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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-120

No. COA20-208

Filed 6 April 2021

Lincoln County, Nos. 18 CRS 50822, 352

STATE OF NORTH CAROLINA

v.

MICHAEL LEE ETTERS JR.

Appeal by defendant from judgment entered 28 June 2019 by Judge Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 26 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General William F. Maddrey, for the State.

Mark Hayes for defendant.

DIETZ, Judge.

¶ 1 Defendant Michael Lee Etters Jr. appeals his conviction for robbery with a dangerous weapon. Etters argues that there was insufficient evidence to support a jury instruction on the “friend exception” to the mere presence rule.

¶ 2 As explained below, we reject this argument. The State’s evidence was sufficient for the jury to infer that Etters knew his presence would be interpreted by

his longtime friend as encouragement and protection during the commission of the robbery. Accordingly, the trial court did not err by overruling his objection and providing the challenged instruction to the jury.

Facts and Procedural History

¶ 3 In early 2018, Defendant Michael Lee Etters Jr. met two other people, Bobby Morton and Sierra Gomez, and the three agreed to pool their money and buy drugs. Etters and Morton were longtime friends. Gomez also knew Etters, but not as well. The group initially planned to buy drugs from a man named Matthew Trammell. At some point, Morton proposed that they rob Trammell instead.

¶ 4 Etters, Morton, and Gomez met outside the home of Gomez's grandmother. Etters arrived in his minivan. Gomez's grandmother watched the group from inside her home and, at one point, saw Etters wearing a black and yellow bandana as a mask over his face. She became concerned that "something wasn't right" and wrote down the license plate number of Etters's van.

¶ 5 Gomez later called Matthew Trammell and his fiancée, Donna Vess, and arranged a meeting to buy drugs. When Trammell and Vess arrived, Etters briefly walked up to their car and began speaking to Vess, who was in the passenger seat. Soon after, Morton ran up to the driver's side of the car, where Trammell was seated. Morton was wearing a mask with a skull on it and holding a gun. Morton pointed the gun at Trammell and demanded "everything." Morton and Trammell then began to

struggle. As Vess fled out of the passenger side of the car during this struggle, she saw Etters moving toward her. Vess believed Etters was trying to block her and Trammell from escaping out of the passenger side of the car.

¶ 6 During the struggle between Morton and Trammell, Trammell dropped a large amount of cash onto the driver's seat. Morton grabbed the money as Trammell fled. Both Morton and Etters ran to Etters's minivan and Etters drove them away.

¶ 7 The State later charged Etters with robbery with a dangerous weapon. At trial, Gomez testified against Etters as part of a plea deal. She explained that Etters knew about the plan to rob Trammell and was a willing participant. Gomez's grandmother also testified that she saw Etters wearing a bandana as a mask shortly before the robbery.

¶ 8 Etters called Morton to testify on his behalf. According to Morton, Etters did not know about the plan to rob Trammell. Morton also testified that Etters did not know Morton had a gun.

¶ 9 After Morton's testimony, the State presented rebuttal evidence of a phone call Morton made from jail, in which he asked someone to put money in Etters's account because Etters "helped me do it," referring to the robbery.

¶ 10 During the charge conference, the State requested a jury instruction on the friend exception to the mere presence rule. Etters objected to that instruction, but the trial court overruled the objection.

¶ 11 The jury convicted Etters of robbery with a dangerous weapon. Etters then pleaded guilty to attaining habitual felon status. The trial court sentenced him to a term of 66 to 92 months in prison. Etters appealed.

Analysis

¶ 12 On appeal, Etters’s sole argument concerns the instruction on the friend exception. Etters argues that the evidence was insufficient to support that instruction.

¶ 13 Challenges to jury instructions “are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). When the State requests a jury instruction concerning a theory of criminal liability, the trial court should provide that instruction if “there is some evidence in the record reasonably supporting the theory.” *State v. Locklear*, 180 N.C. App. 115, 128, 636 S.E.2d 284, 292 (2006).

¶ 14 The challenged instruction concerns an exception to what is known as the “mere presence” rule. This rule states that a defendant “is not guilty of a crime merely because he is present at the scene even though he may silently approve of the crime or secretly intend to assist in its commission.” *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999). Thus, to convict a defendant of a crime based on the defendant’s presence during its commission, the State must prove that the defendant had “the intent to aid the perpetrator in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual

perpetrator.” *State v. Rankin*, 284 N.C. 219, 223, 200 S.E.2d 182, 184–85 (1973).

¶ 15 Importantly, a defendant’s “communication of intent to aid” does not have to be express; it may be “inferred from his actions and from his relation to the actual perpetrator.” *Id.* This principle led to what is known as the “friend exception” to the mere presence rule: “when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement.” *State v. Holland*, 234 N.C. 354, 358, 67 S.E.2d 272, 275 (1951).

¶ 16 The State’s evidence in this case was sufficient to warrant an instruction on this “friend exception.” First, Etters and Morton were longtime friends. Second, Etters was aware that Morton planned to commit a robbery, as shown by both Gomez’s testimony at trial and Etters’s actions before the robbery, such as wearing a bandana mask similar to the one Morton wore during the robbery. Third, Etters took steps that indicated his willingness to assist Morton with the robbery, such as moving toward the passenger door where he could block Trammell from fleeing during the robbery. Fourth, after witnessing Morton commit the robbery, Etters drove him away from the scene in his minivan. Finally, in a recorded jail call, Morton acknowledged that he should give Etters some money because Etters helped him commit the crime.

¶ 17 This evidence readily is sufficient for a reasonable jury to infer that Etters knew his presence at the scene served “as encouragement and protection” for Morton

while Morton committed the robbery. *Rankin*, 284 N.C. at 223, 200 S.E.2d at 185. Accordingly, the trial court properly overruled Etters's objection to the jury instruction on the friend exception to the mere presence rule.

Conclusion

¶ 18

We find no error in the trial court's judgment.

NO ERROR.

Judges ARROWOOD and WOOD concur.

Report per Rule 30(e).