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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-266

Filed: 3 March 2020

Orange County, No. 17 CRS 52067

STATE OF NORTH CAROLINA

v.

DARIUS WILLIAM HODGES, JR., Defendant.

Appeal by Defendant from judgment entered 26 September 2018 by Judge G. Bryan Collins, Jr. in Orange County Superior Court. Heard in the Court of Appeals 2 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Sarah G. Zambon, for the State.

Michael E. Casterline, P.A., by Michael E. Casterline, for defendant-appellant.

MURPHY, Judge.

Substantial evidence must exist for a trial court to deny a motion to dismiss. The trial court here properly denied Defendant's motion to dismiss because the State presented substantial relevant evidence to persuade a rational juror to accept that Defendant acted in concert with his armed brother and others to commit robbery with a dangerous weapon and assault.

In addition, a trial court needs to instruct a jury on a lesser-included offense only if the evidence would permit the jury to rationally find defendant guilty of the lesser offense and to acquit him of the greater. No evidence exists that Defendant committed common law robbery rather than robbery with a dangerous weapon. Thus, the trial court properly denied the motion to include an instruction for the lesser-included offense of common law robbery.

BACKGROUND

Victim¹ was walking home when a car pulled up beside him. The car was driven by Xavier Hodges (“Xavier”). Xavier rolled down his window, pointed a handgun at Victim, and told Victim, “Run yo shit.”² At the same time, two men emerged from behind trashcans and approached Victim from behind. One man was

¹ To preserve the victim’s anonymity, we refer to him as “Victim” throughout the opinion.

² The transcript explains the meaning of this command in the following exchange:

[State]: Let’s back up just for a moment. The phrase “run yo shit”. What did you take that to mean?

[Victim]: I mean, I was just scared. Like, I just gave them everything I had.

[State]: Right. But you may not be able to assume that everybody knows that term. How did you understand -- when he said “run yo shit”, does it mean you go for a run?

[Victim]: It does not mean you go for a run. Obviously not. When they got a gun pointed at you, you just think, give everything you got, you know. That’s really all they want. Whatever you got.

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Lonnie Degraffenreidt (“Degraffenreidt”), and the other was Defendant, Darius William Hodges, Jr.—Xavier’s brother.

Degraffenreidt said to Victim, “You were going for my homie’s head,” and punched Victim twice on the side of his face while grabbing Victim’s phone. Defendant “was just standing right behind [Degraffenreidt] trying to make sure [Victim] didn’t do nothing or try to hit him back or anything.” After Victim handed over his wallet to one of the men, both Degraffenreidt and Defendant got into the car, and Xavier drove them away. As the car pulled away, Victim noticed a fourth man sitting in the car’s backseat. Victim ran home and called 911.

After an investigation, a warrant was issued for Defendant’s arrest on charges of felony robbery with a deadly weapon and misdemeanor assault. He was later indicted for the same offenses. At trial, defense counsel moved “to dismiss the robbery with a dangerous weapon, as well as the assault[.]” Counsel also moved to include a jury instruction on the lesser-included offense of common law robbery. Both motions were denied. The jury found Defendant guilty of robbery with a dangerous weapon and misdemeanor assault.

ANALYSIS

A. Motion to Dismiss

Defendant argues the trial court erred in denying the motion to dismiss the charges of robbery with a dangerous weapon and assault. In particular, he contends

there was insufficient evidence to support a conviction based on the State's theory of acting in concert because he was "merely present at the scene." The State argues it presented "overwhelming evidence" that Defendant was acting in concert with the other perpetrators.

We "review[] the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* (citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). "The trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight, and the test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (quoting *State v. Malloy*, 309 N.C. 176, 178-79, 305 S.E.2d 718, 720 (1983))

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(internal marks omitted). “Once the court decides that a reasonable inference of defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts satisfy the jury beyond a reasonable doubt that the defendant is actually guilty.” *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 550 (internal marks omitted) (quoting *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000)). “But 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, the motion to dismiss must be allowed.” *Id.* (alterations omitted) (quoting *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720).

“The theory of acting in concert does not require an express agreement between the parties. All that is necessary is an implied mutual understanding or agreement to do the crimes.” *State v. Giles*, 83 N.C. App. 487, 350 S.E.2d 868 (1986). “A defendant may be found guilty of committing a crime under the theory of acting in concert if he is present at the scene of the crime acting together with another person with whom he shares a common plan although the other person does all the acts necessary to carry out the crime.” *State v. Gaines*, 345 N.C. 647, 675, 483 S.E.2d 396, 413 (1997). “A defendant’s presence at the scene may be either actual or constructive.” *Id.* “Constructive presence is not determined by the defendant’s actual distance from the crime[.]” *State v. Combs*, 182 N.C. App. 365, 370, 642 S.E. 2d 491, 496 (2007). Instead, “[a] person is constructively present during the commission of a

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crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime.” *Gaines*, 345 N.C. at 675-76, 483 S.E.2d at 413.

Defendant suggests his case has much in common with *State v. Ikard*, 71 N.C. App. 283, 321 S.E.2d 535 (1984). When we viewed the evidence in that case

in the light most favorable to the State, it tend[ed] to show that . . . four men got into the automobile belonging to [the victim] and directed him to drive them to a “liquor house” The defendant sat in the back seat of the car and, when [the victim] stopped in the parking lot of the [liquor house], the defendant emerged from the vehicle, taking with him an AM-FM radio that belonged to [the victim].

The other men also got out of the car, and the four men walked down the driveway toward the building. [The victim] also got out of the car and called to the men, “Hey, bring my radio back here. You made me give you a ride, now give me my radio back.” The four men stopped, looked back, and then turned around and walked a few steps further away, until they were approximately twenty to twenty-five feet from [the victim].

Two of the men then turned around and came back toward [the victim], and one pulled a sawed-off shotgun from under his raincoat, placed the barrel close to the victim’s face, and said, “Give me your money.” The second man then shoved [the victim] and took eighteen dollars from the victim’s wallet.

Defendant and the fourth man remained twenty to twenty-five feet from [the victim] and observed what took place. At no time during the ride or during the incident at the [liquor house] did the defendant say anything, *nor did defendant move toward [the victim] while he was being robbed by the other men.*

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After the two men took the money from [the victim], they walked back to where defendant and the other man stood, and the four walked away.

Id. at 284-85, 321 S.E.2d at 536 (emphasis and paragraph spacing added). This “establishe[d] that [the robbery with a dangerous weapon] occurred *after* the crime [defendant] committed in removing the radio from [the victim’s] vehicle.” *Id.* at 285, 321 S.E.2d 536 (emphasis added). There, no evidence tended to show (1) “defendant knew that his companions were going to rob [the victim]”; (2) defendant “knew one of the men was armed”; (3) “defendant encouraged the other men in the commission of the crime”; or (4) defendant “by word or deed indicated to them that he stood prepared to render assistance.” *Id.* at 285-86, 321 S.E.2d at 537. “The most that [could] be said [about the] evidence [was] that [the] defendant was present when the [robbery with a dangerous weapon] was committed, and [that was] insufficient to take the case to the jury.” *Id.* at 286, 321 S.E.2d at 537. That is not the case here.

Unlike *Ikard*, Defendant was not merely present at the scene of the robbery with a dangerous weapon or the assault. When considered in the light most favorable to the State, there is sufficient testimony to persuade a rational juror to accept a conclusion of Defendant’s guilt. Defendant and Degraffenreidt were already at the scene, behind trashcans, when Xavier, Defendant’s brother, drove up in a car and pointed a gun at Victim. Then, at the same time, Defendant and Degraffenreidt moved toward Victim from behind. Degraffenreidt started punching and taking Victim’s property while Defendant “was just standing right behind [Degraffenreidt.]”

Finally, even though Defendant did not arrive in the car with his brother, the Defendant and Degraffenreidt “hopped in the car and they left” together after the robbery was completed.

Under its theory of acting in concert, the State presented substantial evidence of each essential element of the crimes and that Defendant was the perpetrator. A reasonable inference of Defendant’s guilt may be drawn from the circumstances, and the evidence raises more than suspicion or conjecture as to Defendant acting in concert to commit robbery with a dangerous weapon and assault. The trial court properly denied the motion to dismiss.

B. Lesser-Included Offense

Defendant argues the trial court erred in failing to instruct on the lesser-included offense of common law robbery. He contends the instruction was requested by defense counsel and supported by the evidence. The State argues the instructions were unnecessary based on the evidence presented. We review de novo a trial court’s denial of a request for a jury instruction on a lesser-included offense. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E. 2d 144, 149 (2009). That denial prejudices a defendant when “there is a reasonable possibility that, had the [instruction on the lesser-included offense been given], a different result would have been reached at the trial [. . ..]” N.C.G.S. § 15A-1443(a); see *State v. Brewington*, 343

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N.C. 448, 454, 471 S.E.2d 398, 402 (1996); *State v. Barlowe*, 337 N.C. 371, 379, 446 S.E.2d 352, 357 (1994).

“An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater.” *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). Unlike the above motion to dismiss issue, “for submission of the lesser offense to the jury, we must view the evidence in the light most favorable to the defendant.” *Barlowe*, 337 N.C. at 378, 446 S.E.2d at 357. The trial court may refrain from submitting the lesser offense to the jury when “the State’s evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser-included offense.” *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). “[T]he trial judge is not required to instruct on common law robbery when the defendant is indicted for [robbery with a dangerous weapon] if the uncontradicted evidence indicates that the robbery, if perpetrated, was accomplished by the use of what appeared to be a dangerous weapon.” *State v. Tarrant*, 70 N.C. App. 449, 451-52, 320 S.E.2d 291, 294 (1984).

“The essential elements of robbery with a dangerous weapon 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. Frogge*,

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351 N.C. 576, 585, 528 S.E.2d 893, 899 (2000) (internal marks and citations omitted). To convict a defendant of this offense, “the defendant’s use or threatened use of a dangerous weapon must precede or be concomitant with the taking, or be so joined with it in a continuous transaction by time and circumstances as to be inseparable.” *State v. Hope*, 317 N.C. 302, 306, 345 S.E.2d 361, 364 (1986). Common law robbery is a lesser-included offense of robbery with a dangerous weapon. *State v. Curtis*, 18 N.C. App. 116, 122, 196 S.E.2d 278, 282 (1973). It is “the non-consensual taking of money or personal property from another by means of violence or fear.” *State v. White*, 142 N.C. App. 201, 204, 542 S.E.2d 265, 267 (2001). “The critical difference between . . . robbery [with a dangerous weapon] and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened.” *Peacock*, 313 N.C. at 562, 330 S.E.2d at 195. “[W]hen there is an actual danger or threat to the victim’s life—by the possession, use, or threatened use of a dangerous weapon—the defendant may be charged and convicted of armed robbery rather than common law robbery.” *State v. Duff*, 171 N.C. App. 662, 671, 615 S.E.2d 373, 380 (2005) (citations omitted).

Defendant argues the State’s evidence could only sustain a conviction for common law robbery because the use of the firearm did not happen concomitantly with the taking. He contends the State did not satisfy the second element of armed robbery because the assault and taking was a distinct transaction from the display of

the firearm. This argument hinges on whether the taking of Victim's property was the result of the threatened firearm or the physical assault. If Victim's property was taken solely because of the assault, then Defendant argues the presence of the firearm is irrelevant because it merely facilitated the assault which caused the actual taking. Even if the evidence is viewed in the light most favorable to Defendant, his arguments fail for two reasons.

First, the robbery was concomitant with the assault. Defendant and Degraffenreidt approached Victim while he was under the threat of a firearm. Although the transcript is unclear whether Xavier pointed the gun at Victim during the entire robbery, Victim's property was taken at the same place where, and immediately after, Xavier pointed the gun at him. There remained an actual danger or threat to Victim by the possession, use, and threatened use of a dangerous weapon by Xavier.

Second, the robbery of Victim was one continuous transaction. Defendant asks us to view the threat of a gun and the assault as two separate criminal transactions. Yet, the victim, time, and location remained the same and the exchange was uninterrupted. The criminal transaction began the moment Xavier held Victim at gunpoint a few feet away from Defendant and Degraffenreidt, who were waiting behind trashcans as part of a common plan to rob Victim. The assault was another way of inflicting fear and violence on Victim in concert with the gun; the assault did

not mark the commencement of a new transaction. Thus, the trial court did not err when it refused to instruct on common law robbery.

CONCLUSION

The trial court properly denied the motion to dismiss because substantial evidence exists that Defendant acted in concert to commit robbery with a dangerous weapon and to assault Victim. The trial court also properly declined to instruct on the lesser-included offense of common law robbery because, taken in the light most favorable to the Defendant, no evidence exists that Defendant committed common law robbery or used a dangerous weapon in doing so.

NO ERROR.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).