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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-4

Filed 17 September 2024

Mecklenburg County, Nos. 19CRS27393, 19CRS28377

STATE OF NORTH CAROLINA

v.

ADONIJAH HENRI SUGGS, Defendant.

Appeal by defendant from judgment entered 16 May 2022 by Judge Gale M. Adams in Superior Court, Mecklenburg County. Heard in the Court of Appeals 14 November 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Lewis W. Lamar, Jr., for the State.*

*Everson Law Office, PLLC, by Cynthia Everson, for defendant-appellant.*

STROUD, Judge.

Adonijah Henri Suggs appeals a judgment entered following a jury verdict finding him guilty of felony breaking or entering a building and four counts of discharging a weapon into an occupied dwelling. Defendant argues the trial court erred by admitting certain evidence pursuant to North Carolina Rule of Evidence 404(b), denying his motion to dismiss, and instructing the jury on the acting in concert

theory. We hold Defendant did not preserve his argument regarding the admissibility of the evidence under Rule 404(b) at trial and, by failing to assert plain error in his principal brief, Defendant has waived plain error review on appeal. Moreover, we hold that the trial court did not err by denying Defendant's motion to dismiss or instructing the jury on the acting in concert theory.

### **I. Background**

The State's evidence tended to show that in the late morning of 8 January 2019, Michael Miles was asleep on his couch at his house on Darbyshire Place when he "woke up to a series of knocks." As Mr. Miles walked toward his front door, "the knocks got harder." Mr. Miles walked upstairs and looked out the window; he observed a "gentleman walking away from [his] house and getting into [a] vehicle." Mr. Miles testified that the man was "roughly" 5 feet 7 inches tall, "portly, stocky, shorts, T-shirt, heading into a Ford Explorer." According to Mr. Miles, the man entered the "gold looking," "older model" Ford Explorer through the back seat.

After observing the man leave in the Explorer, Mr. Miles testified that the knocks on his door "started to turn into kicks" and upon going downstairs, he noticed "the door starting to give in." Mr. Miles retrieved his weapon and walked to the top of his stairwell; Mr. Miles said, "Yo, what are you doing? Don't make me do my job." When the kicking escalated, Mr. Miles fired his revolver three times toward the door. Mr. Miles heard "cracking sounds," which turned out to be "shots that were shot back into [his] house." Mr. Miles called 911 and police arrived on the scene. An

investigating officer testified there were four bullet holes in the side exterior of the house and there were no shell casings discovered.

At trial, Mr. Miles's neighbor, Davion Pringle, testified that in the early afternoon of 8 July 2019, he heard gunshots. When Mr. Pringle looked out his window, he saw "[t]wo people running, shooting back" toward Mr. Miles's house; each man was holding a gun. Mr. Pringle testified that one of the men was wearing a red hat and a white t-shirt and was holding "a handgun." Another neighbor, Jennifer Dimaio, testified at trial regarding her Ring camera footage from 8 July 2019 at 11:21 am. The video and screenshots—which were entered into evidence—show a gold Ford Explorer, driven by a black male wearing a white t-shirt and red hat, driving on Darbyshire Place past Ms. Dimaio's driveway. Nineteen seconds later, the video shows the gold Explorer driving the opposite direction, toward Mr. Miles's house.

Officer Mike Dashti testified that he received an email on 9 July 2019 with a description of the gold Ford Explorer suspected to be tied to the shooting on 8 July at Mr. Miles's house. Officer Dashti recognized the 2001 gold Ford Explorer as the same vehicle he pulled over two days earlier—7 July 2019—for driving with an expired tag. Officer Dashti's body camera footage from that encounter on 7 July 2019 was entered into evidence and shows Defendant, wearing a red hat and white t-shirt, standing in front of the gold Explorer. Officer Dashti testified that when he received the email on 9 July 2019, he immediately recognized the vehicle from his prior encounter and "sent an email back to detectives saying this was the car, this was the person driving

it, and that was it.” Following Officer Dashti’s identification, officers were advised to be on the lookout for the gold Ford Explorer.

Officer Daniel Martin testified that on 10 July 2019, after the advisory went out, he located the gold Ford Explorer parked outside of an apartment complex. Officer Martin conducted surveillance on the complex and arrested Defendant when he walked outside. Defendant had the keys to the gold Explorer on his person and advised the officers that the two front car doors did not open.

Also at trial, Edward Izquierdo testified about a break-in at his home on 3 July 2019 and Officer Matthew Garruto testified about his investigation into the break-in at Mr. Izquierdo’s home. The home had a security camera that captured the breaking and entering; a screenshot from the video shows a black male wearing a white t-shirt and red baseball hat standing in Mr. Izquierdo’s living room.

On 16 May 2022, the jury found Defendant guilty of four counts of discharging a weapon into an occupied dwelling and one count of felonious breaking or entering. Defendant appeals.

## **II. Rule 404(b) Evidence**

Defendant argues that the trial court “erred in admitting evidence of other bad acts under Rule 404(b) of the North Carolina Rules of Evidence.” Specifically, Defendant contends that the trial court erred in admitting evidence about the 3 July 2019 breaking and entering and the 7 July 2019 incident where Defendant was driving without a license.

Defendant challenges the admissibility of the evidence admitted pursuant to North Carolina Rule of Evidence 404(b), which provides in relevant part:

Other crimes, wrongs, or acts.-- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404 (2023). Defendant did not file a motion *in limine* regarding the admissibility of the challenged evidence under Rule of Evidence 404(b); however, at a pretrial hearing on the State’s motion for joinder, the parties discussed the admissibility of the 404(b) evidence, and defense counsel did not object. Once the trial began, the parties again discussed the admissibility of the evidence. The State asserted the evidence would be offered to show intent and identity; the parties and judge agreed upon a limiting instruction regarding the Rule 404(b) evidence. At the charge conference, the trial court made oral findings that the evidence was admissible under Rule 404(b) and memorialized those findings in an order entered 17 May 2022.

Although the admissibility of Rule 404(b) evidence was discussed at different times during the trial, Defendant failed to object when evidence of the 3 July 2019 incident or the 7 July 2019 incident was admitted at trial. “Generally speaking, the appellate courts of this state will not review a trial court’s decision to admit evidence unless there has been a timely objection.” *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citation omitted). Therefore, “to preserve for appellate review a trial

court's decision to admit testimony, objections to that testimony must be contemporaneous with the time such testimony is offered into evidence and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony." *Id.* (citations, quotation marks and brackets omitted); *see also State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46 (1995) ("A criminal defendant is required to interpose at least a general objection to the evidence at the time it is offered." (citation omitted)). Here, Defendant did not object to the admission of the evidence regarding either the 3 July 2019 breaking and entering or the 7 July 2019 driving with an expired license. As a result, Defendant is limited to plain error review. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

Defendant did not argue plain error in his principal brief; plain error was first asserted in Defendant's reply brief. "However, a reply brief is not an avenue to correct the deficiencies contained in the original brief." *State v. Dinan*, 233 N.C. App. 694, 698-99, 757 S.E.2d 481, 485 (2014) (holding the defendant lost his ability to assert plain error when it was only argued in the reply brief). As a result, because Defendant did not assert plain error in his principal brief, he has waived his plain error argument for appellate review. *See id.*

We conclude that Defendant failed to preserve his objection to the admissibility of the evidence at trial and waived appellate review of his plain error argument. Defendant's argument is overruled.

### **III. Motion to Dismiss**

Defendant argues the trial court erred in denying his motion to dismiss because there was insufficient evidence: (1) that Defendant was the perpetrator of the crimes for which he was charged; and (2) of discharging a weapon into an occupied dwelling.

#### **A. Standard of Review**

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 original ellipses omitted).

## **B. Defendant as Perpetrator**

Defendant contends that the trial court erred in denying his motion to dismiss “because the State failed to submit substantial evidence identifying Defendant as the perpetrator of the crimes for which he was charged.” We disagree.

The State’s evidence regarding Defendant’s identity as a perpetrator of the shooting at Mr. Miles’s house on 8 July 2019 tends to show that Mr. Miles observed a “roughly” five foot seven inches “portly” and “stocky” man get into an “older model” gold Ford Explorer by climbing through the back seat. Footage from 8 July 2019 at 11:21 am from the Ring camera of Mr. Miles’s neighbor shows a gold Ford Explorer driven by a black male—wearing a red hat and white t-shirt—driving away from Mr. Miles’s house on Darbyshire Place; nineteen seconds later, the gold Ford Explorer drives back toward Mr. Miles’s house. Mr. Pringle testified that after hearing gun shots, he looked out the window and saw a man who was a “little heavyset” running from Mr. Miles’s house wearing a red hat and white t-shirt; according to Mr. Pringle, “I do remember one hundred percent literally seeing the red hat and white T-shirt.” Officer Dashti testified that when he pulled over the 2001 gold Explorer on 7 July 2019 for driving with expired tags, the driver—who Officer Dashti identified as Defendant—explained that the front doors were inoperable, so he had to enter the



car through the back seats. A screenshot from Officer Dashti's body camera, which was entered into evidence, shows Defendant wearing a white t-shirt, black pants, and a red baseball hat. Finally, when Defendant was arrested, he had the keys to the gold Explorer on his person and the arresting officer testified that the vehicle's front doors did not open.

Considering all this evidence in the light most favorable to the State, "giving the State the benefit of every reasonable inference and resolving any contradictions in its favor," *id.*, we conclude that the State presented substantial evidence that Defendant was the perpetrator of the offense charged. The Ring footage placing the gold Explorer, driven by a man matching Defendant's appearance, on Darbyshire Place at 11:21 am on 8 July; testimony that Defendant was the driver of the Explorer on 7 July and had the keys on his person when he was arrested on 10 July; and testimony that the Explorer's front doors were inoperable on 7 July, 8 July, and 10 July is sufficient evidence of Defendant being the perpetrator of the crime charged to take the matter to jury. A juror could reasonably infer that the black male wearing a white t-shirt and red hat and driving a gold Ford Explorer with inoperable front doors on 7 July 2019 was the same male wearing a white t-shirt and red hat and driving a gold Ford Explorer with inoperable doors on 8 July 2019. As a result, we conclude the trial court did not err in denying Defendant's motion to dismiss as to Defendant being the perpetrator.

Defendant also argues that the evidence admitted under North Carolina Rule

of Evidence 404(b) is not substantive evidence and, as such, “none of this evidence should have been considered by the trial court in determining whether the State had presented substantial evidence of the essential elements of each offense, as well as [Defendant’s] identity as the perpetrator of said offenses, sufficient for the charges to go to the jury.” As support for this contention, Defendant cites *State v. Ingram*, 270 N.C. App. 82, 839 S.E.2d 865 (2020), a case where this Court held that the trial court erred in denying the defendant’s motion to dismiss because the *only* evidence presented to support an element of the crime was an officer’s testimony, which was admitted *solely* for the purpose of impeaching a witness. *Id.* at 87-88, 839 S.E.2d at 868-69. However, *Ingram* is inapposite to this case, as it addressed the limited purpose of impeachment evidence, not, as we have here, evidence admitted pursuant to Rule 404(b). *See id.* It is well established that “prior inconsistent statements are admissible for impeachment purposes, they are not admissible as substantive evidence.” *State v. Batchelor*, 190 N.C. App. 369, 373, 660 S.E.2d 158, 161 (2008) (citation omitted); *see State v. Mack*, 282 N.C. 334, 339, 193 S.E.2d 71, 75 (1972) (noting that “[p]rior statements of a witness which are inconsistent with his present testimony are not admissible as substantive evidence because of their hearsay nature” (citations omitted)). Thus, we reject Defendant’s reliance on *Ingram* as support for his bare assertion that the trial court errs when it considers evidence admitted under Rule 404(b) in determining whether the State presented substantial evidence to take a case to the jury.

Moreover, Defendant's argument regarding the trial court's consideration of evidence when ruling on a motion to dismiss is contrary to the law:

For purposes of examining the sufficiency of the evidence to support a criminal conviction, *it simply does not matter whether some or all of the evidence contained in the record should not have been admitted; instead, when evaluating the sufficiency of the evidence, all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question.* *State v. Vestal*, 278 N.C. at 567, 180 S.E.2d at 760 (stating that, "in determining such motion, incompetent evidence which has been admitted must be considered as if it were competent" (first citing *State v. Cutler*, 271 N.C. 379, 382-83, 156 S.E.2d 679, 681 (1967) (stating that "all of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion for nonsuit in a criminal action"); and then citing *State v. Virgil*, 263 N.C. 73, 75, 138 S.E.2d 777, 778 (1964) (same)). For that reason, a reviewing court errs to the extent that it determines whether the evidence suffices to support a defendant's criminal conviction by ascertaining whether the evidence relevant to the issue of the defendant's guilt should or should not have been admitted and then evaluating whether the admissible evidence, examined without reference to the allegedly inadmissible evidence that the trial court allowed the jury to hear, sufficed to support the defendant's conviction.

*State v. Osborne*, 372 N.C. 619, 630, 831 S.E.2d 328, 335-36 (2019) (emphasis added) (original brackets omitted). Thus, in determining whether there was substantial evidence presented to survive a motion to dismiss for insufficiency of the evidence, the trial court considers "all of the evidence, regardless of its admissibility." *Id.* The trial court did not err in considering testimony admitted under Rule 404(b) in denying

Defendant's motion to dismiss.

### **C. Discharging a Weapon**

Defendant also argues that the “State failed to submit substantial evidence supporting four counts of Discharging a Weapon into an Occupied Dwelling” because “there was not substantial evidence presented that the four shots were each separate distinct criminal acts.” We disagree.

Defendant was charged with discharging a firearm into an occupied dwelling pursuant to North Carolina General Statute Section 14-34.1(b). *See* N.C. Gen. Stat. § 14-34.1 (2023). “The elements of the offense prohibited by G.S. § 14-34.1 are (1) the willful or wanton discharging (2) of a firearm (3) into any building (4) while it is occupied.” *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991). For a defendant to be convicted of multiple counts of discharging a firearm, the evidence must show that the defendant “employ[ed] his thought processes each time he fired the weapon.” *State v. Rambert*, 341 N.C. 173, 177, 459 S.E.2d 510, 513 (1995). In *State v. Kirkwood*, this Court reviewed the applicable case law:

In *Rambert*, [our Supreme] Court rejected the defendant's argument that his conviction and sentencing on three counts of discharging a firearm into occupied property violated double jeopardy principles. *Id.* at 177, 459 S.E.2d at 513. There, the State's evidence tended to show that the victim was sitting in a parked car in a parking lot when the defendant, riding in a car, pulled alongside the victim's car. *Id.* at 176, 459 S.E.2d at 512. The defendant produced a gun, the victim ducked, and the defendant fired a shot into the front windshield of the victim's car. *Id.* The victim drove forward and, when the

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cars were approximately 10 yards apart, the defendant fired a second shot that struck the passenger's side door of the victim's car. *Id.* The defendant then "pursued" the victim and fired a third shot, which lodged in the rear bumper of the victim's car. *Id.*, 459 S.E.2d at 512-13.

The Court in *Rambert* held that this evidence "clearly showed that defendant was not charged three times with the same offense for the same act but was charged for three separate and distinct acts." *Id.*, 459 S.E.2d at 512. The Court reasoned: "Each shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that defendant employ his thought processes each time he fired the weapon." *Id.* at 176-77, 459 S.E.2d at 513. Moreover, "each act was distinct in time, and each bullet hit the vehicle in a different place." *Id.* at 177, 459 S.E.2d at 513.

Similarly, in [*State v. Nobles*, 350 N.C. 483, 505, 515 S.E.2d 885, 899 (2019)], [our Supreme] Court relied upon *Rambert* to conclude that the trial court properly denied the defendant's motion to consolidate three of his seven charges of discharging a firearm into an occupied vehicle. The Court in *Nobles* relied upon evidence that tended to show the "defendant's actions were seven distinct and separate events," including evidence that prior to the time of the murder, the truck did not have any bullet holes or broken glass, but after the murder there were seven bullet holes in victim's truck: "there were two bullet holes in the windshield, one near the middle of the windshield and one near the edge of the windshield on the passenger's side; there was a bullet hole below the windshield on the driver's side and one near the headlight on the driver's side; there was a bullet hole on the top of the truck's bed on the driver's side and one in the bed of the truck; and the driver's side door window was burst, which, based on the evidence, was caused by the fatal gunshot to the victim." *Id.*, 515 S.E.2d at 898-99. The Court further relied on evidence that the defendant's gun had the capacity to hold nine bullets, it was empty at the murder scene, and the gun was not a machine gun or other automatic weapon. *Id.*, 515 S.E.2d at

899.

*State v. Kirkwood*, 229 N.C. App. 656, 666-67, 747 S.E.2d 730, 737-38 (2013) (brackets omitted).

Here, the State's evidence tended to show the presence of four distinct bullet holes on the exterior right side of Mr. Miles's house, which corresponded to four holes in Mr. Miles's dining room; Mr. Miles testified that before 8 July 2019, he "didn't have holes in [his] house." Investigators collected three projectiles inside Mr. Miles's house: one was discovered on the floor in the front foyer; a second was located in front of the rear door; and the third projectile was located in the dishwasher. Mr. Miles's neighbor testified that he saw two men running and "shooting at the house" with handguns. An officer who arrived at the scene after the shooting testified that the officers "were unable to locate any bullet shell casings" around the outside of Mr. Miles's house. The officer provided the following explanation regarding the absence of shell casings:

Depending on the style of gun, if it's a revolver the shell casing actually stays inside the revolver, so it does not eject. Like with our firearms they are semi-automatic, so when we fire a bullet, the shell casing actually ejects out of it. And when we were looking back in that back area of the house, we were unable to find any shell casings that would have been ejected from the suspects' firearm.

Thus, it would be reasonable for a juror to infer that the absence of shell casings outside of Mr. Miles's house could mean that Defendant was not using a machine gun or other automatic weapon. *See Rambert*, 341 N.C. at 176-77, 459 S.E.2d at 513

(“Each shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that defendant employ his thought processes each time he fired the weapon.”). The inference that Defendant was not using an automatic or semiautomatic weapon is bolstered by Mr. Pringle’s testimony that he observed two men running and shooting back at Mr. Miles’s house, indicating that the men were not gathering the empty shell casings as they were ejected. Thus, “in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor,” *English*, 241 N.C. App. at 104, 772 S.E.2d at 745, there was substantial evidence from which a reasonable juror could conclude that each shot fired into Mr. Miles’s house was done willfully or wantonly, as the State presented substantial evidence that each of the four shots was a separate and distinct act. Therefore, “[t]he trial court did not err in denying Defendant’s motion to dismiss, and correctly left it to the jury to determine whether the evidence proved beyond a reasonable doubt Defendant committed [four] ‘separate acts’ supporting [four] convictions for [discharging a weapon into an occupied dwelling].” *State v. Morrison*, 272 N.C. App. 656, 670-71, 847 S.E.2d 238, 248 (2020).

#### **IV. Jury Instructions**

Finally, Defendant argues the trial court erred by instructing the jury on the acting in concert theory because “this instruction was not supported by substantial evidence.” Specifically, Defendant argues that the State did not present “substantial evidence” of either his presence at the scene of the crime or the existence of an

agreement between himself and another person to discharge a weapon into Mr. Miles's house. Defendant further argues that even assuming *arguendo* that the State did provide evidence that Defendant was at the scene, "there was no evidence of [Defendant's] presence during the kicking or shooting, i.e. the criminal acts, which is required for an acting in concert instruction." We disagree.

At the charge conference, the State proposed instructing the jury on acting in concert and offered modifications to the pattern jury instruction. Defendant objected; the trial court overruled the objection. As a result, we review the jury instructions *de novo*. See *State v. King*, 227 N.C. App. 390, 396, 742 S.E.2d 315, 319 (2013) ("Properly preserved challenges to the trial court's decisions regarding jury instructions are reviewed *de novo*, by this Court." (citation and quotation marks omitted)).

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citation omitted). When reviewing jury instructions, "this Court considers the jury charge contextually, in its entirety, and the party asserting the error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction." *D & B Marine, LLC v. AIG Prop. Cas. Co.*, 288 N.C. App. 106, 118, 885 S.E.2d 842, 851 (2023) (citation omitted). The appealing party has the burden of demonstrating "that such error was likely, in light of the entire charge, to



mislead the jury.” *Robinson v. Seaboard Sys. R.R.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917 (1987) (citation omitted).

Under an acting in concert theory, “two or more persons, who joined together in a purpose to commit a crime, are responsible for the unlawful acts committed by the other person, so long as those acts are committed in furtherance of the crime’s common purpose.” *State v. Baldwin*, 276 N.C. App. 368, 373, 856 S.E.2d 897, 902 (2021) (citation omitted). This Court has explained:

A jury instruction on the theory of acting in concert is proper when the State presents evidence tending to show the defendant was present at the scene of the crime and acted together with another who completed acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. Furthermore, when the State presents such evidence, the judge *must* explain and apply the law of acting in concert.

*State v. Glidewell*, 255 N.C. App. 110, 117, 804 S.E.2d 228, 234 (2017) (emphasis in original) (citation, quotation marks, and brackets omitted). In the present case, the trial court instructed the jury on acting in concert as follows:

For the defendant to be guilty of a crime, it is not necessary that the defendant do any particular act constituting at least part of a crime in order to be convicted of that crime under acting in concert. If two or more persons join in a common purpose to commit breaking into a building, each of them, if actually or constructively present, is guilty of the crime. A defendant is not guilty of a crime merely because the defendant is present at the scene even though the defendant may silently approve of the crime or secretly intend to assist in its commission. To be guilty, the defendant must aid or actively encourage the person committing the crime, or in some way communicate

to another person the defendant's intention to assist in its commission.

Furthermore, the theory of acting in concert does not require an express agreement between the parties. All that is necessary is an implied mutual understanding or agreement to do the crimes. If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or acting together with other persons, broke into a building without the consent of the owner, intending at that time to commit larceny, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Here, the State's evidence tended to show that at the time Mr. Miles looked out his window in response to hearing the knocks, he saw a man, matching Defendant's description and wearing a white shirt and red hat, get into a gold Explorer and drive away. At that time, Mr. Miles testified that there was at least one person still at his door and the knocking escalated to kicking before ultimately turning to shooting. Upon hearing gun shots, Mr. Miles's neighbor observed two men running away with guns and shooting back at Mr. Miles's house; one of the men was wearing a white shirt and red hat. Despite Defendant's contention, the State *did* present evidence from which a jury could infer that Defendant and another person were at Mr. Miles's house on the morning of 8 July and that Defendant was present during the "kicking or shooting, i.e. the criminal acts." Indeed, as discussed above in the section about Defendant's motion to dismiss, the State's evidence tended to show that Defendant could have driven away, turned around, and returned to Mr. Miles's house to join the

other person approximately a minute later. Thus, the evidence allowed the jury to form a reasonable inference that Defendant was at the scene with another person and that Defendant worked with the other person “pursuant to a common plan or purpose to commit the crime.” *Baldwin*, 276 N.C. App. at 373, 856 S.E.2d at 902.

Additionally, we note that although Defendant has the burden of demonstrating that “the jury was misled or that the verdict was affected by an omitted instruction,” *D & B Marine*, 288 N.C. App. at 118, 885 S.E.2d at 851, Defendant did not argue in his brief that he was prejudiced by the instruction. We therefore conclude that the evidence sufficiently supports a conclusion that Defendant acted in concert with at least one individual committing the charged offense. As a result, the trial court did not err in instructing the jury on the acting in concert theory.

## **V. Conclusion**

We conclude that Defendant did not preserve his argument regarding the admissibility of evidence pursuant to Rule 404(b) and the trial court did not err in denying Defendant’s motion to dismiss and instructing the jury on the acting in concert theory.

NO ERROR.

Chief Judge DILLON and Judge ZACHARY concur.

Report per Rule 30(e).