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NO. COA08-389

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA,
Plaintiff,

v.

CAMERON CORDERAH MORRIS,
Defendant.

Wake County
No. 05CRS035227
05CRS035229
05CRS037632

Court of Appeals

Appeal by defendant from judgments entered on or about 24 January 2007 by Judge Ronald L. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 8 October 2008.

Slip Opinion

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Edwin W. Wesson, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

STROUD, Judge.

Defendant was convicted of murder, attempted robbery with a firearm, and robbery with a firearm. Defendant appeals, and the issues before this Court are whether the trial court erred in (1) refusing to instruct the jury on “mere presence” and (2) allowing Marvin Johnson’s attorney to testify. For the following reasons we find no error as to the first issue and no prejudicial error as to the second issue.

I. Background

The State's evidence tended to show the following: In April of 2005, defendant, Marvin Johnson ("Johnson") and Ezavia Allen ("Allen") were living together. In the early morning hours of 28 April 2005, defendant, Johnson, and Allen decided to "rob some people" as they had previously done. Defendant drove Allen and Johnson to Seventh Street where defendant's weapons were kept. Johnson and Allen waited, and defendant came back with a .45-caliber handgun and a .22 rifle. The three men headed to "the part of south Raleigh where there's a lot of drug transactions."

Defendant parked the car on a side street and Johnson and Allen got out with the guns and approached a Jeep to "[r]ob whoever was in it." The Jeep pulled away and Allen and Johnson shot at the Jeep. Allen and Johnson ran back to the car, got back in, and they headed to Peyton Street.

On Peyton Street, Johnson saw a man walking. Johnson and Allen got out of the car, approached the man, and robbed him. Allen and Johnson got back in the car, and they headed to the Dacian Road area.

Once in the Dacian Road area, defendant noticed a car ("victim's car") with its lights on and blocked the driveway of the victim's car. Johnson and Allen got out of the car. Allen had the .45-caliber handgun pointed towards the victim's window, and he reached for the victim's door handle. The victim's car horn blew, and Allen shot into the victim's car and ran. Allen and Johnson got back in the car and headed to Pines of Ashton.

A police car approached the car from behind. When the car stopped at a stop sign, the police car turned its lights on, and the men decided Allen would run with the .45-caliber handgun and Johnson would run with the .22 rifle. They drove to a wooded area and parked, then Allen and Johnson ran.

On or about 6 June 2005, defendant was indicted for murder, attempted robbery with a firearm, and robbery with a dangerous weapon. Defendant was found guilty on all three charges. The trial court sentenced defendant to life imprisonment without parole for the conviction of first degree murder and continued a prayer for judgment on the other two convictions. Defendant appeals, arguing the trial court erred in refusing to instruct the jury on "mere presence" and in allowing Johnson's attorney to testify. For the following reasons we find no error as to the first issue and no prejudicial error as to the second issue.

II. Requested Jury Instruction

Defendant first argues the trial court erred in denying his requested jury instruction and that this error was prejudicial. Defendant contends he is entitled to a new trial due to this error. We disagree, as in this case, we conclude that the defendant's specific request was not supported by the evidence; however, the trial judge still provided the instruction in substance.

Defendant requested the trial court to instruct the jury according to Footnote 3 of Pattern Jury Instruction - Criminal 202.20 which reads in pertinent part, "A person 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." N.C.P.I. - Crim. 202.20. The trial court denied defendant's request to give this instruction.

We review

jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Glynn, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554, *disc. review denied*, 360 N.C. 651, 637 S.E.2d 180 (2006) (citation, quotation marks, ellipsis, and brackets omitted).

Where there is evidence that the defendant "actively participate[d]" in the crime and was not "merely present," he is not entitled to a "mere presence" instruction. *State v. Cheek*, 351 N.C. 48, 74, 520 S.E.2d 545, 560 (1999), *cert. denied*, 530 U.S. 1245, 147 L.Ed. 2d 965 (2000). The evidence presented at trial showed that defendant made the decision "to ride" meaning "rob some people[,] " provided a .45-caliber handgun and a .22 rifle to his companions, drove the robbers' car, stopped the car at the victim's driveway blocking the victim's car from leaving the driveway, and waited for Allen to go and rob her.

However, even if we assume that defendant was entitled to a jury instruction on "mere presence," the trial court need not use

the exact language requested by defendant, but may give the instruction in substance. See *State v. Williams*, 136 N.C. App. 218, 221, 523 S.E.2d 428, 431 (1999).

If a request is made for a specific instruction which is correct in law and supported by the evidence, the trial judge must give the instruction. The trial court, however, is not required to give a requested instruction in the exact language of the request, so long as the instruction is given in substance.

See *id.* (citations omitted). In *Williams*, this Court concluded the trial court had not erred because "[a]lthough the court refused defendant's request for a specific mere presence instruction . . . the court provided defendant's requested instruction in substance" by instructing the jury,

If you find from the evidence beyond a reasonable doubt, that on or about the alleged date, the Defendant knowingly possessed cocaine, and that the amount which he possessed was 200 grams or more but less than 400 grams of that substance, it would be your duty to return a verdict of guilty of trafficking in cocaine. However, if you do not so find or if you have a reasonable doubt as to either one or both of these things, then it would be your duty to return a verdict of not guilty.

Id. (brackets omitted).

In *State v. Townsend*, this Court again found no error by the trial court where

[w]ith respect to defendant's request for an instruction on "mere presence," the record shows that the trial court instructed the jury that in order to convict, it had to find beyond a reasonable doubt that defendant, "acting either by himself or acting together with other persons did possess cocaine and marijuana for the purpose of delivery and

sale, and did operate a dwelling house for the purpose of selling the illegal substance."

State v. Townsend, 99 N.C. App. 534, 538, 393 S.E.2d 551, 553-54 (1990).

Thus, we conclude that this case is controlled by *Williams* and *Townsend*, in which a "mere presence" instruction was requested, denied by the trial court, but given in substance as the trial court instructed the jury it must find, beyond a reasonable doubt, the defendant committed each individual element of the charged crime in order to find the defendant guilty. See *Williams* at 221, 523 S.E.2d at 431; *Townsend* at 538, 393 S.E.2d at 553-54. The trial court did not err in denying defendant's request for the "mere presence" instruction as defendant was not entitled to it and even assuming he was, the instruction was given in substance. This argument is overruled.

III. Johnson's Attorney's Testimony

Defendant next contends it was error for the trial court to allow "Johnson's appointed counsel to testify that Johnson's statement to the police established his guilt of first degree murder and advised Johnson that his best course of action would be to cooperate with the State by testifying truthfully about the crimes charged against him and . . . [defendant]." Defendant contends this is prejudicial error because it was "an improper attempt to vouch for Johnson's credibility . . . [though] the defense did not challenge or question Johnson's testimony that he had no deal with the State in exchange for his testimony."

"The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Bodden*, ___ N.C. App. ___, ___, 661 S.E.2d 23, 27 (2008). "Even if the admission of . . . [evidence] was error, in order to reverse the trial court, the appellant must establish the error was prejudicial. If the other evidence presented was sufficient to convict the defendant, then no prejudicial error occurred." *Bodden* at ___, 661 S.E.2d at 26. Even assuming *arguendo* that it was error for the trial court to allow Johnson's attorney to testify because his testimony impermissibly "vouched" for Johnson's credibility, we in no way find it prejudicial to defendant's case as there was other sufficient evidence to convict defendant, including testimony from eyewitnesses, the crime scene investigator, and police officers which corroborated Johnson's testimony as to how the crimes occurred. As we find no prejudicial error, this argument is overruled.

IV. Conclusion

For the aforementioned reasons, we find the trial court did not err in denying defendant's request for a jury instruction on "mere presence", and the trial court did not commit prejudicial error in allowing Johnson's attorney to testify.

NO PREJUDICIAL ERROR.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).