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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-954

Filed: 7 May 2019

Edgecombe County, No. 16CRS050135

STATE OF NORTH CAROLINA

v.

MARTELLUS SANDERS, Defendant.

Appeal by Defendant from judgment entered 11 January 2018 by Judge Jeffery B. Foster in Edgecombe County Superior Court. Heard in the Court of Appeals 27 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Mark Hayes for the Defendant.

DILLON, Judge.

Defendant Martellus Sanders appeals from a judgment finding him guilty of first-degree murder. After careful review, we find no plain error.

I. Background

Defendant was arrested and indicted for first-degree murder, based on a drug deal gone bad, when he and an accomplice allegedly shot and killed a man from whom they had planned to purchase drugs.

During Defendant's trial, the jury was instructed on both first- and second-degree murder, and given an "acting in concert" instruction. The jury found Defendant guilty of first-degree murder, for which he was sentenced to life in prison. Defendant timely appealed.

II. Standard of Review

On appeal, Defendant argues that the trial court erred in its jury instructions. Defendant did not object to the instructions at trial, thus we review them for plain error. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Plain error review is to be "applied cautiously and only in the exceptional case[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal citations omitted). Rarely will "an improper instruction [] justify reversal of a criminal conviction when no objection has been made" as the defendant must prove a fundamental error so prejudicial that it impacted the jury's verdict. *Id.* at 661, 300 S.E.2d at 378 (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)).

III. Analysis

Defendant makes two arguments concerning the jury instructions, which we address in turn. Defendant first contends that the trial court erred by instructing

jurors that they could convict if they found that Defendant personally committed the shooting, where there was no evidence that Defendant himself fired the fatal shot. We review jury instructions in context and in their entirety. *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005). Reading the instructions as a whole, we conclude that the trial court did not instruct the jury on a separate theory that Defendant fired the fatal shot, but rather the trial court gave the general instruction on first-degree murder in conjunction with the "acting in concert" instruction. Specifically, we note that the trial judge expressly stated his intention of giving an acting in concert instruction *"in conjunction with"* the murder instructions based on the evidence at trial and that neither party objected to these instructions. We note further that the instructions for murder were immediately followed by an instruction for acting in concert. Thus, we conclude that the trial court did not commit plain error in this regard. *See Blizzard*, 169 N.C. App. at 296-97, 610 S.E.2d at 253.

In his second argument, Defendant contends that the trial court erred by instructing on "acting in concert." More specifically, Defendant contends that the State did not present evidence that he and his accomplice had a common plan or purpose to commit first-degree murder.

To instruct the jury on first-degree murder, sufficient evidence must exist to show: (1) the defendant acted with premeditation, (2) the defendant deliberately,

intentionally, and maliciously killed the victim, and (3) causation. *See State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (discussing the elements of first-degree murder).

For an acting in concert instruction, there must be sufficient evidence that: (1) the defendant was present at the crime scene and (2) he acted "together with another person who [committed] the acts necessary to constitute the crime pursuant to a common plan or purpose." *State v. Poag*, 159 N.C. App. 312, 320, 583 S.E.2d 661, 667 (2003). That is, "[u]nder the doctrine of acting in concert, if two or more persons are acting together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan." *State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618 (1989), *vacated on other grounds*. An acting in concert instruction is proper even when "the other person does all the acts necessary to commit the crime." *State v. Jefferies*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993).

Here, we conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to support a finding by jurors of common plan or purpose. *See State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979) (discussing that the theory of acting in concert is based on common meanings and "need not be overlaid with technicalities"). This evidence showed as follows: Defendant and his accomplice were present at the crime scene. On the night in question, Defendant and

his accomplice looking to purchase marijuana. When Defendant and his accomplice arrived together to purchase drugs, they exited the vehicle and drew their weapons. During this time, Defendant was wearing a red bandana to cover his face, approached victim's vehicle, and told the victim to "stop playing." When the victim did not stop driving, Defendant and his accomplice both began shooting. Defendant himself fired six or seven shots. It was undisputed that a shot fired by Defendant's accomplice was the fatal one. After the shooting, the accomplice left the scene without Defendant; however, the accomplice stopped the car to allow Defendant to catch up and leave the scene with him. The two then drove to the accomplice's home where he and Defendant changed clothes and hid their clothing in a back closet. After being arrested, Defendant made numerous calls from jail about clearing his accomplice's house of any evidence. *See State v. Gabriel*, 207 N.C. App. 440, 445, 700 S.E.2d 127, 130 (2010) (upholding an acting in concert instruction because a common plan or purpose existed due to the defendant's "undisputed presence at the scene" and that he also shot at the victim).

Instructing the jury on an acting in concert theory did not amount to error, much less plain error. *See Gabriel*, 207 N.C. App. at 445, 700 S.E.2d at 130. Indeed, sufficient evidence exists, as discussed above, to show that Defendant and his accomplice were acting together for a common plan or purpose – to purchase drugs –

and that the murder of the victim was committed in pursuance of these actions. *See State v. Golphin*, 352 N.C. 364, 457, 533 S.E.2d 168, 228-29 (2000).

IV. Conclusion

Viewed in their context and entirety, the trial court did not commit plain error in its jury instructions.

NO ERROR.

Judges INMAN and COLLINS concur.

Report per Rule 30(e).