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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1062

Filed: 7 August 2018

Bladen County, Nos. 14 CRS 51698, 14 CRS 51702, 16 CRS 999

STATE OF NORTH CAROLINA

v.

TWASJAY R. BROWN, Defendant.

Appeal by defendant from judgment entered 24 February 2017 by Judge Tanya Wallace in Bladen County Superior Court. Heard in the Court of Appeals 23 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Amanda S. Zimmer for defendant-appellant.

BERGER, Judge.

On February 24, 2017, Twasjay Roddreek Brown ("Defendant") was found guilty of first-degree felony murder, discharging a weapon into occupied property, and possession of a firearm by a felon. Defendant appeals, arguing the trial court erred in denying his motion to dismiss because the State introduced insufficient evidence of his presence at the scene of the crime. We disagree.

Factual and Procedural Background

On October 28, 2014, Danielle Purdie ("Purdie"), who was living with her boyfriend Malcom Melvin ("Melvin"), woke at approximately 1:00 a.m. when Melvin showed her a Facebook message she had received from Raysean Gray ("Gray"). Melvin responded to the message, identifying himself, saying, "This is Malcolm. What's that for?" Gray then responded, "Wassup doh [expletive] y u inbox back doh. . . I'm sayn wess up [expletive] wat up want beef now I'm down wit dat." Melvin did not respond and went back to sleep.

Approximately an hour later, Purdie and Melvin were awoken by a knock at the front door. Melvin retrieved his pistol and answered the door. Purdie later testified that she heard multiple voices outside of the home but was unable to identify the individuals. Purdie heard one of the unidentified individuals say "Wass up? Wass up? You want beef? Wass up?" Purdie then heard several gunshots. She went to the front door of their home to find Melvin had been fatally shot.

At approximately 2:00 a.m., Bladen County Sheriff Sergeant Richard Bailey ("Sergeant Bailey") was dispatched to a "shots fired" call at 44 Sammy Lane in Bladen County. When Sergeant Bailey arrived, he found Melvin lying motionless on the ground with a gunshot wound to the head.

Stephen Johnson ("Johnson"), Gray's uncle, lived in the same mobile home park as Melvin, who lived about 200 feet away. At approximately 2:00 a.m., Amber

Locklear ("Locklear"), Johnson's fiancé, who was living at the Johnson residence, testified she was awoken by the sound of gunshots. Thirty minutes later there was a knock at Johnson's front door. When Johnson went to the door, no one was there. Then, when there was another knock at the front door, Johnson opened the door to find Gray standing outside.

Locklear testified that when Gray entered the residence, he "looked like somebody was after him . . . [h]e was like shook up." Johnson then asked Gray if he had anything to do with the shooting. Gray replied "no," and then proceeded to go to sleep. At approximately 6:30 a.m., Defendant knocked on Johnson's door, told Gray "get up and let's go," and the two men left the residence.

After searching the crime scene and surrounding area, deputies with the Bladen County Sheriff's Department located a wallet belonging to Gray about halfway between Melvin's residence and Johnson's residence. A cell phone belonging to Defendant was found in the front yard of the Melvin residence. Investigators were able to determine that two different caliber weapons were used at the scene, but no weapon was recovered. Seven 9-millimeter bullet casings and five .45-caliber casings were found in the front yard of the Melvin residence. Defendant's probation officer, George Clark ("Officer Clark"), was unable to locate Defendant, and Defendant failed to make his mandatory office visits.

At trial, Defendant moved to dismiss all of the charges against him at the close of the State's evidence, as well as at close of all evidence. Both motions were denied. Defendant was convicted of first-degree felony murder, discharging a weapon into occupied property, and possession of a firearm by a felon. Judgment was arrested for the conviction of discharging a weapon into occupied property, and, for the remaining charges, Defendant was sentenced to life imprisonment without the opportunity for parole. Defendant timely appealed.

Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon 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 defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"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). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State,

drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

Analysis

Defendant contends the trial court erred in denying his motion to dismiss because there was insufficient evidence of his presence at the scene of the crime during its commission to sustain the convictions. We disagree.

To sustain a conviction for felony murder, "[t]he prosecution need only prove that the killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies . . . establish[ing] a *per se* rule of accountability for deaths occurring during the commission of felonies." *State v. Bell*, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). Discharging a weapon into an occupied dwelling is one of the enumerated felonies that can be used to establish felony murder. *See* N.C. Gen. Stat. § 14-34.1(a) (2017); *State v. Wall*, 304 N.C. 609, 612, 286 S.E.2d 68, 71 (1982).

"[W]hen persons act in concert to commit the felony of discharging a firearm into an occupied structure each person is guilty not only of that felony but for any homicide committed in its perpetration." *State v. Thomas*, 325 N.C. 583, 595, 386 S.E.2d 555, 562 (1989). Acting in concert can be established by actual or constructive presence. *State v. McCullers*, 341 N.C. 19, 29-30, 460 S.E.2d 163, 169 (1995). "A person is constructively present during the commission of a crime if he is close enough

to provide assistance if needed and to encourage the actual execution of the crime." *State v. Gaines*, 345 N.C. 647, 675-76, 483 S.E.2d 396, 413 (*purgandum*[1]), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (*purgandum*). When using circumstantial evidence to identify the perpetrator of a crime, "courts often look to proof of motive, opportunity, capability and identity to determine whether a reasonable inference of defendant's guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator." *State v. Hayden*, 212 N.C. App. 482, 485, 711 S.E.2d 492, 494 (*purgandum*), *review denied*, 365 N.C. 349, 709 S.E.2d 928 (2011).

Here, Defendant's phone was found in the front yard of the Melvin residence. The phone number associated with that cell phone was determined to belong to

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[1] Our shortening of the latin phrase "*Lex purgandum est*." This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

Jasmine Jones ("Jones"). Jones testified Defendant "took [her] phone," and he was supposed to "give it back" but never did. Jones' testimony was corroborated by Officer Clark, who testified that he witnessed Defendant with "a cell phone in each hand . . . a flip phone. . . [and] a smart phone," hours before the shooting. Defendant also listed that same number associated with Jones' telephone as his contact number during his office visit with Officer Clark earlier that day.

Additionally, the evidence tended to show that the voices Purdie had heard before Melvin was shot repeated the same distinctive phrase that had been used in the Facebook message sent by Gray. Officer Clark testified that he had seen Defendant with Gray roughly five and a half hours before the shooting. Testimony from Johnson also placed Defendant with Gray a few hours after the shooting occurred.

The evidence collected at the crime scene tended to establish that there were two people at the door of the residence at the time of the shooting, and that bullets were fired from two different weapons into the residence. The evidence permitted a reasonable inference that Defendant was actually or constructively present during the shooting, and Defendant and Gray were able to provide assistance to each other if needed. Therefore, the State introduced substantial evidence to establish each essential element of the offense charged, and, regardless of who fired the fatal shot, Defendant and Gray, acting in concert, were the perpetrators of the offenses.

Conclusion

The trial court did not err in denying Defendant's motion to dismiss because the State introduced substantial evidence from which a rational juror could conclude Defendant acted in concert with Gray to discharge a weapon into an occupied residence that resulted in the death of Melvin. Defendant received a fair trial, free from error.

NO ERROR.

Judge MURPHY concurs.

Judge BRYANT concurs in result only.

Report per Rule 30(e).