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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1168

Filed: 17 November 2020

Cumberland County, No. 17 CRS 51855-56, 19 CRS 01066

STATE OF NORTH CAROLINA

v.

KEYSHAWN TYRONE MATTHEWS

Appeal by defendant from judgments entered 29 May 2019 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, for the State.

Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

TYSON, Judge.

I. Background

Charles Brown (“Brown”) was shot outside of Brown’s Garage in Fayetteville, North Carolina on 10 February 2017. Police arrived on the scene at 12:59 p.m. and

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emergency medical personnel rushed Brown to the hospital. Brown died from blood loss caused by a single gunshot wound to the abdomen.

The State's evidence tended to show the events, which led up to the shooting, were observed by two witnesses. Both witnesses testified and described two black men, being in their mid-20s, walking towards Brown and his truck. The witnesses recounted one man wore a red and black checkered hat and carried a revolver. The other man wore a black sock hat and carried a "Glock-style" pistol.

The two men pointed their guns at Brown, opened the cover to the gas tank of Brown's truck, walked around the truck and opened the doors. Brown backed up with his hands raised. The man in the red and black hat fired a shot towards Brown.

Fayetteville Police Detective Joe Figueroa testified crimes committed in the area of Brown's shooting are difficult to investigate because residents fear retaliation and are reluctant to talk. Witnesses' statements and video surveillance led investigators to charge Keyshawn Matthews ("Defendant") with Brown's murder. Police found a Taurus 9 mm "Glock-style" semi-automatic pistol at the residence where Defendant often slept.

A forensic firearms examiner conducted tests on the pistol and examined the bullet retrieved from Brown's abdomen. The examiner found the bullet that killed Brown was consistent in style and caliber with bullets fired from the Taurus pistol.

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He testified the Taurus pistol could have been used in the shooting. He was unable to determine conclusively the bullet that killed Brown was fired from that pistol.

Defendant was indicted for first-degree murder, robbery with a dangerous weapon and felonious conspiracy. Defendant was also indicted for possession of a firearm by a convicted felon and pled guilty to that count prior to trial.

Defendant's counsel's motion to dismiss at the close of State's evidence was denied. Defendant did not present any evidence. At the close of all the evidence, Defendant renewed his motion to dismiss, which was denied. The jury unanimously found Defendant guilty of first-degree murder under the felony murder rule, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon.

Defendant was sentenced to prison for the remainder of his life without possibility of parole for first-degree murder, and to a consolidated consecutive sentence of 33 to 52 months imprisonment for felonious conspiracy and for possession of a firearm by a felon. The trial court arrested judgment on the conviction for attempted robbery with a dangerous weapon as the predicate felony to support the felony murder conviction. Defendant appealed.

II. Jurisdiction

This Court possesses jurisdiction over a final judgment in the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2019).

III. Standard of Review

This Court reviews the trial court's denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008) (citation omitted). "When considering a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the crime." *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (citation and internal quotation marks omitted). "'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981) (citations omitted). In reviewing challenges to the sufficiency of evidence, the reviewing court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.*

IV. Substantial Evidence

Defendant raises two issues on appeal. First, whether his convictions must be vacated because the State offered only speculative and insubstantial evidence of an attempted robbery, acts of extortion, and a conspiracy to commit robbery. Secondly, whether the trial court's instruction on acts of extortion improperly expressed an opinion on the evidence.

A. Felony Murder

Defendant asserts the State presented speculative and insubstantial evidence to survive his motion to dismiss. A murder is a felony murder when it is “committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon.” N.C. Gen. Stat. § 14-17(a) (2019); *State v. Barlowe*, 337 N.C. 371, 380, 446 S.E.2d 352, 358 (1994).

A murder conviction based upon a theory of felony murder requires the State to prove: (1) “a defendant, or someone with whom the defendant was acting in concert, committed or attempted to commit a statutory predicate felony”; (2) the killing occurred “in the perpetration or attempted perpetration of that felony”; and, (3) “the killing was caused by the defendant or a co-felon.” *State v. Maldonado*, 241 N.C. App. 370, 376, 772 S.E.2d 479, 483-84 (2015) (citations omitted).

When the State prosecutes a defendant for first-degree murder under the felony murder rule, the State is not required to secure a separate indictment for the underlying felony. *State v. Williams*, 305 N.C. 656, 660 n. 1, 292 S.E.2d 243, 247 (1982).

If the State does secure a separate indictment for the underlying felony, and there is a conviction of both felony murder and the underlying felony, the defendant will be sentenced for the felony murder and judgment must be arrested for the underlying felony under the merger rule. *Barlowe*, 337 N.C. at 380, 446 S.E.2d at 358.

If the indictment for the underlying felony is treated as surplusage, and only the felony murder charge is submitted to the jury, the defendant cannot be charged thereafter for the underlying felony. *Id.*

B. Attempted Robbery with a Dangerous Weapon

Defendant was also convicted by the jury for attempted robbery with a dangerous weapon. The essential elements of the crime of attempted robbery with a dangerous weapon are: (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and, (3) danger or threat to the life of the victim. *State v. Van Trusell*, 170 N.C. App. 33, 37, 612 S.E.2d 195, 198 (2005) (alterations and citation omitted).

“Attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result.” *State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987).

Construing the evidence in the light most favorable to the State, sufficient evidence exists from which a reasonable jury could find Defendant committed an attempted armed robbery. Two eyewitnesses observed the shooting of Brown. Both witnesses observed and described the race, age range, clothing, and appearance of the two men carrying guns. Both witnesses saw the men walk around and attempt

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to open or open the truck's doors. One witness observed the men open the door of Brown's truck, and they appeared to go inside the truck for five to ten minutes. Conversely, another witness observed the men attempt to open, but not successfully open the door to Brown's truck.

A witness observed the men open and peer into Brown's gas tank, and then approach Brown with their guns pointed at him. One witness heard Brown cry out, "Oh, so you gonna rob me? You gonna rob me?" One eyewitness observed one of the men shoot Brown. The other eyewitness observed both men shoot their weapons in Brown's direction. Defendant acknowledged he and his co-conspirator, Robert Williams Jr ("Slugger"), fired at least four rounds from their pistols.

After the shooting and later the same day, Defendant admitted to both his sister, Star Terry, and his cousin, Darren Terry, on separate occasions, that he had been involved in a robbery. Defendant told his sister that he and Slugger were together for the purpose of "retrieving an item" for Perry and Terry Campbell ("The Twins"). The Twins are known for drug dealing and committing robberies. Although the record is unclear if Defendant took money for or from The Twins, Defendant showed his sister "some money" after Brown's shooting.

Star Terry testified Defendant had told her, "Somebody had something . . . they wanted. [The Twins] wanted them to go take it." Defendant further

admitted to his sister he had fired his gun, the victim had been shot in the stomach, and he was not sure whether his or Slugger's shots had hit the victim.

Two days later, Defendant sent a text from his phone asserting he had "been in a shootout" two days earlier, and "someone had died." Defendant admitted to Detective Figueroa he was present in the area of Brown's garage at the time of the shooting, he was carrying a gun, and that he and Slugger had both fired their guns. Viewed in the light most favorable to the State, the jury could find and convict Defendant of first-degree murder under the felony murder rule and of attempted armed robbery against Brown based upon this evidence.

C. Defendant's arguments

Defendant cites two cases in his defense: *State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991), and *State v. Johnson*, 208 N.C. App. 443, 702 S.E.2d 547 (2010). In *McDowell*, the State's evidence tended to show the defendant displayed his pistol to several friends and asked his friends if they were "down to make money." 329 N.C. at 369, 407 S.E.2d at 203.

The defendant fired his gun into an occupied vehicle, killing the female driver. *Id.* at 369, 407 S.E.2d at 203-04. The driver had a pocketbook, which lay unopened and undisturbed in her car; and there was no evidence the defendant had attempted to take or had taken anything from the victim. *Id.* at 370, 407 S.E.2d at 204. Our Supreme Court concluded there was a suspicion the defendant had intended to rob

the victim, but mere suspicion was insufficient to convict the defendant of attempted armed robbery. *Id.* at 389, 407 S.E.2d at 215.

In *Johnson*, the victim was at home when the defendant and an accomplice, armed with a gun, attempted to force their way into the victim's house, while threatening they were going to kill him. *Johnson*, 208 N.C. App. at 444, 702 S.E.2d at 549. The defendant and accomplice ran away while the victim's uncle retrieved a gun. *Id.* at 445, 702 S.E.2d at 549. "[W]e recognize evidence can be direct or circumstantial, this does not rise to the level of sufficient circumstantial evidence, but merely raises a suspicion that defendant was attempting a taking." *Id.* at 447, 702 S.E.2d at 550. On this evidence, without more, this Court held insufficient evidence was admitted to prove the defendant had intended to rob the victim. *Id.*

There is more than mere suspicion to support the denial of the motions to dismiss than was present in either *McDowell* or *Johnson*. Defendant specifically told two family members, on separate occasions, that he had been involved in a robbery earlier that day. Defendant was observed trying to open the door of Brown's truck, appeared to go inside the truck for a short period of time, walked around, opened the cover and looked in the truck's gas tank.

Witnesses heard Brown exclaim, "Oh, so you gonna rob me? You gonna rob me?" According to witnesses at the scene, and as Defendant admitted at his interview with Detective Figueroa, Defendant was one of the men who shot at Brown.

Defendant also told his sister he had accompanied Slugger for the purpose of “retrieving an item” for The Twins. During the interview with Detective Figueroa, Defendant stated, “They say they want that s***, and I wasn’t the one supposed to bring it to them.” It is unclear if Defendant was referring to money or drugs after Brown had allegedly “made a drop.” Substantially greater evidence was admitted here to surpass mere suspicion of Defendant’s attempted robbery of Brown.

Acting in concert with another occurs “when two or more persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other in pursuance of the common plan or purpose.” *State v. Melvin*, 364 N.C. 589, 592, 707 S.E.2d 629, 631 (2010) (citations and internal quotations omitted).

A defendant may “be held guilty for a murder committed in pursuit of that common plan even though the defendant did not personally commit the murder.” *Id.* at 592, 707 S.E.2d at 631-32. Defendant admitted both he and Slugger were armed and had fired their weapons multiple times. Defendant admitted Terry Campbell, one of The Twins, had told him “if things go wrong, just start shooting” and “we about to get dude [Brown] out of here . . . we want the garage.” Defendant asserted, “That’s all I thought they was gonna do. I didn’t think nobody was gonna be killed or shot.”

Substantial evidence, more than mere suspicion, exists from which the jury could find Defendant committed the offense of attempted armed robbery; or Defendant had acted in concert with Slugger during the attempted robbery prior to

Brown's murder. A reasonable mind could find this evidence supports both attempted armed robbery by Defendant and acting in concert with Slugger in an attempted armed robbery. The trial court properly denied Defendant's motion to dismiss this charge.

D. Evidence of Conspiracy to Commit Robbery

The jury also convicted Defendant of conspiracy to commit armed robbery. "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. Privette*, 218 N.C. App. 459, 478, 721 S.E.2d 299, 313 (2012) (citations omitted). "The crime of conspiracy is an agreement to commit a substantive criminal act." *State v. Ledwell*, 171 N.C. App. 328, 333-34, 614 S.E.2d 412, 415 (2005). "The crime is complete when the agreement is made." *Id.* at 333-34, 614 S.E.2d at 415 (holding conspiracy arose when the defendant entered into an agreement to traffic cocaine). Under North Carolina law, no overt act in furtherance of the agreement is required. *State v. Gallimore*, 272 N.C. 528, 532, 158 S.E.2d 505, 508 (1968).

Defendant contends the trial court erred in denying his motion to dismiss the charge of conspiracy to commit armed robbery. The State's evidence tended to show Defendant, acting together with Slugger and The Twins, planned to approach Brown, attempted to gain access to his vehicle, and threatened Brown with their guns pointed

at him. Both of these men shot at Brown. Defendant sent a text message, on 12 February 2017 confessing, “I was in a shootout two days ago and somebody died.”

Defendant admitted that Terry Campbell had told him the plan, and “if things go wrong, just start shooting” and “we about to get dude (sic) [Brown] out of here . . . we want the garage.”

Viewed in the light most favorable to the State, sufficient evidence was admitted from which a jury could find Defendant entered into and conspired with others to commit robbery with a firearm. Defendant’s motion to dismiss was properly denied.

V. Harmless Error

A. Extortion Instruction

Defendant argues insufficient evidence was presented to support an instruction on acts of extortion and the trial court erred by instructing the jury on a crime not charged.

The jury was given instructions on evidence of acts of extortion and armed robbery as the underlying felonies to support the felony murder conviction. As discussed above, our Supreme Court has repeatedly held when a defendant is prosecuted for first-degree murder under the felony murder rule, the State is not required to secure a separate indictment for the underlying felony. *State v. Williams*, 305 N.C. 656, 660 n. 1, 292 S.E.2d 243, 247 n. 1 (1982).

If the State secured a separate indictment for the underlying felony, and the jury convicts on both felony murder and the underlying felony, the defendant will be sentenced for the murder and the judgment must be arrested for the underlying felony under the merger rule. *Barlowe*, 337 N.C. at 380, 446 S.E.2d at 358. Here, the trial court properly arrested judgment on the conviction of attempted robbery with a dangerous weapon as the predicate felony for felony murder.

Defendant argues “[w]here the trial judge has submitted the case to the jury on alternative theories, one of which is . . . erroneous . . . and we cannot discern . . . the theory upon which the jury relied . . . we resolve the ambiguity in favor of the defendant.” *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987).

Presuming an error occurred, an instruction to support unindicted acts of extortion is harmless if the defendant is not materially prejudiced. “The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.” N.C. Gen. Stat. § 15A-1443(b) (2019).

1. Three Felonies Support the Underlying Felony Murder

“A murder . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, *or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree[.]*” N.C. Gen. Stat. § 14-17 (2019) (emphasis supplied).

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Defendant pled guilty to possession of a firearm by a felon in a pre-trial conference. The jury unanimously found Defendant was guilty of the felonious offenses of attempted armed robbery and conspiracy to commit robbery with a dangerous weapon. “Only one underlying felony is required to support a felony murder conviction[.]” *State v. Coleman*, 161 N.C. App. 224, 235, 587 S.E.2d 889, 896 (2003).

The State argues the jury’s failure to state which felony supported their felony murder conviction is harmless. Any one of the three convictions would be sufficient to uphold the jury’s conviction for felony murder. *See State v. Fields*, 315 N.C. 191, 199, 337 S.E.2d 518, 523 (1985) (holding possession of a deadly weapon is enough, and the defendant is guilty of felony murder, even if the weapon is not *physically* used to actually commit the felony if the defendant has brought the weapon along).

Furthermore, our precedents do not require the jury verdict form to reflect the jury’s determination of which underlying felony supported their finding of felony murder. *See State v. Taylor*, 362 N.C. 514, 541, 669 S.E.2d 239, 262 (2008) (finding either of the alternative acts established an element of felony murder [] namely, the commission of one of the several felonies enumerated in N.C. Gen. Stat. § 14-17 the requirement of jury unanimity was satisfied); *State v. Hartness*, 326 N.C. 561, 563-67, 391 S.E.2d 177, 178-81 (1990) (holding when a defendant is charged with a single offense which may be proved by evidence of the commission of any one of a number

of acts, an instruction that does not specify which of those acts the jury should consider is not fatally ambiguous such that it risks a nonunanimous verdict). This Court has also applied these precedents in *State v. Coleman*, 161 N.C. App. at 234-35, 587 S.E.2d at 896 (2003) (upholding the jury’s finding of felony murder when the trial court instructed the jury in the disjunctive regarding four separate felonies that could have served as the predicate felony, even though the trial court’s instructions were “ambiguous as to what underlying felony formed the basis of the felony murder charge”).

2. Extortion by Alternate Acts

The jury found Defendant was guilty of felonious attempted armed robbery with a dangerous weapon, which necessarily found facts to support the elements of extortion. “[I]f the trial court merely instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied.” *State v. Taylor*, 362 N.C. 514, 541, 669 S.E.2d 239, 262 (citations omitted).

Under N.C. Gen. Stat. § 14-118.4 (2019), a person is guilty of extortion if the person “threatens or communicates a threat or threats to another with the intention [to] wrongfully . . . obtain anything of value or any acquittance, advantage, or immunity.” No presence of a deadly or dangerous weapon is required to commit extortion. *See id.*

Similarly, “[a]n attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result.” *Allison*, 319 N.C. at 96, 352 S.E.2d at 423.

The State provided substantial evidence tending to show Defendant committed multiple acts of extortion from Brown. During his interview with Detective Figueroa, Defendant twice stated the purpose of the armed confrontation with Brown was to “extort” from Brown. Brown was known to sell marijuana. The Twins told Defendant that Brown was to be threatened with harm to force Brown from the shop.

Defendant claimed one of The Twins had told him, “I’m a go (sic) over there and tell [Brown] he gotta get his a** off the block, plain and simple . . . What I’m gonna do is just extort him and just take over the shop.”

At the conclusion of the interview, Detective Figueroa stated: “You went there with the intention, the purpose of robbing him.” In response, Defendant claimed: “I didn’t go out there with the intention to rob nobody . . . What I was told . . . it was just to extort [Brown] and to scare him.

Both attempted armed robbery with a dangerous weapon and extortion require a use of threat to deprive another of personal property or to obtain something of value from the victim. The jury’s unanimous finding of attempted armed robbery with a dangerous weapon would also support a finding of acts of extortion under these facts.

The State has met their burden to show any purported error in the instruction on acts of extortion was harmless beyond a reasonable doubt.

B. Improper Expression of Opinion

Defendant contends the trial court improperly expressed an opinion when the jury was instructed on evidence of extortion. Applying the same reasoning above, this error is also harmless. In giving the charge on acts to extortion, the trial court instructed the jury as follows:

There are three elements of extortion. First, that the Defendant, acting either by himself or together with another, threatened the victim by pointing a gun at the victim. Second, that the Defendant, acting either by himself or together with another, did this with the intent to obtain something of value or an advantage. Getting the victim off the block and obtaining use of the garage *would* be something of value or an advantage –*could* be something of value or an advantage. (emphasis supplied).

Defendant asserts any such expression of opinion violates the statutory mandates of N.C. Gen. Stat. § 15A-1222 (2019) (a judge may not express any opinion in the presence of the jury on any question of fact) and N.C. Gen. Stat. § 15A-1232 (2019) (when instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved). Defendant further argues this instruction violation is preserved for appellate review as a matter of law. *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989).

In *Young*, our Supreme Court considered whether the trial court stated his

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opinion in his jury instructions. The judge stated: “There is evidence in this case which tends to show that the defendant confessed that he committed the crime charged.” The defense argued the trial courts use of the words “tends to show” amounted to an expression of opinion on the evidence and violated the general statutes. *Id.* at 495, 380 S.E.2d at 97.

Our Supreme Court stated: “The use of the words ‘tending to show’ or ‘tends to show’ in reviewing the evidence does not constitute an expression of the trial court’s opinion on the evidence.” *Id.* The Court reasoned, the evidence, if believed by the jury, was sufficient to support the verdict convicting the defendant. If the jury believed the evidence before them, it would be justified in finding the defendant had admitted to committing the crime. *Id.* at 496-97, 380 S.E.2d at 98. “The effect of the remarks on the jury and not the judge’s motive in making them is determinative.” *State v. Staley*, 292 N.C. 160, 232 S.E.2d 680 (1977).

Here, the jury heard testimony from witnesses and detectives sufficient to support the verdict convicting Defendant of attempted armed robbery with a dangerous weapon and extortion. The standard to show error and prejudice is not the intent of the judge, but the meaning of the judge’s words to the jury. *State v. Canipe*, 240 N.C. 60, 65, 81 S.E.2d 173, 177 (1954).

Further, the trial court’s use of “would” was clearly inadvertent. The judge immediately corrected himself once he realized he had misspoken, by correctly

instructing “could be something of value or an advantage.” The trial court’s instruction did not express an opinion on the evidence to the jury. Defendant’s argument is overruled. *See Young*, 324 N.C. at 495-98, 380 S.E.2d at 97-99.

VI. Conclusion

When viewed in a light most favorable to the State, sufficient evidence was admitted for a reasonable jury to convict Defendant of attempted robbery with a dangerous weapon. Sufficient evidence was also admitted to support the jury’s finding of a felony murder conviction. The trial court properly denied Defendant’s motion to dismiss based upon sufficiency of the evidence.

The conviction of attempted robbery with a dangerous weapon complies with the statute as an underlying felony to support Defendant’s conviction for felony murder. Defendant was indicted for this crime. The trial court properly arrested judgment of the jury’s conviction of attempted robbery with a dangerous weapon. Defendant was not sentenced separately for this conviction.

The trial court’s immediate correction of its misstatement during jury instructions must be viewed by the jury’s interpretation. Here, sufficient evidence was presented and admitted to prove attempted armed robbery, and any purported error in the instruction on Defendant’s acts of extortion was harmless.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury’s verdicts or in the judgments entered thereon.

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It is so ordered.

NO ERROR

Judges BRYANT and COLLINS concur.

Report per Rule 30(e).