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NO. COA11-1508
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2012

STATE OF NORTH CAROLINA

v.

Gaston County
Nos. 09 CRS 55577 and 55298

JAMES EDWARD GARVIN and
JOHN EDWARD MCGILL,
Defendants.

Appeal by defendants from judgments entered 16 May 2011 by
Judge James W. Morgan in Gaston County Superior Court. Heard in
the Court of Appeals 15 August 2012.

*Attorney General Roy Cooper, by Special Deputy Attorney
General Sonya Calloway-Durham, for the State vs. James
Edward Garvin.*

*Attorney General Roy Cooper, by Special Deputy Attorney
General Jill Ledford Cheek, for the State vs. John Edward
McGill.*

*Appellate Defender Staples Hughes, by Assistant Appellate
Defender Constance E. Widenhouse, for defendant James
Edward Garvin.*

Paul F. Herzog for defendant John Edward McGill.

BRYANT, Judge.

Where there was sufficient evidence to find that defendants were acting in accordance with a common purpose, the trial court did not err by instructing the jury on the doctrine of acting in concert. Where the trial court's sanction of striking a witness' testimony regarding defendant Garvin was not manifestly without reason, we hold no abuse of discretion. And, where the admission of Jamal Kearney's statement to police taken on the day of the shooting was not unduly prejudicial, we hold there was no plain error.

During the early evening hours of 16 April 2009, brothers Jamal and Demetrious Kearney, Keeaira Pendergrass, and Aaron Grant were outside the home of the Kearneys' mother and step-father, located at 516 West Harrison Street in Gaston County. From across the street, shots were fired at the group. As Jamal, Demetrious, Keeaira, and Aaron retreated for cover, eighteen-year-old Keeaira Pendergrass was stuck by a bullet. She died at the scene.

Defendant John McGill, also known as "J.R.," was indicted on 20 April 2009 on the charge of first-degree murder; defendant James Garvin, also known as "Jim Jones," was indicted on 4 May 2009 on the same charge. The cases were joined for trial and tried before a jury during the 9 May 2011 Criminal Session of

Gaston County Superior Court, the Honorable James Morgan, Judge, presiding. At the conclusion of the presentation of evidence by the prosecution and defendant McGill (defendant Garvin chose not to offer evidence), the jury returned verdicts finding both defendant McGill and defendant Garvin guilty of first-degree murder. The trial court entered judgment against each defendant in accordance with the respective jury verdicts and sentenced defendants to life imprisonment in the custody of the Department of Correction. Defendant McGill gave verbal notice of appeal at the time sentence was imposed, whereupon the trial court entered notice of appeal on behalf of both defendants.

On appeal, defendants raise the following issues: whether the trial court erred by (I) instructing the jury on acting in concert; and (II) failing to strike all testimony of Demetrious Kearney; and (III) whether the trial court committed plain error by admitting an out-of-court statement by Jamal Kearney.

Jurisdiction of defendant Garvin's appeal

Having failed to enter timely notice of appeal, defendant Garvin filed a petition for writ of certiorari with this Court which we have granted.

Defendants first argue that the trial court erred by instructing the jury on the doctrine of acting in concert. We disagree.

A challenge to a trial court's decision regarding jury instructions is reviewed by this Court de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An instruction about a material matter must be based on sufficient evidence." *Id.*

"Under the doctrine of acting in concert 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. Wilkerson*, 363 N.C. 382, 424, 683 S.E.2d 174, 200 (2009) (citations and quotations omitted). "To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979) (citation omitted). However, "common purpose" does not require an agreement. *See State v. Kemmerlin*, 356 N.C. 446, 477, 573 S.E.2d 870, 891 (2002). "All that is necessary is an implied mutual understanding or agreement to do the crimes." *State v. Hill*, 182 N.C. App. 88, 93, 641 S.E.2d 380, 385 (2007) (citation and quotations omitted).

A

Defendant Garvin raises four contentions: (1) that no evidence showed that defendants were together prior to the shooting; (2) that no evidence showed that defendants discussed shooting anyone or communicated with each other in any way prior to the shooting; (3) that no witness offered competent testimony that defendants were both at the scene or were together when the shooting occurred; and (4) that there was no evidence of a common plan or purpose or that defendants shared a common goal.

1 & 2

By contentions (1) and (2), defendant Garvin asserts that there was no evidence that he and defendant McGill were together or otherwise communicated prior to the shooting.

We note that the requisite evidentiary threshold to prompt a jury instruction on the doctrine of acting in concert does not require express communication or prior planning. "[T]he communication or intent to aid, if needed, . . . may be inferred from [the defendant's] actions and from his relation to the actual perpetrators." *State v. Jackson*, ___ N.C. App. ___, ___, 716 S.E.2d 61, 66 (2011) (quoting *State v. Sanders*, 288 N.C. 285, 291, 218 S.E.2d 352, 357 (1975)). Therefore, we find unpersuasive the contention that the instruction on acting in

concert lacked sufficient basis because of a failure to show any express communication or a meeting between defendants prior to the shooting.

Defendant Garvin argues that no witness offered competent testimony defendants were both at the scene or were together when the shooting occurred.

We acknowledge that no one witness testified that he or she observed both defendant Garvin and defendant McGill at the crime scene at the same time; however, sufficient evidence was presented for the jury to find that defendant Garvin and defendant McGill were at the crime scene at the same time and fired upon persons standing outside 516 W. Harrison Street.

Aaron Grant, a friend of the Kearneys, was on the porch during the shooting and gave the following testimony:

Q. How many people did you see shooting?

A. I seen one shooter, and I seen another one come around the corner.

Q. Okay. So you say you saw one shooting and then one come around the corner. You saw two people shooting?

A. Yeah.

Both Jamal and Demetrious Kearney testified to observing defendant McGill, whom they both referred to as J.R., firing a

gun towards them. When Jamal heard gunfire, he retreated into the residence at 516 W. Harrison Street.

Q. All right. And did you see who was shooting from where you were?

A. Yes, sir.

. . . .

Well, at that point in time, at that point in time after the bullets kept shooting, I was on the ground with Keeaira and the door was still cracked open I went out there, looked at the bottom of the door. I see J.R.

Q. When you say you could see J.R. -

. . . .

you're referring what [sic] he was John McGill?

A. Yes, sir.

Q. And what do you see John McGill doing outside?

A. Shots was fired, gun was in his hand.

Demetrious also testified that he observed defendant McGill firing a handgun.

Q. Okay. And then at what point did you see J.R.?

A. He was over there in this path

Q. Okay. And then - and you said you saw him fire a shot at the porch.

A. Yes, sir.

Q. Okay. Have a seat for me. Now, the person that you say is J.R., do you see him in the courtroom today?

A. Yes, sir.

. . .

Q. Okay.
[Prosecutor:] Your Honor, we ask the record reflect he's identified the defendant, John McGill.

Quonisha Friday, who lived near the Kearneys on W. Harrison Street for twenty-one years, testified that she "knew of" both defendants Garvin and McGill. She also knew the victim, Keeaira Pendergrass. Friday testified that on the day of the shooting, she and her mother were on their way back home from a local store when she observed a car parked on a side street off of W. Harrison St. "I saw a couple of people outside, I saw some girls, and then I saw people start shooting."

A. I saw Jim Jones and some more people. They were in the cut through the house and they were shooting. They was in a cut where they were shooting at.

. . .

Q. All right. And do you see Jim Jones in the courtroom today?

. . .

[Prosecutor:] Your Honor, we ask that the

record reflect that she identified James Garvin.

. . .

Q. And you indicated that you came through and saw him shooting at that point. Did you see what direction he was shooting in?

A. He was shooting at the house.

Q. And you say the house?

A. Where Keeaira was.

We hold that there was sufficient evidence presented for a jury to find that defendants Garvin and McGill were both at the crime scene, shooting at people outside 516 W. Harrison Street.

Defendant Garvin contends that there was no evidence of a common plan or purpose or a shared common goal.

The record evidence tends to show that prior to 16 April 2009, defendant Garvin, along with a group of others, initiated a physical altercation outside a neighborhood store with Jamal Kearney. At trial, Jamal identified defendant Garvin as the man who attacked him but testified that he knew defendant Garvin as "Jim Jones." On 16 April 2009, Jamal observed defendant Garvin standing near a car parked at 514 W. Harrison Street - next door to the residence of Jamal's mother and step-father. Jamal

confronted defendant Garvin and challenged him to a fight. Before he drove away, defendant Garvin stated words to the effect of "get away from the car before I shoot you."

That same evening, sometime before 7:30 p.m., defendant McGill received a phone call while at the residence of Candida Matthews. Matthews testified that defendant McGill was often referred to as "J.R." Shortly after receiving the phone call, defendant McGill left. He said "Jimmy had put his name into something[,]" and he "was going over there to straighten this out[.]"

At approximately 7:30 p.m., 16 April 2009, two cars drove past the residence at 516 W. Harrison Street. Jamal and Demetrious Kearney testified that they immediately recognized defendant McGill as an occupant of one of the vehicles. Within minutes, shots were fired at the people outside 516 W. Harrison Street and witnesses placed both defendants at the scene, shooting towards the people outside 516 W. Harrison Street.

Based on the foregoing, we hold there was sufficient evidence for the jury to find that defendant Garvin and McGill acted with an implied mutual understanding to shoot at the people outside 516 W. Harrison Street. Accordingly, we overrule defendant Garvin's contentions challenging the evidentiary basis

for the trial court's instruction to the jury on the doctrine of acting in concert. See *Hill*, 182 N.C. App. at 93, 641 S.E.2d at 385.

B

In his challenge to the trial court's instruction to the jury on the doctrine of acting in concert, defendant McGill raises several evidentiary points which he summarizes as follows:

In summary, the evidence showed nothing more than the mere possibility that Mr. Garvin and Mr. McGill were aware of each other's identities, and frequented the same general area of Gastonia. . . . [T]he record lacks evidence of any prior enmity between [Jamal and Demetrious Kearney] and [defendant] McGill. There is no evidence in the record that offers any reason for [defendant] McGill to join in a scheme to harm the Kearneys, their friends or family. Finally, no competent evidence put both [defendant] Garvin and [defendant] McGill at the scene together at the time of the shooting.

As detailed above, the record presents sufficient evidence for a jury to find that defendants McGill and Garvin were both at the crime scene shooting towards 516 W. Harrison Street. Furthermore, from the evidence presented, it appears that on 16 April 2009, after being verbally challenged to a fight by Jamal Kearney, defendant Garvin drove away, and called defendant McGill who went to the aid of Garvin.

We hold that the evidence presented at trial was sufficient for a jury to find that the actions of defendants Garvin and McGill indicated a mutual intent or common purpose to shoot people standing outside 514 W. Harrison Street, this being sufficient to warrant an instruction to the jury on the doctrine of acting in concert. *See Jackson*, ___ N.C. App. at ___, 716 S.E.2d at 66 ("[T]he communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions"). Accordingly, defendants' arguments are overruled.

II

Next, defendant Garvin argues that the trial court erred by imposing an inadequate sanction for the State's discovery violation by failing to strike all of Demetrious Kearney's testimony. Defendant Garvin contends that Demetrious Kearney's testimony was so entangled with other matters that the jury could not reasonably separate only those parts of Kearney's testimony that did not implicate defendant Garvin. We disagree.

"Defendant's rights to discovery are statutory." *State v. Pender*, ___ N.C. App. ___, ___, 720 S.E.2d 836, 841 (2012) (citation and quotations omitted). "[T]he purpose of discovery under our statutes is to protect the defendant from unfair

surprise by the introduction of evidence he cannot anticipate.”
Id. at ____, 720 S.E.2d at 842 (citation and quotations
omitted).

Pursuant to North Carolina General Statutes, section 15A-
903,

[u]pon motion of the defendant, the court
must order: (1) The State to make available
to the defendant the complete files of all
law enforcement agencies, investigatory
agencies, and prosecutors’ offices involved
in the investigation of the crimes committed
or the prosecution of the defendant.

. . . .

c. Oral statements shall be in written
or recorded form, except that oral
statements made by a witness to a
prosecuting attorney outside the
presence of a law enforcement officer
or investigatorial assistant shall not
be required to be in written or
recorded form *unless there is
significantly new or different
information in the oral statement from
a prior statement made by the witness.*

N.C. Gen. Stat. § 15A-903(a)(1)(c.) (2011) (emphasis added).

“If at any time during the course of the proceedings the court
determines that a party has failed to comply [with this rule]
the court in addition to exercising its contempt powers may . .

. (3) [p]rohibit the party from introducing evidence not
disclosed” N.C. Gen. Stat. § 15A-910(a)(3) (2011).

"Which of the several remedies available under G.S. 15A-910(a) should be applied in a particular case is a matter within the trial court's sound discretion." *Pender*, ___ N.C. App. at ___, 720 S.E.2d at 842 (citation and quotations omitted). "We review a ruling on discovery matters for an abuse of discretion. An abuse of discretion will be found where the ruling was so arbitrary that it cannot be said to be the result of a reasoned decision." *Id.* at ___, 720 S.E.2d at 841. (citations and quotations omitted).

On the day of the shooting, Demetrious Kearney was interviewed by detectives and thereafter signed a statement that implicated defendant McGill as the shooter but did not reference defendant Garvin. However, as a witness for the prosecution, Demetrious testified in substance that on 16 April 2009, he observed defendants McGill and Garvin firing shots towards the people in front of 516 W. Harrison Street. Demetrious further testified that he verbally informed the prosecutors two or three times up to a year in advance of trial that defendant Garvin, the person Demetrious knew as "Jim Jones," was present at the shooting.

Defendant Garvin argued that the prosecution failed to provide Demetrious Kearney's verbal statement pursuant to G.S.

15A-903 and that he had no notice that a witness had placed him at the scene of the shooting until Quonisha Friday and Demetrious Kearney testified in court. The trial court determined that there was a discovery violation and sanctioned the prosecution by instructing the jury to disregard Demetrious Kearney's testimony regarding defendant Garvin. The trial court further inquired whether any juror could not follow that instruction. No juror indicated that he or she could not follow the instruction.

Despite defendant Garvin's contentions to the contrary, we do not find the trial court's sanction for the prosecution's failure to reduce to writing or otherwise record Demetrious Kearney's verbal statement implicating defendant Garvin and failure to provide this to defendant Garvin, pursuant to N.C. Gen. Stat. § 15A-903(a)(1)(c.), to be without reason. Therefore, we cannot hold that the trial court's sanction was an abuse of discretion. Accordingly, defendant Garvin's argument is overruled.

III

Lastly, defendants argue that the trial court committed plain error by admitting Jamal Kearney's non-corroborative hearsay statement made on the day of the shooting describing two

suspects, when Jamal testified before the jury to seeing only one person fire a gun at the house. We disagree.

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, ___ N.C. ___, ___, 723 S.E.2d 326, 333 (2012).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801 (2011). "Hearsay is not admissible except as provided by statute or by these rules." N.C. R. Evid. 802 (2011). Testimony offered as corroborating evidence and not substantive evidence is not hearsay. *State v. Garcell*, 363 N.C. 10, 39, 678 S.E.2d 618, 637 (2009).

Corroborative testimony is testimony which

tends to strengthen, confirm, or make more certain the testimony of another witness. Deciding whether to receive or exclude corroborative testimony, so as to keep its scope and volume within reasonable bounds, is necessarily a matter which rests in large measure in the discretion of the trial court. This Court has held that

. . . New information contained within the witness' prior statement, but not referred to in his trial testimony, may also be admitted as corroborative evidence if it tends to add weight or credibility to that testimony.

State v. Davis, 349 N.C. 1, 28, 506 S.E.2d 455, 469-70 (1998) (citations omitted) . . .

Id. at 39-40, 678 S.E.2d at 637 (citations and quotations omitted).

At trial, Jamal Kearney testified in substance that while shots were being fired at 516 W. Harrison Street, he observed defendant McGill outside the residence shooting.

Officer Gladys Grier of the Gastonia Police Department testified that on 16 April 2009, she responded to a report of a shooting at 516 W. Harrison Street. On the scene, she took a statement from Jamal Kearney.

Q. ([Prosecutor]) Officer Grier, what information did Jamal Kearney give you about the person who had done this?

A. He said it was two guys, and I asked him what did they look like. He said

one - they had long dreads. One was light skin, one was brown skin.

And this I said - I asked him approximately how tall they were . . .
.

Q. Okay. Which subject did he identify as being approximately five foot nine?

A. The J.R. subject.

Q. And how else did he describe the J.R. subject?

A. He said he was light skinned. He said one was light and one was dark.

Q. Did he make any other indication about his hair style or anything like that?

A. He said they were in dreads and it was about shoulder length.

Q. Now, with regard to the second individual, the one he described as the darker-skinned individual, did he give you any other description about specific markings that that [sic] individual may have had?

A. Yeah. He told me the darker-skin male had, like a teardrop on his eye, a tattoo-like teardrop, and he had dreads about shoulder length.

Q. When he was speaking about these people, he was talking about them as possible people who were involved; is that right?

A. Yeah. Well, he was saying they did it .
. . .

Despite defendants' contentions that they suffered prejudice by the admission of Jamal Kearney's statement made the day of the shooting because the statement described two shooters rather than one, we note the unchallenged testimony of Aaron Grant, who was also present at the time of the shooting.

Q. Now, did you see - could you describe the individuals who were shooting?

A. I don't know who it was. I just know they had dreads.

Q. How many people did you see shooting?

A. I seen one shooter, and I seen another one come around the corner.

Q. Okay. So you say you saw one shooting and then one come around the corner. You saw two people shooting?

A. Yeah.

Q. And you said they had dreads; is that right?

A. Yes.

Given this testimony, even presuming that the details contained in Jamal Kearney's statement to Officer Grier on the day of the shooting were held not to corroborate Jamal's trial testimony, Aaron's unchallenged testimony also implicates two suspects. Therefore, we cannot say that the implication of two suspects made by the admission of Jamal Kearney's statement to

police prejudiced defendants with regard to the number of suspects implicated or that the trial court committed plain error. Accordingly, defendants' argument is overruled.

No error.

Judges STEPHENS and THIGPEN concur.

Report per Rule 30(e).