" *Wilson*, 106 N.C. App. at 346, 416 S.E.2d at 605, the evidence in this case does not suggest an "ongoing plan" to commit the string of bank robberies as each combination of people committing each of the robberies met separately and independently to agree to rob a specific bank and to plan that particular robbery.

In sum, considering the totality of the circumstances, given the discrete and independent nature of the agreements, the sporadic

time intervals between them, the differing combinations of participants, and the numerous meetings, we conclude that the evidence was sufficient to support a reasonable inference that defendant was involved in five separate conspiracies to commit armed robbery. *Roberts*, 176 N.C. App. at 167, 625 S.E.2d at 852; *Choppy*, 141 N.C. App. at 40, 539 S.E.2d at 50. The trial court, therefore, properly submitted all five conspiracy charges to the jury.

II

Defendant's only other argument on appeal is that the trial court's imposing 10 consecutive sentences, totaling a minimum of 445 months and a maximum of 625 months imprisonment, is "grossly disproportionate to the offenses he committed" and violates the Eighth Amendment prohibition against cruel and unusual punishment. "It is undisputed that the trial court has express authority under N.C.G.S. § 15A-1354(a) to impose consecutive sentences[,]" *State v. LaPlanche*, 349 N.C. 279, 284, 507 S.E.2d 34, 37 (1998); N.C. Gen. Stat. § 15A-1354(a) (2009), and that "[t]he imposition of consecutive . . . sentences, standing alone, does not constitute cruel or unusual punishment[,]" *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). "[A]s long as the judge sentences within the limits established by the legislature, the Eighth Amendment is not offended." *State v. Streeter*, 146 N.C. App. 594, 599, 553 S.E.2d 240, 243 (2001), *cert. denied*, 356 N.C. 312, 571 S.E.2d 211 (2002), *cert. denied*, 537 U.S. 1217, 154 L. Ed. 2d 1071 (2003).

Here, defendant was convicted of five separate counts of robbery with a dangerous weapon and five separate counts of conspiracy to commit robbery with a dangerous weapon. As the Supreme Court has explained, "[a] defendant may be convicted of and sentenced for each specific criminal act which he commits." *Ysaguirre*, 309 N.C. at 786, 309 S.E.2d at 441 (1983). The imposition of 10 consecutive sentences in this case is not cruel and unusual. See, e.g., *State v. Williams*, __ N.C. App. __, __, 685 S.E.2d 534, 541 (2009) (holding "seven consecutive active terms of imprisonment from 75 to 99 months" did not violate eighth amendment where defendant was convicted of "eleven charges of attempted robbery with a dangerous weapon, seven charges of robbery with a dangerous weapon, and four charges of first-degree burglary"). Defendant's contention is overruled.

No Error.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).