NO. COA01-1133

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Halifax County
No. 98CRS003157

CHRISTOPHER ALVIN JOHNSON

Appeal by defendant from judgment entered 9 May 2001 by Judge J. Richard Parker in Halifax County Superior Court. Heard in the Court of Appeals 11 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General Diane A. Reeves, for the State.

The Smallwood Law Firm, by Tonza D. Ruffin, for defendant appellant.

TIMMONS-GOODSON, Judge.

On 9 May 2001, a jury found Christopher Alvin Johnson ("defendant") guilty of first-degree murder. At trial, the State presented evidence that tended to show the following: On the morning of 28 March 1998, the body of Alvin "Slick" Garner ("Garner") was discovered in a field adjacent to Ray Smith Road in Halifax County, North Carolina. A lime-green Kawasaki ZX9 Ninja motorcycle, riddled with bullet holes, lay nearby. Law enforcement officers subsequently arrested defendant, who admitted his involvement in Garner's death and gave a statement explaining the events leading up to the shooting. Defendant stated that earlier

that evening he visited the Fireside night club ("the Fireside") with two friends, Tone and Ron G. While defendant stood in the parking lot of the Fireside, Lamont Pitchford and passengers in his automobile threatened defendant and shot at him. Defendant and his companion, Tone, returned fire. Defendant believed that one of the passengers in the vehicle was an individual known as "Moon," with whom defendant had previous altercations. As defendant averred, "A guy by the name of Moon has been taking crack shots at me and my friends. He tried to murder my brother."

Concerning the events of the evening, defendant went on to state, in pertinent part, that:

> I went to Littleton to see a girl but she wasn't there. . . . I came back through on that road that Slick [Garner] was killed on. We pulled over because one of my boys had to use the bathroom, . . .
>
> All of a sudden we notice a motorcycle come through and someone said that looks like Moon's bike. Then a motorcycle came back through again and was slowing down. . . . The motorcycle was coming closer and it looked like his hand was raised but we couldn't really tell because the light was kind of blinding us.
>
> As it got closer we noticed it was Moon's bike. We started firing because we thought it was going to do a drive-by shooting on us. We started shooting so wildly that the windows got shot out. The bike slid and fell. He jumped up and ran across the field and fell. I say damn I think we shot hem. [sic] We jumped in the car and left.

Defendant explained that he knew it was Moon's motorcycle because he had seen him riding it earlier, and wondered "why he would be

out there that time of the morning riding a bike when we saw him earlier with Lamont."

The State presented further testimony by Tarvis "Moon" Price ("Moon"). At trial, Moon testified that he and defendant did not like each other; in fact, Moon had a history of "problems" with defendant and his family. Moon explained that on 27 March 1998, he, Garner, and Garner's cousins, Terrel, and Calvin Garner, did not go to the Fireside, because they heard there was a shooting. They then went to a restaurant where they decided to ride motorcycles. Having only three helmets for the four of them, Garner left on Moon's motorcycle to retrieve an extra helmet. When Garner did not return, Moon, Terrel and Calvin began searching for him and discovered the motorcycle riddled with bullet holes and Garner's body in a field adjacent to Ray Smith Road.

As Dr. Robert E. Ziph, regional forensic pathologist for the North Carolina Medical Examiner's office, testified, an autopsy performed at Nash General Hospital on 28 March 1998, confirmed that Garner was killed by a bullet that perforated his heart. Forensic tests of bullets found at both Ray Smith Road and the Fireside showed that the same firearms were used at both locations.

Following the jury verdict, the trial court sentenced defendant to life in prison without parole. Defendant now appeals.

Although the record sets forth six assignments of error, defendant has only briefed two errors on appeal: whether the trial court erred in denying defendant's motion to dismiss and whether

the trial court committed plain error in failing to instruct the jury on the theory of self-defense. Arguments that are not briefed are considered abandoned. See N.C.R. App. P. 28(a) (2002). For the reasons set forth herein, we find no error by the trial court.

When considering a defendant's motion to dismiss, the trial court must consider the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). A motion to dismiss is proper when the State fails to present substantial evidence of each element of the crime charged. *See State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). Evidence is considered substantial when a jury "could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). Substantial evidence can be either direct or circumstantial, as long as it "support[s] a finding that the offense charged has been committed and that the defendant committed it, . . ." *Locklear*, 322 N.C. at 358, 368 S.E.2d at 383.

Unlawfully killing a human being with malice and with premeditation and deliberation constitutes first-degree murder. *See* N.C. Gen. Stat. § 14-17 (2001); *State v. Judge*, 308 N.C. 658, 661, 303 S.E.2d 817, 820 (1983). Premeditation may be established by proving that the killing was thought out "beforehand for some length of time, however short." *State v. Stone*, 323 N.C. 447, 451, 373 S.E.2d 430, 433 (1988).

Defendant argues that the evidence lacked the essential element

of premeditation. Defendant notes that he did not fire any shots because his gun jammed. Moreover, defendant asserts that according to his statement, Ron G. and Tone fired in self-defense "because we thought [the motorcyclist] was going to do a drive-by on us." Because they acted quickly in self-defense, defendant claims he could not possibly have acted with premeditation and deliberation. This argument is without merit.

Defendant was convicted under the theory of acting in concert. Under this theory, the State is not required to show individual intent of the actors.

> [I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Westbrook, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *judgment vacated in part*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972); *see also State v. Evans*, 346 N.C. 221, 228, 485 S.E.2d 271, 275 (1997) (quoting *Westbrook*), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998). Concert theory is well established in North Carolina. *See State v. Barnes*, 345 N.C. 184, 230-31, 481 S.E.2d 44, 69-70 (1997), *certs. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). Actual participation is not required for conviction. "[O]ne may be found guilty of committing the crime if he is at the scene acting together with another . . . although the other person does all the acts necessary to effect the commission of the crime." *State v. Abraham*, 338 N.C.

315, 346, 451 S.E.2d 131, 147 (1994)(holding that, the jury could infer that defendants acted in concert although the fatal shots were not attributable to a particular co-defendant); *see also State v. Willis*, 332 N.C. 151, 177, 420 S.E.2d 158, 170 (1992) (holding that the defendant could be found guilty of first-degree murder because of her constructive presence when she was on her front porch, in sight of the killing, when it happened).

Defendant's statement indicates that he acted "in concert" with Tone and Ron G. to commit the murder. "We started shooting so wildly that the windows got shot out. . . . I say damn I think we shot hem [sic]." From his use of plural pronouns when describing the events leading up to the shooting, a jury could infer that defendant participated with the "joint purpose" of shooting the victim. Furthermore, when asked whether he fired any shots at the motorcyclist, defendant responded, "[N]o, my gun jammed." Even if he did not fire the shots that wounded Garner, evidence submitted at trial, including defendant's own statement, shows his intent to act and his presence at the scene. We therefore overrule defendant's first assignment of error.

By his second assignment of error, defendant argues that the trial court's failure to instruct on self-defense was plain error. Although defendant did not request a jury instruction on self-defense at trial, he asserts that his statement raises an inference of self-defense. Thus, defendant argues that the trial court's failure to instruct on self-defense was plain error. We disagree.

Plain error is fundamental error that is basic and prejudicial,

affecting the fairness, integrity or public reputation of judicial proceedings so that justice cannot have been done and the error had a probable impact on the jury's verdict. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

In the instant case, the evidence does not show that defendant acted in self-defense. An instruction on self-defense is proper where there is evidence that:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981).

In the case at bar, defendant explained that "We started firing because we thought [the motorcyclist] was going to do a drive-by shooting on us." Defendant may have believed that the motorcyclist was going to shoot him. Defendant's belief, however, did not give him license to fire his weapon at the motorcyclist. Defendant's statement also illustrates that defendant was an initial aggressor. Moreover, the evidence fails to demonstrate that shooting Garner was defendant's only option to protect himself. We conclude that the

trial court did not err in failing to instruct the jury on the doctrine of self-defense, and we therefore overrule defendant's second assignment of error.

In conclusion, we hold that the trial court did not err in denying defendant's motion to dismiss and committed no plain error in its jury instructions.

No error.

Judges GREENE and HUNTER concur.

Report per Rule 30(e).