NO. COA01-1139

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Pitt County
No. 99 CRS 055307
99 CRS 055727

ANTHONY JEROME JACKSON,
Defendant-Appellant.

Appeal by defendant from judgments entered 2 March 2001 by Judge Dwight L. Cranford in Pitt County Superior Court. Heard in the Court of Appeals 5 June 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

W. Gregory Duke, for defendant-appellant.

BRYANT, Judge.

Defendant appeals from two convictions of assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tended to show the following. On the night of 9 January 1999, Darren Worsley was driving a car in which John Williams and William Butler were passengers. Worsley noticed a black Geo Tracker with no lights on in a parking lot down the street. The Tracker pulled out and drove toward Worsley's car. As the Tracker approached, the high beam lights came on and gunfire erupted from the passenger side of the Tracker. Defendant was in the passenger seat of the Tracker. Worsley was shot in the back

and paralyzed. Butler, who was in the back seat, was shot in the leg. Three months later, on 10 April 1999 local law enforcement officers were executing a search warrant near a nightclub when they heard shots fired from the vicinity of the nightclub. Upon arriving at the scene, Sergeant Harold Hines testified that he saw defendant exit the nightclub and place a handgun in the waistband of his pants. Hines placed defendant in handcuffs and removed a Baikal "Makarov" .380 Automatic Colt Pistol from defendant's waistband. Another officer retrieved a .45 Haskell semi-automatic pistol from the ground near the entrance to the nightclub. A .45 caliber Remington Rand pistol was also recovered from the crotch area of defendant's pants. A ballistics report conducted on the casings found at the scene of the January drive-by shooting and pistols found on or near defendant at the April nightclub shooting revealed that four of the casings were fired from the Haskell pistol. Five of the casings were fired from the Remington Rand pistol.

On 19 April 1999, defendant was indicted on two counts of assault with a deadly weapon with intent to kill inflicting serious injury. On 2 March 2001, the jury returned verdicts of guilty on both charges. Defendant appealed.

Defendant argues that the trial court erred in: 1) denying defendant's motion to exclude a ballistics report; 2) allowing into evidence a copy of the criminal judgment of possession of a firearm

by a felon; and 3) instructing the jury on the principle of acting in concert.

I.

Defendant first argues that the trial court erred in denying his motion to exclude a 18 November 1999 ballistics report that was not delivered to defendant until 11 October 2000. The Pitt County District Attorney's Office allegedly had this report since 7 December 1999. Defendant argues that the late disclosure of this report prejudiced him in that defendant pled guilty to possession of a firearm by a felon, and two of the weapons recovered at the nightclub shooting were used in the drive-by shooting on 9 January 1999. Defendant argues that had he been provided the ballistics report when requested, he would not have pled guilty on 19 April 2000 to possession of a firearm by a felon.

N.C.G.S. § 15A-903(e) provides that upon motion by the defendant, the court shall order the prosecutor to provide a copy of test results or reports possessed by the State that the prosecutor either knows about or may know about with the exercise of due diligence. N.C.G.S. § 15A-903(e) (2001). Additionally, upon motion by the defendant, the court must order the prosecutor to allow the defendant to inspect and test physical evidence if the State intends to offer the evidence or tests at trial. *Id.* If a party fails to comply with discovery requirements, the court may, among other things, order the non-complying party to permit discovery or inspection, preclude the admission of evidence or dismiss the charge. N.C.G.S. § 15A-910 (2001). The imposition of

sanctions for failure to comply with discovery requirements rests within the discretion of the trial court and will not be overturned on appeal absent abuse of discretion. *State v. Thomas*, 291 N.C. 687, 692, 231 S.E.2d 585, 588 (1977).

In this case, the State provided the ballistics report on 11 October 2000. The original trial date was set for 23 October 2000. On 17 October 2000, defendant requested an independent evaluation of the weapons by a private ballistics expert. On 25 October 2000, the trial court ordered the State to make the weapons available to defendant for independent evaluation. The trial was continued until 26 February 2001 to allow defendant's expert to examine the weapons. We find no abuse of discretion. Because of the State's failure to timely provide the ballistics report, the trial court granted a continuance to allow the defendant to secure an expert of his choosing. Because N.C.G.S. § 15A-910 is permissive and not mandatory, *State v. Dukes*, 305 N.C. 387, 289 S.E.2d 561 (1982), the trial court had within its discretion the power to order curative measures ranging from no action to dismissal of the charges. *See* N.C.G.S. § 15A-910. The trial court continued the trial to allow a defense expert to examine or test the weapons. Accordingly, this assignment of error is overruled.

II.

Defendant next argues that the trial court erred in allowing into evidence a copy of the criminal judgment of possession of a firearm by a felon. Aside from a general reference to Rule 609 of our Rules of Evidence, defendant cites to no authority in support

of this argument. Our Rules of Appellate Procedure mandate that "[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C. R. App. P. 28(b)(6). Accordingly, we decline to review this assignment of error.

III.

Finally, defendant argues that the trial court erred in instructing the jury on the principle of acting in concert because there was no evidence of another individual with defendant at the scene of the crime. We disagree. A defendant is guilty of an offense under the theory of acting in concert "if he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Evans*, 346 N.C. 221, 231, 485 S.E.2d 271, 276 (1997) (quoting *State v. Wilson*, 322 N.C. 117, 141, 367 S.E.2d 589, 603 (1988)), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998). Concerted action means "to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979).

Implicit in defendant's argument is that because neither victim conclusively saw anyone else in the car with defendant, who was sitting in the passenger seat, the car was operating by itself. "The trial court, not the appellate court, weighs the credibility of evidence. Therefore, '[w]here there is competent evidence in the record supporting the court's findings, we presume that the

court relied upon it and disregarded the incompetent evidence.'" *State v. Coronel*, 145 N.C. App. 237, 250, 550 S.E.2d 561, 570 (2001) (alteration in original) (citations omitted), *review denied*, 355 N.C. 217, 560 S.E.2d 144 (2002).

The State's evidence tended to show that on 9 January 1999, Worsley noticed a car with no lights on in a nearby parking lot. The car pulled into the street and drove toward the car occupied by Worsley, Williams and Butler. As it drew near, the high beam lights came on and shots were fired from the passenger side of the car. Defendant was in the passenger seat and there were two individuals in the car. This is sufficient evidence that there was someone in the car other than defendant, and that defendant acted with that person to commit the crime. Accordingly, this assignment of error is overruled.

Conclusion

Based on the foregoing, we hold that the trial court did not err in admitting the ballistics report and instructing the jury on acting in concert.

NO ERROR.

Judges WALKER and McCULLOUGH concur.

Report per Rule 30(e).