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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-149

No. COA20-847

Filed 1 March 2022

Wake County, Nos. 17 CRS 216619; 3865

STATE OF NORTH CAROLINA

v.

BARRY CARNELL MCCRAE, JR., Defendant.

Appeal by defendant from judgment entered 17 March 2020 by Judge Andrew T. Heath in Superior Court, Wake County. Heard in the Court of Appeals 5 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. Mosteller, for the State.

Freedman Thompson Witt Ceberio & Byrd, PLLC, by Stuart L. Brooks, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Barry Carnell McCrae, Jr. ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of conspiracy to commit murder, felonious possession of marijuana with intent to sell and deliver, and intentionally keeping and maintaining a dwelling place for selling marijuana. Defendant argues that the trial court erred by denying his motion to dismiss the charge of conspiracy to commit first

degree murder; allowing Ms. Washington to testify regarding an inference she formed; and instructing the jury it could convict based on a theory not alleged in the indictment. Because we hold there was sufficient evidence presented to support the denial of Defendant's motion to dismiss, the trial court did not violate Rule of Evidence 701 in allowing Ms. Washington's testimony, and the trial court instructed the jury in accordance with the law, we find no error.

I. Background

¶ 2 In 2017, Tyra Washington was a sophomore at Shaw University and lived in the Wolf Creek Apartments. Ms. Washington testified that she met Quentin Judd in 2016 at Shaw and, although he had shown romantic interest in Ms. Washington, the two had never been intimate. Ms. Washington met Defendant in early 2017 and shortly after, became "intimate friends." In the summer of 2017, Defendant told Ms. Washington that Mr. Judd had broken into Defendant's car and stolen a lockbox containing money.

¶ 3 On 26 August 2017, Ms. Washington was at her apartment with Defendant and his cousin, Kevin Powell, who was visiting from Baltimore. "[T]hroughout the whole day[,]" at Defendant's behest, Ms. Washington communicated with Mr. Judd "on and off" via text message. Defendant instructed Ms. Washington to "see what [Mr. Judd] was doing that night" and make "plans for [Mr. Judd] to come over to [Ms. Washington's] apartment." Ms. Washington testified that Mr. Judd said his plans for

the night were "[m]e" and Defendant directed Ms. Washington to respond back and "see like when and how that would happen." According to Ms. Washington, "when [Mr. Judd] would say something to me, I would tell [Defendant] what he said and [Defendant] would tell me what to say back to [Mr. Judd] just to keep the conversation going." Ms. Washington and Mr. Judd discussed meeting at one of their apartments, and Mr. Judd sent Ms. Washington the location of his apartment. Defendant told Ms. Washington that he and Mr. Powell would go to Mr. Judd's apartment and do a "[d]rive by." Ms. Washington understood that to mean that Defendant and Mr. Powell would "drive by" and "[s]hoot him."

¶ 4 Later that night, at Defendant's request, Ms. Washington drove to the Motel Six and booked a motel room for Mr. Powell for the night. When Ms. Washington returned to her apartment at approximately 11:30 p.m., Mr. Judd texted her and asked if he could come to her apartment instead. She relayed this message to Defendant, who responded, "that's perfect." Within thirty minutes of Ms. Washington's return, Defendant and Mr. Powell left the apartment. Ms. Washington testified that on the night of 26 August, she had observed a "small black gun sitting on the table" in her apartment. She had never seen the gun prior to 26 August 2017. Mr. Powell took the gun with him when he left the apartment with Defendant.

¶ 5 Ms. Washington testified that when Defendant and Mr. Powell left her apartment, the plan was that Mr. Judd would come to the apartment and Ms.

Washington would remain inside the apartment. Ms. Washington testified that Defendant and Mr. Powell were "going to meet [Mr. Judd] outside" Ms. Washington's apartment. Ms. Washington's role was to alert Defendant via Snapchat messenger when Mr. Judd arrived outside her apartment. At one point, Defendant called Ms. Washington via Snapchat and asked if she had a picture of Mr. Judd she could send him. Ms. Washington testified that a little before 2:00 a.m., Mr. Judd "Facetimed me when he got close" and sent her a text message when he pulled into the parking lot. Mr. Judd texted Ms. Washington when he was at her front door; however, Ms. Washington did not go to the door to let him in. Instead, she texted him, "[h]old on, I'm coming." Ms. Washington "let [Defendant] know that [Mr. Judd] was outside." Ms. Washington then heard five gunshots. Ms. Washington did not go outside the apartment to see what had happened. Ms. Washington did not call 911.

¶ 6 When asked if she knew what had happened, Ms. Washington responded, "[h]e had gotten shot" "[b]ecause that was [Defendant'S] and [Mr. Powell's] plan." Defendant objected and moved to strike. Outside the presence of the jury, the trial court heard arguments from both parties and overruled Defendant's objection. The jury returned and Ms. Washington resumed her testimony. The State again asked Ms. Washington when she heard the gunshots, "[w]hat did you think happened?" Ms. Washington responded, "I thought [Mr. Judd] was shot." Defendant objected to "what she thought," and the trial court overruled the objection. The State asked, "Why did

you think that?" Ms. Washington testified, "Because that's what they were talking about before they left." Ms. Washington testified that she was scared "[b]ecause of what I assumed happened."

¶ 7 At 1:58 a.m. on 27 August 2017, Officer Midgett of the Raleigh Police Department responded to a dispatch call of possible shots fired on Wolf Creek Court. Officer Harvey Slade of the Raleigh Police Department testified that on 27 August at approximately 3:20 a.m., he received a dispatch call reporting "a loud party" around the "512 Wolf Creek" block. Officer Slade decided to check each floor of the apartment building in search of the apartment with the loud music. When he entered the stairwell, Officer SLade "saw a shoe on a foot sticking out from underneath the stairwell." Thinking that "it was possibly an intoxicated individual," Officer Slade testified that he "tapped the foot to see if [he could] get that person's attention." Officer Slade checked the individual for a pulse and checked for breath; he got neither. Officer Slade alerted EMS and requested more officers come out to the area.

¶ 8 In the immediate area surrounding the body, the Raleigh Police Department officers found six shell casings, two projectiles, and one unfired round. Once the crime scene was secure, Officer Slade joined other officers in a door-to-door canvas of the apartment complex. First responders retrieved a Maryland identification card in the victim's pocket identifying the individual as Quentin Judd. The medical examiner testified that Mr. Judd sustained ten gunshot wounds and in his opinion, the cause

of Mr. Judd's death was "[m]ultiple gunshot wounds."

¶ 9 At approximately 12:00 p.m. on 27 August 2017, Detective Smith came to Ms. Washington's apartment and informed her that Mr. Judd "was shot and he had died that morning at the hospital." Detective Smith informed Ms. Washington that she needed to come to the station. Detective Zeke Morse testified that he met with Ms. Washington at the police station on the afternoon OF 27 August. Detective Zeke testified that Ms. Washington was not forthcoming at this interview. When Detective Morse left the room, Ms. Washington called Defendant and told him that the detective was asking about him. Ms. Washington testified that after speaking with her attorney, she decided to speak with Detective Morse again. On 28 August, Ms. Washington told Detective Morse "that [Defendant] and [Mr. Powell] had said they wanted to talk to [Mr. Judd], but I didn't know why." Detective Morse testified that at this interview, Ms. Washington appeared "more forthcoming[.]" Ms. Washington told Detective Morse where Defendant lived, where Defendant was the night of 26 August, that Mr. Powell was with Defendant, and about the in-person and Snapchat conversations she and Defendant had engaged in.

¶ 10 Detective Faulk testified that on 27 August, he called Defendant and asked if Defendant would speak with Raleigh Police Department officers. Defendant agreed, and Detective Faulk and Detective Smith went to Defendant's apartment, picked up him, and drove him to the police station. Defendant told Detective Faulk that on 26

August, he went to the house of a person named Deangelo around 9:00 or 10:00 p.m., went to Shaw University around 1:00 a.m., and went back to his apartment with a woman he met around 2:00 or 2:30 a.m. Detective Faulk confronted Defendant about the inconsistencies between his phone records and his story. Defendant changed his story and said that he left his friend's apartment around 11:00 p.m., returned to his apartment at the Wolf Glen apartments, left his apartment and went to Shaw University around 2:00 a.m., and returned to his apartment around 3:00 a.m. Defendant said he was by himself in his car.

¶ 11 Defendant consented to a search of his apartment and car. In Defendant's room, the officers found a black duffel bag containing marijuana. During the search, Defendant identified and pointed out six pounds of marijuana which he claimed was "for personal use." Defendant was arrested for possession of marijuana, taken to the police station, and interviewed. Defendant waived his Miranda rights and agreed to talk to detectives. During this second interview, Detective Faulk testified that Defendant told Detective Faulk that he had picked Mr. Powell up from the bus station on 26 August and had driven him to a woman's house and did not see him again. Defendant denied he and Mr. Powell went to Ms. Washington's apartment on 26 August. Defendant said he didn't want to talk anymore, and the interview ended.

¶ 12 On 31 August 2017, Detective Faulk and other detectives viewed the surveillance video from the Motel Six. The video was shown at trial. Detective Faulk

testified that the video showed that at 1:58 a.m. on 27 August, Defendant's gray Infinity pulled into the parking lot and Mr. Powell got out of the car.

¶ 13 Defendant, Mr. Powell, and Ms. Washington were charged with Mr. Judd's murder. Ms. Washington and Mr. Powell both entered guilty pleas. Defendant was indicted with first degree murder, conspiracy to commit first degree murder, intentionally keeping and maintaining a dwelling for keeping and selling marijuana, and possession with intent to sell and deliver marijuana. The case came on for hearing in Superior Court, Wake County on 9 March 2020. Defendant moved to dismiss the charges at the close of the State's evidence and again at the close of all the evidence. The trial court denied Defendant's motions. The jury returned verdicts finding Defendant not guilty of first degree murder and guilty of conspiracy to commit first degree murder, intentionally keeping and maintaining a dwelling for keeping and selling marijuana, and possession with intent to sell and deliver marijuana. Defendant was sentenced to 157-201 months of incarceration for the conspiracy conviction and 6-17 months of incarceration, suspended for 24 months of supervised probation, for the drug convictions. Defendant orally noticed his appeal.

II. Analysis

A. Motion to Dismiss

¶ 14 Defendant argues "the trial court erred by denying Defendant's motion to dismiss because there was no evidence [Defendant] conspired intending to kill [Mr.

Judd]." (Capitalization altered.) According to Defendant, "the evidence supported nothing more than a conspiracy to commit a felonious assault – a conspiracy to shoot [Mr. Judd]."

> This Court reviews the trial court's ruling with respect to a motion to dismiss for insufficient evidence on a *de novo* basis. The question for the trial court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense, and of the defendant's being the perpetrator of such offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. The evidence can be circumstantial or direct, or both. However, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor. In considering such motions, the trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. If, however, the evidence 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.

State v. English, 241 N.C. App. 98, 104, 772 S.E.2d 740, 744–45 (2015) (citations, quotation marks, and brackets omitted).

¶ 15 "A criminal conspiracy is an agreement between two or more persons to do an unlawful act[.]" *State v. Massey*, 76 N.C. App. 660, 661, 334 S.E.2d 71, 72 (1985) (citation omitted). "To prove that the defendant committed conspiracy to commit

first-degree murder, the State must prove that the defendant agreed to perform every element of the crime-i.e., that he agreed to the intentional killing of a victim after premeditation and deliberation." *State v. Choppy*, 141 N.C. App. 32, 39, 539 S.E.2d 44, 49 (2000) (citation omitted). Therefore, in this case, the State's evidence must show an agreement between Defendant and Ms. Washington, or between Defendant and Mr. Powell, or between Defendant, Ms. Washington and Mr. Powell to intentionally kill Mr. Judd after premedication and deliberation. *See id.* "Specific intent to kill is an essential element of first degree murder, but it is also a necessary constituent of the elements of premeditation and deliberation." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005) (citation and quotation marks omitted). However, there is no requirement that the agreement between Defendant, Ms. Washington, and/or Mr. Powell be express; "[a] mutual, implied, understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense." *State v. Smith*, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953) (citation and quotation marks omitted).

¶ 16 Moreover, a criminal conspiracy may be demonstrated by direct or circumstantial evidence. *State v. Lawrence*, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000). "[P]roof of a conspiracy may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *Id.* (citation and

quotation marks omitted). However, "[c]onspiracies cannot be established by a mere suspicion, nor does a mere relationship between the parties or association show a conspiracy. If the conspiracy is to be proved by inferences drawn from the evidence, such evidence must point unerringly to the existence of a conspiracy." *Massey*, 76 N.C. App. at 662, 334 S.E.2d at 72 (citations omitted).

¶ 17 Here, Defendant does not argue about the existence of an agreement; he argues that there was insufficient evidence of an agreement that included an intention to kill Mr. Judd. However, taken in the light most favorable to the State, there was sufficient evidence of an intent to kill. *See English*, 241 N.C. App. at 104, 772 S.E.2d at 745. The State presented evidence that Defendant suspected that Mr. Judd had broken into his car and stolen his money. *See Chapman*, 359 N.C. at 375, 611 S.E.2d at 827 ("While evidence of motive is not essential to a determination of premeditation and deliberation, evidence of motive for the commission of a crime is relevant to that determination and is admissible."). Ms. Washington testified that throughout the day on 26 August, at Defendant's behest, Ms. Washington engaged in a text message conversation with Mr. Judd, and Defendant instructed Ms. Washington "to get [Mr. Judd] over" to her apartment. Ms. Washington's text messages to Mr. Judd were dictated by Defendant. Ms. Washington understood this conversation was "based off shooting [Mr. Judd]."

¶ 18 Defendant told Ms. Washington that he and Mr. Powell would go to Mr. Judd's

apartment and "[d]rive by," which Ms. Washington understood to mean that Defendant and Mr. Powell would "drive by" and "[s]hoot him." When Defendant and Mr. Powell left Ms. Washington's apartment, Mr. Powell took a gun with him. When the plans changed and Mr. Judd decided to come to Ms. Washington's apartment, Defendant responded, "perfect." Ms. Washington's role was to alert Defendant when Mr. Judd arrived; once Mr. Judd indicated he was outside Ms. Washington's apartment, Ms. Washington immediately relayed this information to Defendant. Ms. Washington did not answer her apartment door. Then, after hearing five gunshots, Ms. Washington did not call 911. When asked if she knew what had happened, Ms. Washington responded, "[h]e had gotten shot" "[b]ecause that was Barry and Kevin's plan[.]" Finally, Defendant was shot *ten times* and his body was found under the stairwell of Ms. Washington's apartment complex. *See State v. Cromartie*, 177 N.C. App. 73, 77, 627 S.E.2d 677, 680 (2006) ("Where the defendant points a gun at the victim and pulls the trigger, this constitutes evidence from which intent to kill may be inferred." (citation omitted)); *see also Chapman*, 359 N.C. at 376, 611 S.E.2d at 828 ("Premeditation and deliberation may be inferred from the multiple shots fired by defendant." (citations omitted)).

¶ 19 Thus, taken in the light most favorable to the State, the State's evidence showed an agreement between Defendant, Ms. Washington, and Mr. Powell to intentionally kill Mr. Judd. *See Choppy*, 141 N.C. App. at 39, 539 S.E.2d at 49. The

evidence presented by the State "point[s] unerring to the existence of a conspiracy." *Lawrence*, 352 N.C. at 25, 530 S.E.2d at 822.

B. Opinion Testimony

¶ 20 Defendant argues that "the trial court prejudicially erred by allowing [Ms. Washington] to opine about [Defendant's] and [Mr. Powell's] intent." (Capitalization altered.) Defendant takes issue with the following exchange:

> Q. Did you know what happened?
> [Ms. Washington]. Yes
> [Ms. Washington]. He had gotten shot
> Q. How did you know that?
> [Ms. Washington] Because that was [Defendant's] plan

¶ 21 "[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

¶ 22 Rule of Evidence 701 provides: "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2019). "Evidentiary errors are harmless

unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001) (citation omitted).

¶ 23 At trial, Defendant objected when Ms. Washington testified that she knew that Mr. Judd had been shot because it "was [D]efendant's plan." Outside the presence of the jury, the trial court heard arguments from both parties and ultimately ruled that Ms. Washington made "a reasonable inference" and that Ms. Washington is "allowed to testify what she knows." Defendant reasserted his objection because "I don't think it should be allowed [for] someone to testify who killed someone based on an opinion and not any facts, regardless of what conversations may have occurred earlier in the night." The trial court again overruled the objection. When the jury returned, the prosecutor re-worded the question to Ms. Washington: "What do you think happened?" Ms. Washington responded that she "thought [Mr. Judd] was shot" because "that's what they were taking about before they left."

¶ 24 We hold that the trial court did not abuse its discretion in allowing Ms. Washington to make an "inference . . . based on [her] perception" that also helped the jury have a clear understanding of why Ms. Washington formed that belief. N.C. Gen. Stat. § 8C-1, Rule 701. Ms. Washington had already testified that earlier in the night, Defendant had told her that he and Mr. Powell planned to do a "drive by." When asked "what was supposed to happen" when Mr. Judd came to her apartment, Ms.

Washington testified, "[Defendant] and [Mr. Powell] were going to meet [Mr. Judd] outside." Ms. Washington explained that Defendant and Mr. Powell would know when Mr. Judd arrived at the apartment because "I was going to tell them." Despite Defendant's assertion, Ms. Washington did not testify about Defendant and Mr. Powell's intention to kill Mr. Judd. Instead, based on prior conversations involving herself, Defendant, and Mr. Powell, Ms. Washington testified as to the inference she made after hearing gunshots outside her apartment shortly after she alerted Defendant of Mr. Judd's arrival. *See* N.C. Gen. Stat. § 8C-1, Rule 701. This testimony also clarified for the jury the basis of Ms. Washington's belief. *See id.* Moreover, the trial court's ruling reflected that it made a reasoned decision, after considering the arguments of both parties, that Ms. Washington made "a reasonable inference" and that Ms. Washington is "allowed to testify what she knows." As a result, we hold that the trial court's decision was not "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Therefore, Ms. Washington's testimony was properly admitted under Rule 701.

¶ 25 Even assuming it was error for Ms. Washington to testify about Defendant's "plan," any error was harmless at best. *Ferguson*, 145 N.C. App. at 307, 549 S.E.2d at 893. The jury was presented with ample evidence showing Defendant's guilt. The evidence showed that Defendant blamed Mr. Judd for breaking into his car and stealing his money; on the night of 26 August, Defendant coached Ms. Washington to

engage in a text message conversation with Mr. Judd and lure him to her apartment; Defendant and Mr. Powell took a gun and left the apartment before Mr. Judd arrived; Ms. Washington alerted Defendant when Mr. Judd arrived at her apartment; Mr. Judd's body was riddled with ten gunshot wounds and was found in the stairwell of Ms. Washington's apartment; Defendant and Mr. Powell were seen on surveillance video arriving at the Motel Six shortly after the shooting; and Defendant lied to police when first interviewed about the night of 26 August. Thus, Defendant cannot show a reasonable possibility that the jury would have reached a different verdict but for Ms. Washington's testimony about Defendant's "plan." *See Ferguson*, 145 N.C. App. at 307, 549 S.E.2d at 893.

C. Jury Instruction

¶ 26 Defendant argues that "the trial court plainly erred by instructing the jury it could convict based on a theory not alleged in the indictment." (Capitalization altered.) The indictment alleged that Defendant "unlawfully, willfully, and feloniously did conspire with Tyra Washington and Kevin J. Powell, III to commit the felony of first degree murder, N.C.G.S. § 14-17, against Quentin Quante Judd." Defendant argues that there was no evidence presented that exclusively Defendant, Mr. Powell, and Ms. Washington were directly involved in Mr. Judd's murder. According to Defendant, the trial court therefore erred in instructing the jury that it must find that Defendant "and at least one other person entered into an agreement .

. . to commit murder" without listing Mr. Powell and Ms. Washington's names. This argument is contrary to law.

¶ 27 Defendant acknowledges that he did not object to the jury instructions and therefore, our review is limited to plain error. N.C. R. App. P. 10. "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997) (citation omitted).

¶ 28 Defendant also recognizes that as discussed in *State v. Pringle*, 204 N.C. App. 562, 694 S.E.2d 505 (2010), "during jury instructions the trial court need not specifically name the individuals with whom defendant was alleged to have conspired so long as the instruction comports with the material allegations in the indictment and the evidence presented at trial." *Id.* at 566, 694 S.E.2d at 508. We reject Defendant's argument that although the indictment and evidence presented at trial *did not show* the involvement of other co-conspirators beyond Ms. Washington and Mr. Powell, it was "error for the trial court to instruct the jury that it may find the defendant guilty of conspiracy based upon an agreement with persons not named in the indictment." *Pringle* does not require the State to prove a negative, *i.e.* that other individuals not named in the indictment or referred to in the evidence were not

involved in the conspiracy. *See id.* The case law simply does not require that jury instructions specifically name the individuals involved in a conspiracy. *State v. Johnson*, 337 N.C. 212, 224, 446 S.E.2d 92, 99 (1994) ("Reviewing the entire record before us, we are convinced that the trial court did not commit plain error in failing to include the names of Debbie Hemmert and Rebecca Hill in its instructions on conspiracy. . . . In addition, no evidence showed that defendant conspired with any other persons."). Therefore, the trial court did not err, let alone plainly err, in instructing the jury in accordance with the law.

III. Conclusion

¶ 29 We hold that trial court did not err in denying Defendant's motion to dismiss the charge of conspiracy to commit first degree murder; allowing Ms. Washington's testimony about the inference she formed; and instructing the jury in accordance with the law. As a result, we find no error.

NO ERROR.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).