

NO. COA14-67

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2015

STATE OF NORTH CAROLINA

v.

Guilford County

Nos. 11 CRS 96203-06

ZEBEDEE BROWN,

12 CRS 66930-31

Defendant.

Appeal by defendant from judgments entered 28 June 2013 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 21 May 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Iain M. Stauffer, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

GEER, Judge.

Defendant Zebedee Brown was convicted of multiple counts of robbery with a dangerous weapon ("RWDW") arising out of a string of robberies that took place in 2011. On appeal, defendant primarily argues that the trial court erred in allowing defendant to proceed pro se. However, because defendant engaged in repeated conduct designed to delay and obfuscate the proceedings, including refusing to answer whether he wanted the assistance of counsel, we hold -- consistent with the opinions in *State v. Leyshon*, 211 N.C.

App. 511, 710 S.E.2d 282 (2011), and *State v. Mee*, ____ N.C. App. ____, 756 S.E.2d 103 (2014) -- that defendant forfeited his right to the assistance of counsel. Consequently, the trial court did not err in failing to appoint counsel for defendant.

Facts

The State's evidence tended to show the following facts. On 12 September 2011, three individuals, including defendant and Tamarquis Merritt, entered an internet sweepstakes business at J&W Business Center in Greensboro, North Carolina and robbed it. The individuals' faces were covered, and one of them pointed a gun at the employee and demanded money. The individuals took about \$900.00 in cash and ran out of the store.

On 17 September 2011, another internet sweepstakes business on Cone Boulevard in Greensboro was robbed by two individuals wearing masks. One of the robbers had dreadlocks and pointed a gun at an employee of the business and demanded money. The robbers took between \$4,000.00 and \$5,000.00.

On 27 September 2011, Mr. Merritt, defendant, and another individual robbed Lucky Nine Sweepstakes in Greensboro. Two of the robbers were wearing hoodies and masks, and one of the masked robbers had dreadlocks. That robber pointed a gun at a Lucky Nine employee and demanded money. The robbers took about \$1,000.00 from Lucky Nine.

On 3 October 2011, Mr. Merritt, defendant, and two other men went to the Click It Internet Sweepstakes in Greensboro at night. Mr. Merritt knocked on the front door and, after an employee, Paul Beal, unlocked it, defendant and two other men rushed in from behind Mr. Merritt into the business. Defendant and the other men wore masks and hoodies, and each one carried a gun. While inside Click It, one armed robber directed Mr. Beal to go behind the counter, and the robbers took between \$7,000.00 and \$9,000.00 in cash. Another one of the armed men pointed the gun at another employee, Larry Beal, forcing him to hand over the money in his pockets, as well as his cell phone. Two of the men also took money and cell phones from two customers, Mitchell Baker and Barry Gregory, before the robbers left.

On 15 October 2011, Mr. Merritt, defendant, and two other men went to Wendover Internet Services around 2:00 a.m. Mr. Merritt knocked on the door, and, after an employee, Lori Tuttle, unlocked and opened the door, defendant and the other two men rushed in behind Mr. Merritt. Defendant and the other two men were wearing masks and each carried a gun. Everyone in the store was forced to lie down on the floor. Before leaving, one of the armed robbers took \$1,200.00 from the business and a handgun belonging to Ms. Tuttle, while another took a purse belonging to a customer, Jolenda

Morgan. At the time of the robberies, Mr. Merritt did not have dreadlocks.

Defendant was arrested and charged with nine counts of RWDW, among other charges. Prior to trial, on 5 March 2013, defendant had a hearing before Judge Richard W. Stone in the Guilford County Superior Court concerning his right to counsel for the charges of RWDW. Judge Stone concluded that defendant waived his right to court-appointed counsel in connection with the RWDW charges. On 11 March 2013, defendant and Anne Littlejohn, defendant's counsel for other charges, appeared before Judge Ronald E. Spivey in Guilford County Superior Court concerning Ms. Littlejohn's motion to withdraw as defendant's counsel. Judge Spivey ordered a forensic evaluation of defendant before he would rule on Ms. Littlejohn's motion. Following the evaluation, defendant was found competent to proceed pro se. After a hearing on 8 April 2013, Ms. Littlejohn's motion to withdraw was allowed, and defendant declined all counsel.

On 25 June 2013, defendant appeared without counsel before Judge David L. Hall in Guilford County Superior Court for jury selection. At that hearing, defendant requested standby counsel, but Judge Hall denied that request and ruled that defendant had forfeited his right to proceed with any counsel.

Defendant was tried for nine counts of RWDW. At the close of the State's evidence, defendant made a motion to dismiss that the trial court denied. Defendant then put on two witnesses, and the State presented a rebuttal witness. At the close of all the evidence, defendant renewed his motion to dismiss, which the trial court again denied. The jury returned guilty verdicts for six robbery charges -- for robbing Paul and Larry Beal, Mr. Baker, Mr. Gregory, Ms. Tuttle, and Ms. Morgan -- and "not guilty" verdicts for the other three charges.

On 28 June 2013, Judge Hall sentenced defendant to four consecutive terms of 90 to 120 months imprisonment and two additional terms of 90 to 120 months imprisonment to be served concurrently with the last consecutive term of imprisonment. Defendant gave oral and written notice of appeal. On or about 28 August 2013, the trial court entered corrected judgments setting the maximum term of imprisonment as 117 months for each sentence.

I

Defendant argues that he is entitled to a new trial because the trial court erroneously allowed him to proceed pro se in violation of his Sixth Amendment rights. Defendant first contends that the trial court erred in finding that he waived his right to counsel. "The right to counsel is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and

Article I of the North Carolina Constitution." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 68 (2000). "Given the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981). Consequently, mere "[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *Id.*

On 5 March 2013, defendant had the following exchange with Judge Stone regarding whether defendant wished to have court-appointed counsel:

THE COURT: Well, . . . let me interrupt you, Mr. Brown. Can you tell me whether or not you want a lawyer appointed to represent you?

THE DEFENDANT: No. I am my proper self. I do not need no representation.

THE COURT: You do not want a lawyer to represent you on these other charges.

THE DEFENDANT: That's correct.

THE COURT: Okay. You're charged with assault on a female that's punishable by up to 150 days in prison, assault by strangulation that's punishable by up to --

Is the date of the offense before December 1?

THE DEFENDANT: I object --

THE COURT: If so --

THE DEFENDANT: -- no proceeding of any kind shall be --

THE COURT: Just a moment. Just a moment.

. . . .

THE COURT: Okay. So . . . you're facing a maximum sentence of 39 months on assault by strangulation. Robbery with a dangerous weapon is a Class D felony. You're facing a maximum sentence of 204 months on that charge. In the -- you have another charge -- you have two -- three more charges of robbery with a dangerous weapon. Each of those is punishable by up to 204 months. You are also charged with a Class H felony of larceny, which is punishable by up to 39 months; and a conspiracy to commit robbery with a dangerous weapon, a Class E felony punishable by up to 88 months. And all those charges could run consecutive to one another.

You're entitled to have a lawyer represent you. If you can't afford a lawyer, I'll appoint a lawyer. Obviously, you've got a lawyer appointed on the other charges, Mr. -- Mr. Brown. I suggest you have a lawyer. I believe you need a lawyer.

THE DEFENDANT: I object, Your Honor.

THE COURT: But if you don't want a lawyer, I can't make you take one. Are you going to waive your right to a lawyer?

THE DEFENDANT: I object, Your Honor. I am waiving no rights.

THE COURT: You are waiving no rights? Do you want a lawyer or not?

THE DEFENDANT: I -- I shall -- by -- I am sequestering (sic) Islamic council and a blue-ribbon jury.

THE COURT: Okay. Well, I understand what you're requesting, but --

THE DEFENDANT: A jury of my own peers.

THE COURT: -- do you want a lawyer appointed or not?

THE DEFENDANT: I do not. I am in proper persona sui juris in my own proper person competent enough to handle my own affairs, Your Honor.

THE COURT: Well, do you want a lawyer appointed to help you with that or not?

THE DEFENDANT: I object, Your Honor. I am a proper persona sui juris in my own proper person --

THE COURT: Just answer yes or no; do you want a lawyer appointed? You -- you can say no. It doesn't -- it's not going to hurt my feelings. Sir, do you want a lawyer appointed or not?

THE DEFENDANT: I'm in proper persona sui juris competent enough to handle my own affairs, Your Honor.

THE COURT: Does that mean you want a lawyer or does that mean you don't want a lawyer?

THE DEFENDANT: It means I'm in proper persona sui juris competent enough -- over the age of 21 years old competent enough to handle my own affairs. For the record, let the record show --

THE COURT: Mr. Brown, I'm not -- I understand all that, but you're facing what in

effect is the remainder of your natural life in prison, so . . .

THE DEFENDANT: Okay. Your Honor, no proceeding of -- for the record, let the record show that --

THE COURT: No. Well, I'm -- I'm not asking you that.

THE DEFENDANT: -- no proceeding of any kinds (sic) shall be implemented without first presenting documentary proof of nationality and delegation of order of authority --

THE COURT: Okay.

THE DEFENDANT: -- for any establishment of jurisdiction --

THE COURT: It sounds to me like your client doesn't want --

THE DEFENDANT: -- for a natural-born title not to -- National based on the artifacts.

. . . .

THE COURT: Okay. It sounds like Mr. Brown does not want a lawyer appointed and wants to -- to represent himself on those matters.

THE DEFENDANT: I -- I object. I am not representing myself. I am myself, Your Honor. I am in proper persona sui juris in special appearance in my own proper person competent enough to handle my own affairs.

THE COURT: Well, I have no idea what that -- most of what that means, Mr. Brown. I'm just --

THE DEFENDANT: That means that I'm not a Negro --

THE COURT: I'm not asking you what it means. I'm just telling you I don't understand what you're saying, so you've got to -- you've got your own vocabulary going on in your brain; nothing I can do about that.

THE DEFENDANT: I object, Your Honor. This is --

THE COURT: I'm not a -- I'm not a scientist, so I'm going to find that you do not want a lawyer to represent you and that you've waived counsel.

Anything else at this time?

. . . .

THE DEFENDANT: I object. I have no counsel. I have not seen the Islamic council. I have not seen a blue-ribbon jury of my own peers.

THE COURT: Okay.

THE DEFENDANT: And no -- no proceeding -- no proceeding of any kind should be implemented without first presenting documentary proof of nationality and delegation of order of authority before any establishment of jurisdiction for a natural-born title National based on the artifacts. I am a Moorish American.

At a hearing on 12 March 2013 in Guilford County Superior Court, Judge Spivey heard a motion to withdraw from Ms. Littlejohn who was representing defendant on charges other than the RWDW charges. At that hearing, Ms. Littlejohn stated that defendant wished her to withdraw and, although no forensic psychological evaluation had been done on defendant, Ms. Littlejohn believed

defendant could proceed on his own. Shortly thereafter, when the district attorney and Judge Spivey were discussing the court calendar, defendant interjected: "Um, anybody who feels that they still represent me, I hereby announce them fired."

After Judge Spivey responded that he would file documents with the Clerk of Court that defendant had brought with him to the hearing and that defendant had attempted to file previously, defendant stated, "I do by here refute the fraud. I am not a commercial entity or artificial person. I am a live, living soul over -- natural born sovereign by descended nature, my ancestors being Moroccans, the true birds of this land (unintelligible word) title, and I do hereby announce that I am a mortal (phonetic) American natural born sovereign." The court then responded that after a forensic psychiatric evaluation, the court would take up Ms. Littlejohn's motion to withdraw.

At a hearing on 8 April 2013, following an evaluation that indicated that defendant was competent to proceed to trial, Judge Spivey heard Ms. Littlejohn on her motion to withdraw. Ms. Littlejohn informed the trial court that defendant "cannot acknowledge authority of the courts . . . [which] extend[s] to appointed counsel as well[,]" as part of his beliefs. Judge Spivey stated: "The representation is he wishes to proceed representing himself and decline all counsel from the court; is that correct?"

Defendant then responded, "I would tell Your Honor, I am myself . . . in persona, so therefore I do not represent myself. I am myself." Judge Spivey ultimately granted Ms. Littlejohn's motion to withdraw, finding that defendant had previously been allowed to waive counsel in other proceedings and finding that he was competent to waive counsel in this case.

During jury selection on 25 June 2013 before Judge Hall, defendant declared: "I do not recognize anything that this court is doing. No . . . proceedings of any kind may be implemented without first presenting delegation of authority," and "I do not recognize anything that this court is doing. The DA has not presented delegation of authority order." Defendant stated that he did not have "Islamic counsel" and that he did not "have the capacity [to represent myself] because I do not understand, I do not recognize anything that's going on." Defendant objected or interjected on similar grounds, refusing to acknowledge the trial court's authority to proceed, at least 17 other times throughout the 25 June 2013 hearing.

During the hearing, Judge Hall ruled that defendant had forfeited his right to counsel. At the end of the hearing, defendant made a request for standby counsel that Judge Hall took under advisement but ultimately denied.

In *Leyshon*, 211 N.C. App. at 514, 710 S.E.2d at 286, this Court addressed a defendant's claims that he was appointed counsel against his wishes and that he did not waive his right to have assistance of counsel. At trial in that case,

[t]he transcript shows that Defendant refused to answer whether he waived or asserted his right to counsel, and he made contradictory statements about his right to counsel. During the hearing, Defendant clearly stated, "I'm not waiving my right to assistance of counsel," "I want to retain my right to assistance of counsel[,] " and "I'm reserving my rights." Yet, in the same hearing, Defendant also said "I don't need an attorney[,] " "I refuse his counsel[,] " and "I'll have no counsel" at trial. Furthermore, although Defendant argues in his brief that "[t]he Court determined at the initial proceeding of July 19, 2007 that Defendant could proceed without a lawyer," Defendant refused to sign the waiver of counsel form filed on 19 July 2007, and the trial court noted on the waiver form that Defendant "refused in open court to sign."

Id. at 517, 710 S.E.2d at 287. Based on those statements, this Court held that defendant did not unequivocally waive his right to counsel, and the trial court did not err in appointing counsel for the defendant. *Id.*

Here, when asked whether he wanted a lawyer to represent him, defendant replied that he did not and, alternatively, when the trial court explained that defendant would proceed without counsel, defendant objected and stated he was not waiving any rights. Defendant's statements refusing to answer whether he

waived his right to counsel were similarly equivocal to the defendant's statements in *Leyshon*, and we, therefore, hold that defendant did not waive his right to counsel.

The State, nonetheless, argues that defendant forfeited his right to counsel as did the defendant in *Leyshon*. Despite the lack of a waiver of counsel in *Leyshon*, this Court held:

Defendant . . . obstructed and delayed the trial proceedings. The record shows that Defendant refused to sign the waiver of counsel form filed on 19 July 2007 after a hearing before the trial court. At the 7 January 2008 hearing, the court twice advised Defendant of his right to assistance of counsel and repeatedly asked if Defendant wanted an attorney. Defendant refused to answer, arguing instead, "I want to find out if the Court has jurisdiction before I waive anything." Even after the court explained the basis of its jurisdiction, Defendant would not state if he wanted an attorney, persistently refusing to waive anything until jurisdiction was established. Likewise, at the 14 July 2008 hearing, Defendant would not respond to the court's inquiry regarding whether he wanted an attorney. Defendant adamantly asserted, "I'm not waiving my right to assistance of counsel," but he also verbally refused the assistance of the attorney appointed by the trial court. At the next hearing on 13 July 2009, Defendant continued to challenge the court's jurisdiction and still would not answer the court's inquiry regarding whether he wanted an attorney or would represent himself. Instead, Defendant maintained, "If I hire a lawyer, I'm declaring myself a ward of the Court . . . and the Court automatically acquires jurisdiction . . . and I'm not acquiescing at this point to the jurisdiction of the Court." Based on the evidence in the record, we conclude Defendant

willfully obstructed and delayed the trial court proceedings by continually refusing to state whether he wanted an attorney or would represent himself when directly asked by the trial court at four different hearings.

Id. at 518-19, 710 S.E.2d at 288-89 (footnote omitted).

Here, in addition to refusing to answer whether he wanted assistance of counsel at three separate pretrial hearings, defendant repeatedly and vigorously objected to the trial court's authority to proceed. Although defendant on multiple occasions stated that he did not want assistance of counsel, he also repeatedly made statements to the effect that he was reserving his right to seek Islamic counsel, although over the course of four hearings and about three and a half months he never did obtain counsel. We conclude that defendant's behavior, similar to the defendant's behavior in *Leyshon*, amounted to willful obstruction and delay of trial proceedings and, therefore, defendant forfeited his right to counsel. See also *Mee*, ___ N.C. App. at ___, 756 S.E.2d at 113-14 (upholding forfeiture where "defendant appeared before at least four different judges over a period of fourteen months, during which time he hired and then fired counsel twice, was briefly represented by an assistant public defender, refused to indicate his wishes with respect to counsel, advanced unsupported legal theories concerning jurisdiction, and claimed not to understand anything that was said on a subject other than

jurisdiction. When the case was called for trial, defendant refused to participate in the trial.").¹

II

Defendant next argues that the trial court erred in denying his motion to dismiss the RWDW charges because the evidence did not show that defendant personally took the personal property of another. Defendant acknowledges that "a defendant can be convicted of armed robbery under acting in concert," but contends that "the court must properly instruct the jury on acting in concert in order for the conviction to be upheld based on that theory." Defendant then asserts: "When the trial [court] fails to properly instruct the jury on acting in concert, the defendant's convictions can only be upheld if the evidence shows that the defendant 'personally committed each element' of the offense[,]" quoting *State v. Roberts*, 176 N.C. App. 159, 163-64, 625 S.E.2d 846, 850 (2006). This is a misleading citation of *Roberts*.

¹While defendant relies upon *State v. Wray*, 206 N.C. App. 354, 698 S.E.2d 137 (2010), that appeal presented an issue not raised in this case: whether the defendant was competent to represent himself under *Indiana v. Edwards*, 554 U.S. 164, 171 L. Ed. 2d 345, 128 S. Ct. 2379 (2008). See *Wray*, 206 N.C. App. at 371, 698 S.E.2d at 148 (after concluding that the record raised questions about defendant's competence to represent himself, holding: "We are well aware that the trial court may not have had the benefit of the U.S. Supreme Court's decision of *Indiana v. Edwards*. On the facts of this record, we conclude that the trial court erred by granting defense counsel's motion to withdraw and in ruling that Defendant had forfeited his right to counsel.").

In *Roberts*, this Court held simply:

The jury was instructed it could find defendant guilty of first degree sexual offense only if he employed or displayed a dangerous or deadly weapon. *Without an instruction on acting in concert* or the theory of aiding and abetting, the evidence must support a finding that defendant personally employed or displayed a dangerous or deadly weapon in the commission of the sexual offense.

Id. at 164, 625 S.E.2d at 850 (emphasis added). *Roberts* is limited solely to the situation in which the trial court has given no instruction whatsoever on acting in concert or aiding and abetting. See also *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (noting that "in the absence of an acting in concert instruction, the State must prove that the defendant committed each element of the offense").

Defendant cites no authority -- and we know of none -- supporting his position: that even when a jury is instructed on acting in concert, that theory cannot be considered with respect to the sufficiency of the evidence to defeat a motion to dismiss if the trial court made any error in the acting-in-concert instruction. See *State v. Taft*, ___ N.C. App. ___, 738 S.E.2d 454, 2013 WL 602999, at *5, 2013 N.C. App. LEXIS 160, at *13, (unpublished) ("After reviewing the arguments and applicable case law, we find a distinction between the cases cited by defendants in which the trial court failed or refused to give an acting in

concert instruction and there was otherwise insufficient evidence to support the convictions, and the case presently before this Court, where the trial court mistakenly issued the wrong instruction but there is otherwise sufficient evidence to support the convictions"), *appeal dismissed and disc. review denied*, ___ N.C. ___, 743 S.E.2d 200 (2013).

Here, after instructing the jury on the elements of RWDW and indicating that the elements would be the same for each of the nine counts, the trial court then instructed the jury:

Ladies and gentlemen, for a person to be guilty of a crime it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to *commit robbery with a dangerous weapon*, each of them, if actually or constructively present, is not only guilty of that crime if the other person commits the crime, but is also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a dangerous weapon, or as a natural or probable consequence thereof.

(Emphasis added.) The trial court, therefore, specifically instructed the jury regarding the doctrine of acting in concert in connection with the charges of RWDW. Therefore, *Roberts* is inapplicable.

While defendant spends a significant portion of his brief setting out his contentions as to why this acting-in-concert instruction was "defective," defendant acknowledges that he did

not object to the instruction, and he denies that he is seeking plain error review of the instruction. Instead, he asserts in his reply brief: "The issue in this case is not that the trial court failed to give a proper acting in concert instruction to the jury." Consequently, we do not address whether the trial court committed plain error with respect to the instruction on acting in concert. *See, e.g., State v. Hill*, ___ N.C. App. ___, ___, 741 S.E.2d 911, 916 ("Since defendant does not argue that the trial court's purported error should be reviewed for plain error, we conclude he has waived appellate review of this issue on appeal."), *disc. review denied*, ___ N.C. ___, 747 S.E.2d 577 (2013).

No error.

Judges BRYANT and CALABRIA concur.