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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-267

Filed: 21 November 2017

Columbus County, No. 10 CRS 053881

STATE OF NORTH CAROLINA,

v.

KENNETH GORE, Jr., Defendant.

Appeal by Defendant from Judgment and Commitment entered 2 June 2016 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 26 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc Bernstein, for the State.

Kimberly P. Hoppin for Defendant-Appellant.

INMAN, Judge.

When circumstantial evidence was sufficient to show that a defendant was present with his girlfriend at the scene of a murder, the couple fled in the victim's vehicle to another state, and were found in possession of other personal property taken from the victim, the trial court did not err in denying motions to dismiss charges of first degree murder and robbery.

Kenneth Gore, Jr., (“Defendant”) appeals from a judgment and commitment following a jury verdict finding him guilty of robbery with a dangerous weapon and first degree murder on the basis of the felony murder rule with the predicate felony of robbery with a dangerous weapon. On appeal, Defendant argues that the trial court committed reversible error by denying his motions to dismiss the charges for insufficient evidence. Defendant also argues that the trial court committed reversible error by denying his motions for mistrial following an outburst by one of Defendant’s relatives during the announcement of the verdict. After careful review, we conclude that Defendant has failed to demonstrate error.

Factual and Procedural History

This case arises from the death of Bonnie Fowler (“Ms. Fowler”), a 77-year-old resident of Chadbourn, North Carolina.

The evidence at trial tended to show the following:

On 6 November 2010, Ms. Fowler, who lived alone in an apartment complex, spent the morning and early afternoon with her family in her home. Later that afternoon, at around 4:20 p.m., she spoke by phone with the last relative to have had contact with her. One of Ms. Fowler’s daughters called her at around 8:00 p.m., but Ms. Fowler did not answer the phone. At approximately 8:15 p.m., security footage captured Ms. Fowler’s car leaving her apartment complex.

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The next morning, on 7 November 2010, between 9:15 a.m. and 9:30 a.m., one of Ms. Fowler's daughters arrived at Ms. Fowler's apartment to take her to church. Ms. Fowler's daughter noticed that her mother's car was not in the parking lot, and, when her mother did not answer the door, she let herself into the apartment using a spare key. Upon entering, Ms. Fowler's daughter saw the apartment was ransacked, found her mother deceased on the kitchen floor, and called the police.

Police arrived shortly and secured the apartment. Special Agent Nathan Smoots ("Agent Smoots"), of the North Carolina State Bureau of Investigation ("SBI"), processed the crime scene. Agent Smoots did not discover any signs of forced entry or any latent fingerprints in the apartment. He did, however, find a hammer in a linen closet, which lab tests revealed was stained with Ms. Fowler's blood. Agent Smoots also found several bloody shoeprints in the kitchen and a bent knife in the sink. Lab tests did not reveal the presence of blood on the knife.

A medical examiner testified that Ms. Fowler suffered extensive stab wounds, contusions on the left side of her head, a broken bone around one eye, and lacerations from blunt force impact. The medical examiner also noted several injuries to Ms. Fowler's lower arms and hands, which he concluded were consistent with defensive wounds. The cause of death was determined to be "stab wounds to the chest."

At the time of Ms. Fowler's death, Defendant and Tiffany Faulk ("Faulk") were staying with one of Ms. Fowler's neighbors. On 9 November 2010, after receiving

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information from the SBI regarding the events surrounding Ms. Fowler's death and Defendant and Faulk's suspected involvement, Maryland police went to Faulk's sister's house and were directed to a row house in Baltimore where Defendant and Faulk were staying. When the police arrived at the row house, several officers knocked on the front door and Defendant ran out the back door, where awaiting officers took him into custody.

The officers secured the house while a search warrant was procured. Once the search warrant was issued, a resident of the row house walked with police through the house and identified particular items that she said belonged to Defendant and Faulk. Among those items were: jewelry, a purse, clothing which contained a receipt with Defendant's name on it, a prescription bottle with Ms. Fowler's name on it, and two pairs of tennis shoes—one pair of size 5 Adidas and one pair of size 10 Air Jordans. The Adidas shoes tested positive for the presence of Ms. Fowler's DNA. An expert witness for the State matched the Adidas shoes with one set of the bloody shoeprints in Ms. Fowler's apartment, but no such identification could be made for the Jordans. Rather, the expert testified only that the outsoles of those shoes were consistent with shoes that made one set of bloody shoeprints in Ms. Fowler's apartment.

Following his arrest, Defendant provided police with conflicting statements regarding how he came into possession of Ms. Fowler's car and prescription

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medication and denied any involvement with Ms. Fowler's death. Defendant was indicted on 10 February 2011 for first degree murder and on 6 October 2011 for robbery with a dangerous weapon.

Defendant's trial began on 16 May 2016. Defendant moved to dismiss the charges at both the close of the State's evidence and at the close of all the evidence, arguing that the evidence was insufficient to support convictions on the charges. Both motions were denied. The trial court instructed jurors that they could find Defendant guilty of both charges on a theory of acting in concert with Faulk, so that it was not necessary for jurors to find that Defendant, rather than Faulk, personally robbed or murdered Ms. Fowler. The trial court also instructed jurors that they could find Defendant guilty of first degree murder on the basis of premeditation and deliberation or based on committing the murder in the course of committing another felony.

The jury returned a verdict finding Defendant guilty of robbery with a dangerous weapon and first degree murder on the basis of the felony murder rule.

Immediately after the courtroom clerk announced the unanimous jury verdict finding Defendant guilty of first degree murder on the basis of the felony murder rule, Defendant's mother began yelling "F*** all of you-all. F*** all of you. F*** you-all. . . ." Defendant's mother and several other spectators were quickly escorted out of the courtroom.

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Following the commotion, the trial court asked the jurors collectively if they agreed with the verdict; all but Juror Number 6 raised their hands in affirmation. Juror Number 6 apologized, and the trial court repeated the request to which all jurors responded affirmatively.

Defense counsel then requested that the jury be polled. Again, all jurors confirmed and maintained their guilty verdict on the robbery charge, and all jurors except Juror Number 6 confirmed and maintained their guilty verdict on the murder charge. Juror Number 6 confirmed that her verdict had been guilty on both charges but, when asked whether her verdict remained guilty on the first degree murder charge, she said “I’m sorry. No. It’s not.”

The jury was then directed to leave the courtroom. Defense counsel moved for a mistrial on the ground that the jury had been substantially affected by the emotional outburst of Defendant’s mother. The trial court was unpersuaded and called the jury back to the courtroom.

The trial court then reinstructed jurors on the first degree murder charge, and additionally instructed them as follows:

THE COURT: I apologize for the disturbance in the courtroom. But you took an oath that you would decide this case, again, based upon the facts and the evidence, and you would not let sympathy, fear, prejudice, bias, or any other such factor influence your decision. And I trust that each of you can continue to follow your obligations as jurors. And, again, not to consider any other factor other than what has been the evidence presented in this court of law

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and apply the law that I've given to you to the facts as you find the facts to be.

The jury was then sent back to the deliberation room to consider their verdict on the murder charge.

Approximately a half hour later, the trial court received a note from the jury stating, "Juror No. 6 will not agree to work with the rest of the jury pool." Defense counsel renewed his motion for mistrial, but the State recommended that the jury be released for a lunch break. The trial court did not declare a mistrial and granted the State's request for a lunch recess.

Upon returning from lunch, the trial court, at the request of defense counsel, provided the jury with an *Allen* charge pursuant to North Carolina Pattern Jury Instruction 101.40. The jury resumed deliberations and returned a unanimous verdict finding Defendant guilty of first degree murder on the basis of the felony murder rule. The jury was polled again and this time all jurors confirmed the verdict.

Defendant gave notice of appeal in open court.

Analysis

I. Sufficiency of the Evidence

Defendant argues that the trial court erred by denying his motions to dismiss the charges because the evidence did not affirmatively place Defendant at the scene of the crime, and that, regardless, his mere presence was insufficient evidence of

guilt. After careful review of the evidence and application of the appropriate standard of review, we hold that the trial court did not err.

“The extent to which the evidence presented at trial suffices to support the denial of a motion to dismiss for insufficiency of the evidence is a question of law reviewed de novo by the appellate court.” *State v. Barnett*, 368 N.C. 710, 713, 782 S.E.2d 885, 888 (2016). When reviewing a challenge to the sufficiency of the evidence, this Court “must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *State. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (citation omitted). “ ‘Upon [a] defendant’s motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant’s being the perpetrator of such offense. If so, the motion is properly denied.’ ” *Id.* at 378, 526 S.E.2d at 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). “If, however, when the evidence is so considered it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed. This is true even though the suspicion aroused by the evidence is strong.” *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citations omitted). “Substantial evidence is such relevant evidence as a reasonable mind might

accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

Defendant was charged with first degree murder on the basis of premeditation and deliberation and the alternate basis of the felony murder rule with the predicate felony of robbery with a dangerous weapon. The jury was instructed, *inter alia*, on a theory of acting in concert and returned a verdict finding Defendant guilty of the charged offenses. “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 (2003) (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)). To obtain a conviction under an acting in concert theory, the State need not prove that the defendant did any particular act constituting some part of the crime. *See State v. Lundy*, 135 N.C. App. 13, 18, 519 S.E.2d 73, 78 (1999). Rather, the State must only show that “the defendant [was] ‘present at the scene of the crime’ and that he ‘act[ed] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.’ ” *Id.* at 18, 519 S.E.2d at 78 (quoting *State v. Moore*, 87 N.C. App. 156, 159, 360 S.E.2d 293, 295 (1987)).

Applying the foregoing principles to the case before us, we hold that the evidence introduced was sufficient to survive Defendant's motions to dismiss. Defendant's primary assertion—that there was insufficient evidence of his presence at the crime scene—is without merit. At the time Ms. Fowler was killed, Defendant was in a relationship with Faulk and both were staying with one of Ms. Fowler's neighbors. Police found bloody shoeprints at the crime scene that were consistent with the shoes found at the Baltimore row house. The State's expert testified that the size 10 tennis shoes in the row house where Defendant was captured were consistent with the type of shoe that created one set of bloody shoeprints in Ms. Fowler's apartment. Those shoes were found next to size 5 tennis shoes, which tested positive for the presence of Ms. Fowler's DNA. In addition, shortly after the time of Ms. Fowler's death, Defendant and Faulk traveled together to Baltimore in Ms. Fowler's car, and police found items belonging to Ms. Fowler among Defendant's and Faulk's possessions.

While Defendant argues that this evidence was circumstantial and only gives rise to conjecture and suspicion, it is well recognized by our courts that “jurors may rely on circumstantial evidence to the same degree as they rely on direct evidence[.]” *State v. Sluka*, 107 N.C. App. 200, 204, 419 S.E.2d 200, 203 (1992), and that “the law requires only that the jury shall be fully satisfied to the truth of the charge[.]” *State v. Adcock*, 310 N.C. 1, 29, 310 S.E.2d 587, 603 (1984) (internal quotation marks and

citations omitted). Taking the evidence in the light most favorable to the State, we hold that while circumstantial, the evidence is sufficient to lead a reasonable mind to conclude that Defendant was present in Ms. Fowler's apartment when she was killed.

Defendant contends that his presence alone at the crime scene is insufficient evidence of guilt, because the State failed to present evidence of Defendant's participation, assistance or intent to encourage the commission of the crimes. Generally, "[m]ere presence, even with the intention of assisting in the commission of a crime[,] cannot be said to have incited, encouraged or aided the perpetration thereof, unless the intention to assist was in some way communicated to [the perpetrator]." *State v. Hargett*, 255 N.C. 412, 415, 121 S.E.2d 589, 592 (1961) (citation omitted). However, "[w]hen 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. Rankin*, 284 N.C. 219, 223, 200 S.E.2d 182, 185 (1973) (emphasis added) (internal quotations and citations omitted). Evidence of Defendant's relationship to Faulk, his presence at the crime scene, and his travel with Faulk to Baltimore in Ms. Fowler's car with Ms. Fowler's medication reasonably support the conclusion that Defendant's presence encouraged Faulk to rob and kill Ms. Fowler. Accordingly, we hold that the State presented sufficient evidence to survive Defendant's motions to dismiss.

II. Motions for Mistrial

Defendant also argues that the trial court committed reversible error by denying his motions for mistrial because Defendant's mother's outburst, following the initial recitation of the jury verdict, greatly affected the jury such that a mistrial was required pursuant to N.C. Gen. Stat. § 15A-1061. We disagree.

"The decision to grant or deny a mistrial lies within the sound discretion of the trial court and is entitled to great deference[.]" *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008) (quotation marks omitted). "Absent an abuse of discretion, therefore, the trial court's ruling will not be disturbed on appeal." *Id.* at 538, 669 S.E.2d at 260. An abuse of discretion occurs when a ruling is "manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision." *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998).

North Carolina statutes direct that a trial court must declare a mistrial "if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2015). Several prior decisions by this Court and the North Carolina Supreme Court have held that a trial court did not abuse its discretion in denying a motion for mistrial following incidents of emotional outbursts in the courtroom. *See, e.g., State v. Locklear*, 322 N.C. 349, 359, 368 S.E.2d 377, 383 (1988) (holding no abuse of discretion in the denial of a motion for mistrial following an emotional outburst by a murder victim's widow); *State v. Revels*, 153 N.C. App. 163, 168-69, 569 S.E.2d 15,

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18-19 (2002) (holding no abuse of discretion denying a motion for mistrial after several outbursts by the victim's family). In *Revels*, our Court held that the defendant failed to establish an error that resulted in "irreparable prejudice to [the] defendant" when the trial court excused the jurors after the outbursts, cautioned the audience, and provided a curative instruction. 153 N.C. App. at 169, 569 S.E.2d at 18-19.

As in *Revels*, the record here indicates that the trial court took curative measures immediately following the outburst. A half hour later, when the jury informed the trial court of Juror Number 6's refusal to work with the others, the trial court sent the jury to lunch and, at the request of defense counsel, provided an *Allen* charge upon their return and before they resumed deliberations.

We are not persuaded by Defendant's argument that the outburst prejudiced the jury to his detriment. The outburst occurred immediately *after* the announcement of the initial guilty verdict on the murder charge. It was minutes after the outburst that Juror Number 6 declined to maintain her verdict against Defendant on the murder charge. Only after a recess, further deliberation, another recess, and an *Allen* charge did Juror Number 6 ultimately agree with her fellow jurors that the State had proven Defendant's guilt on the murder charge. It therefore appears that any prejudice caused by the outburst was detrimental to the State rather than to Defendant. Accordingly, Defendant has failed to demonstrate irreparable prejudice to his defense, and we cannot conclude that the trial court's denials of his motions for

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mistrial were “so arbitrary that [they] could not have been the result of [] reasoned decision[s].” *T.D.R.*, 347 N.C. at 503, 495 S.E.2d at 708. We therefore hold that the trial court did not abuse its discretion.

Conclusion

For the foregoing reasons, we hold that Defendant has failed to demonstrate error.

NO ERROR.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).