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NO. COA13-676
NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2013

STATE OF NORTH CAROLINA

v.

Robeson County
No. 09 CRS 50766, 50971

RODNEY JONES, JR.

Appeal by Defendant from judgments entered 7 November 2012 by Judge Thomas H. Lock in Robeson County Superior Court. Heard in the Court of Appeals 4 November 2013.

Attorney General Roy Cooper by Assistant Attorney General John A. Payne for the State.

William D. Spence for defendant-appellant.

STEELMAN, Judge.

Where the State presented evidence that, after taking part in an attempted armed robbery in which a man was shot and killed, defendant directed a co-defendant to drive to his house where defendant placed firearms used in the offense inside his home before the group drove towards their homes and vehicles, the trial court did not err in denying defendant's motion to dismiss the charge of being an accessory after the fact. Where

there was evidence of only one incident that might support a charge of conspiracy to commit armed robbery, the trial court did not err by failing to specify for the jury that this charge was not based on other evidence of defendant's participation in a conspiracy to commit larceny from farm outbuildings. Where the State presented evidence that after the target of an armed robbery was mortally wounded, defendant immediately drove away with his co-defendants; that when the group saw a state trooper they drove onto a dirt road to avoid detection and; that when their car became mired in mud on the dirt road, defendant got out of the car and fled on foot despite having a gunshot wound, the trial court did not err by instructing the jury on flight.

I. Factual and Procedural Background

In January, 2009, Rodney Jones, Jr., (defendant), Mickey Ray Locklear (Mickey), and James Lester Vasquez (Vasquez) decided to steal a large quantity of marijuana which they had heard was stored in outbuildings at a chicken farm in Robeson County. On 28 January 2009 they met at Vasquez's home, where they were joined by Herman Ray Locklear (Herman) and Derek Scott (Scott). When Scott drove the five men to the chicken farm, defendant had a shotgun and the others were unarmed. They searched the buildings at the chicken farm, but found no marijuana.

Having failed in their first attempt to steal marijuana, the men formed a new plan to steal marijuana and/or cash from either Marcus Locklear (Marcus) or Bobby Mitchell (Mitchell), who lived near Marcus and assisted him in selling marijuana. The men decided that upon their arrival at Marcus' home, Herman would approach Mitchell's house under the pretense that he wanted to buy marijuana, while defendant and Mickey would hide around the corner of the building. When Mitchell opened his door to speak with Herman, they would show themselves, brandish weapons, and rob Mitchell of marijuana and cash. Defendant felt that in order to carry out this plan they would need another firearm, so they obtained a rifle from defendant's home before driving to Marcus' trailer.

At around 10:00 p.m. the men arrived at Marcus' home. Herman went to Mitchell's living quarters while defendant and Mickey, armed with a shotgun and rifle respectively, stood near the corner of the barn. Herman knocked on Mitchell's door and, after discussing a marijuana sale, Mitchell asked Herman to turn away while he retrieved the marijuana. While Herman was facing the back of the room, he heard someone say "get down," and when he turned around he saw Mitchell and Mickey "wrestling over a gun" while defendant stood behind Mickey holding a shotgun. Mitchell "grabbed the barrel of the gun [so] as to move it out

of his face, and the gun went off." After Mickey's gun discharged and struck Mitchell, the three men fled to the car without obtaining cash or marijuana.

When Marcus saw that two of the men were armed, he retrieved a shotgun and fired several times, hitting defendant in the leg. The five men fled in Scott's automobile with the rifle and shotgun, and defendant directed Scott to drive to his house, where he took the firearms inside. After defendant left the weapons and attempted to bandage his gunshot wound, the men left defendant's house and drove towards Vasquez's home where defendant had left his car. While in route, they drove onto a dirt road to avoid a state trooper. When this resulted in the car being stuck in mud, defendant got out of the car and walked away. The other men were finally able to get the car out of the mud and drove back towards Vasquez's home, but were stopped and arrested by the state trooper. Defendant was arrested the following day.

After the men left, Marcus went to the barn, where he found that Mitchell was gravely injured. An autopsy revealed that the cause of Mitchell's death was a close range gunshot wound to the head.

On 12 October 2009 defendant was indicted for first-degree murder, conspiracy to commit robbery with a dangerous weapon,

and attempted robbery with a dangerous weapon. On 13 February 2012, a superseding indictment was returned charging him with first-degree murder and with being an accessory after the fact to first-degree murder. On 7 November 2012, the jury found defendant not guilty of first-degree murder, but found him guilty of being an accessory after the fact to first-degree murder, conspiracy to commit robbery with a dangerous weapon, and attempted robbery with a dangerous weapon. He was sentenced as a Level III offender to 108 to 139 months imprisonment for being an accessory after the fact to first-degree murder and attempted armed robbery, and to a consecutive term of 27 to 42 months for conspiracy to commit armed robbery.

Defendant appeals.

II. Accessory After the Fact to First-degree Murder

In his first argument, defendant contends that the trial court erred by denying his motion to dismiss the charge of being an accessory after the fact to first-degree murder, on the grounds that the State failed to present sufficient evidence that he attempted to conceal or dispose of the firearms used in the murder. We disagree.

A. Standard of Review

"Our standard of review regarding motions to dismiss is well established:

"When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. . . . [A]ll evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. . . . [I]f there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied."

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (quoting *State v. Abshire*, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009) (internal citations and quotation marks omitted)).

B. Analysis

"In order to convict defendant of being an accessory after the fact, the State must prove: (1) the principal committed the underlying felony, (2) defendant gave personal assistance to the principal to aid in his escaping detection, arrest, or punishment, and (3) defendant knew the principal committed the felony." *State v. McGee*, 197 N.C. App. 366, 372, 676 S.E.2d 662, 667 (2009) (citing *State v. Jordan*, 162 N.C. App. 308, 312, 590 S.E.2d 424, 427 (2004) (citations omitted)). Defendant's assistance to the principal may be shown by evidence that the

defendant "aided the principal in his attempts to avoid criminal liability by any means calculated to assist him in doing so." *State v. Fearing*, 304 N.C. 499, 504, 284 S.E.2d 479, 483 (1981) (citing *State v. Atkinson*, 298 N.C. 673, 685, 259 S.E. 2d 858, 865 (1979)).

The indictment alleges that "after Mickey Locklear committed the felony of First Degree Murder upon Bobby Glenn Mitchell, [defendant] did knowingly give assistance to Mickey Locklear in escaping or attempting to escape detection, arrest or punishment, by concealing and/or disposing of the firearm used to commit the murder, knowing that Mickey L. Locklear had committed said crime[.]" To convict defendant of being an accessory after the fact to the first-degree murder of Mitchell, the State was required to produce substantial evidence that Mickey committed first-degree murder, that defendant was aware of the crime, and that he assisted Mickey in his attempt to escape detection, arrest, or punishment by attempting to conceal or dispose of the firearm used in the offense. Defendant does not dispute the sufficiency of the State's evidence that Mickey committed the murder of Mitchell or that defendant was aware of this murder. Rather, he challenges only the sufficiency of the State's evidence that defendant took actions to conceal or dispose of the shotgun and rifle.

Defendant first notes that he could not be convicted of both first-degree murder and accessory after the fact to first-degree murder:

Murder and accessory after the fact to that murder are mutually exclusive offenses. . . . Nevertheless, the State may join for trial two offenses when they "are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan," N.C.G.S. § 15A-926(a) (2009)[.] . . . When two such offenses are joined for trial and substantial evidence supports each offense, both should be submitted to the jury. "[H]owever, the trial court must instruct the jury that it may convict the defendant only of one of the offenses or the other, but not of both."

State v. Melvin, 364 N.C. 589, 592-93, 707 S.E.2d 629, 632 (2010) (citing *State v. McIntosh*, 260 N.C. 749, 753, 133 S.E.2d 652, 655 (1963), and quoting *State v. Speckman*, 326 N.C. 576, 578-79, 391 S.E.2d 165, 167 (1990) (internal citation omitted)). In this case, the trial court properly instructed the jury that it could convict defendant of only one of the two offenses.

Defendant also cites several cases holding that, where all the evidence shows that a criminal defendant was an equal participant in an offense and there is no evidence that he provided any assistance after the crime was committed, the trial court does not err by failing to instruct the jury on accessory after the fact. See, e.g., *Atkinson*, 298 N.C. at 685, 259 S.E.2d

at 865 (finding no error in the court's failure to instruct on accessory after the fact where the evidence showed only actual participation in the substantive crime charged) (citations omitted). Defendant contends that the State "failed to offer substantial evidence" that defendant knowingly gave any assistance to Mickey "by concealing and/or disposing of the firearm[s] used to commit the murder" as alleged in the bill of indictment. We disagree and conclude that the facts of this case are distinguishable from the authorities cited by defendant.

Defendant contends that, although the firearms were last seen in his house and were never recovered by law enforcement officers, that these facts are insufficient to support an inference that, after removing the firearms from the car and leaving them in his house, Defendant later disposed of them. However, the State offered evidence that: (1) when the men drove away from Marcus' home, the rifle and shotgun used in the offense were in the car; (2) although defendant's car was parked at the home of Vasquez, defendant directed the driver not to drive directly to that location but instead to go first to defendant's house; (3) upon arrival at defendant's house, he took the two firearms inside and left them, and; (4) only after removing the weapons from the car did defendant agree that the men should go to Vasquez's house. We hold that by directing the

driver to go to his house so that he could put the rifle and shotgun inside, defendant took actions that assisted Mickey in avoiding detection, arrest, or punishment. *See, e.g., State v. Schiro*, __ N.C. App. __, 723 S.E.2d 134, *disc. review denied*, 366 N.C. 401, 735 S.E.2d 179 (2012) (defendant properly convicted of accessory after the fact to first-degree murder for attempting to hide the murder weapon), and *McGee*, 197 N.C. App. 366, 676 S.E.2d 662 (evidence sufficient to submit charge of accessory after the fact to jury where a codefendant gave the defendant a knife used in the offense and the defendant later told the codefendant he had thrown it away). But for the actions of defendant, the firearms would still have been in the automobile when the men were stopped and arrested by the state trooper. The trial court did not err in denying defendant's motion to dismiss the charge of being an accessory after the fact to first-degree murder.

III. Instruction on Conspiracy to Commit Armed Robbery

In his second argument, defendant contends that the trial court committed plain error by "failing to instruct the jury that the conspiracy charge they were to consider was limited to the attempt to rob Bobby Mitchell" and that this charge was not based on the plan to steal marijuana from the chicken farm. Defendant speculates that some jurors might have found him

guilty based upon his participation in the conspiracy to steal marijuana from the chicken farm and others based upon the conspiracy to rob Mitchell. Defendant also contends that he was deprived of his right to a unanimous verdict guaranteed by the North Carolina constitution. We hold that the court did not commit error in its instruction on conspiracy, a conclusion that obviates any need to address whether the alleged error would have been reviewed as plain error or constitutional error.

A. Standard of Review

Defendant argues that the trial court committed plain error in its instructions on conspiracy.

[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 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, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original)). In addition,

"[b]efore engaging in a plain error analysis, it must first be determined whether the trial court's action constituted error." *State v. Brown*, 182 N.C. App. 115, 121, 646 S.E.2d 775, 779 (2007) (citing *State v. Duff*, 171 N.C. App. 662, 669-70, 615 S.E.2d 373, 379 (2005)).

Defendant also asserts that the trial court's instruction violated "his right to a unanimous verdict guaranteed to him by Article 1, Sec. 24 of the North Carolina Constitution." In *State v. Wilson*, 363 N.C. 478, 479, 681 S.E.2d 325, 327 (2009), the North Carolina Supreme Court "consider[ed] whether defendant waived appellate review by failing to object to instructions by the trial court to a single juror" and held that "because the trial court's instructions to a single juror violated defendant's right to a unanimous jury verdict under Article I, Section 24 of the North Carolina Constitution, the error was preserved for appeal notwithstanding defendant's failure to object" and that "[w]here the error violates a defendant's right to a unanimous jury verdict under Article I, Section 24, we review the record for harmless error." *Wilson*, 356 N.C. at 487, 687 S.E.2d at 331 (citing *State v. Nelson*, 341 N.C. 695, 700-701 462 S.E.2d 225, 227-28 (1995), and *State v. Ashe*, 314 N.C. 28, 36-39, 331 S.E.2d 652, 657-59 (1985)). This standard of review is more favorable to a criminal defendant than plain error

review. However, because we hold that the trial court did not err, it is unnecessary for us to decide which standard of review would have been proper, had there been error.

B. Discussion

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. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)), *cert. denied*, 540 U.S. 988, 124 S. Ct. 475, 157 L. Ed. 2d 382 (2003).

"To establish a conspiracy, the State must prove an agreement between two or more people to commit an unlawful act or to commit a lawful act in an unlawful manner. The State need not prove an express agreement. Evidence that establishes a mutual, implied understanding is sufficient to withstand a motion to dismiss." *McGee* at 370, 676 S.E.2d at 665-66 (citing *State v. Wiggins*, 185 N.C. App. 376, 389, 648 S.E.2d 865, 874 (citations omitted), *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007)). To convict defendant of conspiracy to commit armed robbery, the State was required to offer evidence that

defendant and at least one other person agreed to take property from the presence or person of another by the use or threatened use of a firearm or other dangerous weapon.

Defendant does not dispute the sufficiency of the State's evidence that he and Mickey agreed to rob Mitchell by the use or threatened use of firearms. Instead, he argues that there was evidence that might also have supported a conviction for conspiracy to commit armed robbery at the chicken farm. However, no evidence was presented at trial tending to show that the conspirators expected anyone to be present at the chicken farm, that they planned to rob any person or persons, or that they searched anyplace other than outbuildings where no one was present. We also note that, before going to Marcus' home, the men obtained an additional firearm. There was no evidence offered that might have supported a finding that there was a conspiracy to commit armed robbery at the chicken farm. There was no need for the trial court to "clarify" this speculative ambiguity and the court did not commit error by omitting such an instruction.

IV. Flight Instruction

In his final argument, defendant argues that the trial court erred by instructing the jury on flight. He argues that the State failed to produce evidence that, after the attempted

robbery of Mitchell, defendant took steps to avoid apprehension. We disagree.

A. Standard of Review

"Arguments challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.' We consider 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.'" *State v. Bell*, __ N.C. App. __, __, 741 S.E.2d 919, 923 (2013) (quoting *State v. Davis*, __ N.C. App. __, __, 738 S.E.2d 417, 419 (2013) (citation, quotation marks, and brackets omitted), and *State v. Ballard*, 193 N.C. App. 551, 559, 668 S.E.2d 78, 83 (2008) (citation omitted).

B. Analysis

"A trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged.' Evidence that the defendant hurriedly left the crime scene without rendering assistance to the homicide victim may warrant an instruction on flight." *State v. Taylor*, 362 N.C. 514, 540, 669 S.E.2d 239, 261-62 (2008) (quoting *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625 (2001) (internal quotation

omitted), and citing *State v. Anthony*, 354 N.C. 372, 425, 555 S.E.2d 557, 591 (2001), *cert. denied*, 536 U.S. 930, 122 S. Ct. 2605, 153 L. Ed. 2d 791 (2002)), *cert. denied*, 558 U.S. 851, 130 S. Ct. 129, 175 L. Ed. 2d 84 (2009). "[T]he relevant inquiry concerns whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990).

In this case, it is undisputed that after Mickey fatally wounded Mitchell, defendant and the other men immediately fled the scene without offering assistance to Mitchell or even calling 911. In addition, when the men saw a state trooper's car, they turned onto a dirt road to avoid him. Finally, after their car became mired in mud on the dirt road, defendant fled on foot, notwithstanding the fact that it was raining and he had suffered a gunshot wound. We hold that this evidence was sufficient to support the trial court's flight instruction. This argument is without merit.

V. Conclusion

We hold that defendant received a fair trial, free of reversible error, and that the judgment entered against him should remain undisturbed.

NO ERROR.

Chief Judge MARTIN and Judge DILLON concur.

Report per Rule 30(e).