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NO. COA01-1153

NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2002

STATE OF NORTH CAROLINA

v.

KEVIN TYRONE ANDERSON

Defendant-appellant.

Forsyth County
Nos. 00 CRS 7474-76, 7483,
7558, 40231, 40233-34

STATE OF NORTH CAROLINA

v.

TERENCE DANELLE SMITH,

Defendant-appellant.

Forsyth County
Nos. 00 CRS 7477-78,
35153-55, 35157, 40235

Appeal by defendants from judgments entered 23 March 2001 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 15 May 2002.

Attorney General Roy Cooper, by Assistant Attorneys General Joan M. Cunningham and John G. Barnwell, for the State.

J. Clark Fischer, for defendant-appellant Kevin Tyrone Anderson.

Hough & Rabil, PA, S. Mark Rabil, for defendant-appellant Terence Danelle Smith.

BRYANT, Judge.

The State's evidence tended to show the following. Clarence Hart sold marijuana out of his home in Winston-Salem, North Carolina. Defendant Terence Smith was a regular customer. Hart

did not know defendant Kevin Anderson. On the night of 5 February 2000, Temaka McMoore, Joshua McCaskill, and Shineka Littlejohn were watching television and smoking marijuana in Hart's living room. At approximately 11:30 pm, defendants knocked on Hart's kitchen door and asked if he had any marijuana. At least one person saw Anderson and Smith as they approached Hart's residence. Anderson wanted to purchase a large quantity of "weed," but Hart had only a few ounces. Hart went to the living room to retrieve the marijuana. When he returned to the kitchen, Anderson pulled a gun and both defendants told Hart to empty his pockets. Hart did not want to turn over the \$2250 in his pockets, so he ran toward the living room. Anderson fired two shots, one striking Hart in the back and one grazing McMoore in the head.

Hart fell into the living room, paralyzed from the waist down by the bullet in his spine. McMoore fell to the floor and played dead. Littlejohn ran into a nearby bathroom. Anderson demanded that McCaskill empty his pockets and when McCaskill started to get up, Anderson shot him in the leg. Anderson then held the gun to McCaskill's head, went through McCaskill's pockets and hit him on the head with the gun. Anderson then approached Hart and pistol-whipped him in the head. As Hart tried to hide the money in his pockets, Smith took the \$2250. Defendants then fled.

Following the shooting, there was some confusion as to the name of the shooter. Hart and McMoore initially named Smith as the shooter but the person they both positively identified as the

shooter in photo lineups and at trial was Anderson. Smith was positively identified by both as the accomplice.

Defendants were indicted on one count each of robbery with a dangerous weapon, attempted armed robbery, first-degree burglary, attempted murder, and three counts each of assault with a deadly weapon with intent to kill inflicting serious injury. In addition, Anderson was indicted on one count of possession of a firearm by a convicted felon. Defendants were found guilty on all counts and appeal their convictions.

Defendant Anderson argues that the trial court erred in denying his motion to sever. Defendant Smith argues that the trial court erred in: 1) failing to instruct the jury that mere presence at the scene of a crime is insufficient to support a conviction; and 2) denying his motion for severance and overruling his objection to the State's motion for joinder. We disagree as to the arguments of each defendant and find no error.

I. Kevin Tyrone Anderson

Defendant Anderson's sole assignment of error is that the trial court erred in denying his motion to sever when the antagonistic nature of defendants' respective defenses resulted in a trial that was fundamentally unfair to Anderson.

Two or more offenses may be properly joined when "the offenses charged are 'part of the same act or transaction' or are 'so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the

others.'" *State v. Lundy*, 135 N.C. App. 13, 16, 519 S.E.2d 73, 77 (1999) (quoting *State v. Fink*, 92 N.C. App. 523, 527, 375 S.E.2d 303, 306 (1989)), review denied, 351 N.C. 365, 542 S.E.2d 651 (2000); see N.C.G.S. § 15A-926(a) (2001). Our Supreme Court discussed at length our laws regarding severance.

There is a strong policy in North Carolina favoring the consolidation of the cases of multiple defendants at trial when they may be held accountable for the same criminal conduct. Severance is not appropriate merely because the evidence against one codefendant differs from the evidence against another. The differences in evidence from one codefendant to another ordinarily must result in a conflict in the defendants' respective positions at trial of such a nature that, in viewing the totality of the evidence in the case, the defendants were denied a fair trial. However, substantial evidence of the defendants' guilt may override any harm resulting from the contradictory evidence offered by them individually.

State v. Barnes, 345 N.C. 184, 220, 481 S.E.2d 44, 63-64 (1997) (citations omitted), cert. denied, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998).

On appeal, this Court determines whether the trial court abused its discretion in denying defendant's motion for severance. *Id.* at 220, 481 S.E.2d at 63. To determine whether the trial court abused its discretion, this Court looks at "'whether the conflicts in the defendants' respective positions at trial [are] of such a nature that, considering all of the evidence in the case, defendant was denied a fair trial.'" *Lundy*, 135 N.C. App. at 16, 519 S.E.2d at 78 (alteration in original) (quoting *Fink*, 92 N.C. App. at 528, 375 S.E.2d at 306). Conflicting or antagonistic defenses standing

alone do not warrant severance. See *State v Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986).

Anderson relies on *State v. Pickens*, 335 N.C. 717, 440 S.E.2d 552 (1994), *appeal after new trial*, 346 N.C. 628, 488 S.E.2d 162 (1997),¹ in support of his argument that the cases should have been severed because of the antagonistic nature of defendants' defenses. In *Pickens*, defendants Pickens and Arrington were convicted of the first-degree murder of a nine-year-old girl and discharging a firearm into occupied property (an apartment). At trial, two witnesses testified that Arrington was outside the apartment window, two witnesses testified that Pickens was outside the window, one witness saw a third person in the area, and only one of these witness actually saw one or the other defendant fire into the apartment. *Id.* at 728, 440 S.E.2d at 558. Further, Pickens intended to testify after the State agreed not to cross-examine on his five prior convictions. Arrington, however, indicated that he would fully cross-examine Pickens on the prior convictions. Consequently, Pickens did not testify. The *Pickens* Court concluded that there was an "irreconcilable conflict between defendants' evidence, and their defenses were antagonistic." *Id.* at 728, 440 S.E.2d at 558-59.

The evidentiary conflict between the defendants in *Pickens* which resulted in the denial of a fair trial is not present here. In the instant case, Anderson presented an alibi defense, while

¹ On remand, defendant Pickens was tried separately and convicted of first-degree murder. Our Supreme Court found no error on appeal.

Smith argued that he was merely present during the commission of the offenses. In support of his argument that the trial court erred in denying his motion to sever, Anderson points to the conflicting evidence of the identity of the shooter. Although there was some initial confusion as to the *name* of the shooter, at trial, witnesses under oath positively identified Anderson as the shooter.

Detective C.W. Fine of the Winston-Salem Police Department testified that he spoke with Clarence Hart at the hospital a few days after the incident and Hart indicated that "Kevin" (Anderson) and an unknown black male entered the kitchen, and that the unknown male pointed the gun at Hart and told him to empty his pockets. When Detective Fine showed Hart the first of two photo line-ups, Hart pointed to Smith's photo and said, "This is my homeboy Kevin." Detective Fine told Hart that the person was actually Terence Smith. When Detective Fine showed Hart the second photo line-up, Hart became agitated and unequivocally identified Anderson as the shooter.

Officer Todd Hart testified that he interviewed McMoore at the scene and that she was hysterical. McMoore told him that "Terence" (Smith) shot McCaskill in the leg, then went through his pockets. At trial, however, McMoore made an in-court identification of Anderson as the shooter.

Unlike in *Pickens*, in the instant case, Hart, McMoore and McCaskill positively identified Anderson as the shooter at trial,

even though there was conflicting evidence as to the name of the shooter immediately following the incident.²

Moreover, evidence presented by Anderson in support of his alibi defense did not conflict with Smith's "mere presence" defense. Anderson presented evidence that he was at a party on the night of the incident; however, neither of his two alibi witnesses could account for Anderson's whereabouts the entire time. Further, Anderson's witnesses testified that they either did not know Smith or that he was not at the party. Therefore, even though there is contradictory evidence, substantial evidence of Anderson's guilt overrides any harm resulting from the contradictory evidence. Accordingly, this assignment of error is overruled.

II. Terence Danelle Smith

A. Jury Instruction

Smith argues that the trial court erred in failing to instruct the jury that mere presence at the scene of a crime is insufficient to support a conviction. We disagree.

At trial, the State proceeded on the theory that defendants acted in concert to commit the offenses. A defendant is guilty 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

² The fourth person present at the shooting, Shineka Littlejohn, did not testify as to the identity of the shooter.

(quoting *State v. Wilson*, 322 N.C. 117, 141, 367 S.E.2d 589, 603 (1988)), *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), and *cert. denied*, *Gillis v. North Carolina*, 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). Under this theory, a defendant 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. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (alteration in original) (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)).

If a party requests a jury instruction that is a correct statement of the law and is supported by the evidence, the trial court must give the instruction. *State v. Conner*, 345 N.C. 319, 480 S.E.2d 626, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997). A defendant appealing the trial court's failure to give a requested instruction "must show that substantial evidence supported the omitted instruction and that the [omitted] instruction was correct as a matter of law." *State v. Farmer*, 138 N.C. App. 127, 133, 530 S.E.2d 584, 588 (citing *State v. Thompson*, 118 N.C. App. 33, 454 S.E.2d 271 (1995)), *review denied*, 352 N.C. 358, 544 S.E.2d 550 (2000).

We first determine whether there is substantial evidence in support of the omitted instruction on mere presence. Smith

presented no direct evidence at trial, but attempted to establish mere presence through cross-examination of the State's witnesses. Through cross-examination of Hart, Smith established that after defendants entered the kitchen, Smith first stood by himself, and later told Hart to empty his pockets. McMoore was asked on cross-examination if she identified Smith in a photographic lineup "as someone who was there that night but not the shooter." McMoore responded that she identified Smith as an "[a]ccessory to the [] shooting." McCaskill was asked if he saw Smith on the night of the shooting and replied that he never saw Smith enter the house. Finally, on cross-examination Detective Fine testified that Hart stated an unknown suspect told Hart to empty his pockets and never referred to Terence Smith, and that Hart never told Detective Fine that Smith took the \$2250.

On the other hand, the State's evidence tended to show the following. Jerrell Roberts knew Terence Smith. At trial, Roberts testified that on the night of 5 February 2000 he saw Anderson and Smith going into Hart's house as he was leaving. Anderson and Smith arrived at Hart's house between 11:30 pm and 12:30 am. When in the kitchen, Smith asked Hart if he had any "weed." Anderson wanted to purchase between one-quarter to one-half pound. Hart retrieved two ounces from the living room. When Hart returned, Anderson pulled a gun and told Hart to empty his pockets. Smith also told Hart to empty his pockets. When Hart tried to flee through the living room, Anderson shot him in the back. Smith took

\$2250 out of Hart's hand while Anderson pistol-whipped Hart in the head.

Based on the above, we find that Smith failed to present substantial evidence in support of his request for a "mere presence" jury instruction. Accordingly, this assignment of error is overruled.

B. Motion for Severance

Smith next argues that the trial court erred in denying his motion for severance and overruling his objection to the State's motion for joinder. We disagree.

Smith argues that Anderson's attorney was a "surrogate prosecutor" for the State, emphasizing statements made by witnesses when they transposed defendants' names. For example, during cross-examination of McMoore, Anderson's attorney repeatedly asked McMoore about her statement to an investigating officer concerning Smith's involvement. McMoore was asked by Anderson's attorney if she said that Smith told McCaskill to "give me all your money" before he shot McCaskill. In attempting to impeach McMoore's in-court identification of Anderson as the shooter, Anderson's attorney also asked McMoore if she said that "Terence then went through all of Mr. McCaskill's pockets but could not find anything." The three victim witnesses positively identified Smith as an accomplice acting in concert with Anderson.

Smith has shown no abuse of discretion by the trial court in denying severance. As stated earlier, this Court looks at "'whether the conflicts in the defendants' respective positions at

trial [are] of such a nature that, considering all of the evidence in the case, defendant was denied a fair trial.'" *Lundy*, 135 N.C. at 16, 519 S.E.2d at 78 (alteration in original) (quoting *Fink*, 92 N.C. App. at 528, 375 S.E.2d at 306). Accordingly, this assignment of error is overruled.

Conclusion

Based on the foregoing, we hold that defendants Anderson and Smith received a trial free of error.

NO ERROR.

Judges WALKER and McCULLOUGH concur.

Report per Rule 30(e).