NO. COA01-863

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

STATE OF NORTH CAROLINA

v. Rockingham County
No. 00 CRS 2233
ALLIE FRANKLIN THOMAS, JR. 00 CRS 3891

Appeal by defendant from judgments entered 7 December 2000 by Judge Peter M. McHugh in Superior Court, Rockingham County. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

Margaret Creasy Ciardella for defendant-appellant.

McGEE, Judge.

Allie Franklin Thomas, Jr. (defendant) was indicted on 3 April 2000 on two counts of solicitation to commit first degree murder of his former wife, Alice Thomas (now Decker), in violation of N.C. Gen. Stat. § 14-2.6.

Evidence for the State at trial tended to show that defendant was upset when he learned in January 2000 that his former wife was to be remarried. William Thompson (Thompson), a friend of defendant, testified that defendant repeatedly told him that he wanted to have his former wife murdered. Defendant suggested to Thompson that Thompson call in a favor from acquaintances in

Florida "for the purpose of asking one of them to kill [defendant's former wife]." Defendant provided Thompson with pictures of his former wife and her fiancé, their addresses, a description of and directions to her residence, and three hundred dollars in cash. Defendant gave Thompson a list of dates when defendant did not want his former wife killed because he would not have an alibi on those dates. Thompson testified that defendant gave him a picture of a woman who resembled defendant's former wife and who had a similar name to ensure this other woman was "not targeted by a hit man." Defendant gave Thompson a description of his former wife's car and the car's license tag number. Thompson testified that he never suggested to defendant the idea that defendant's former wife be murdered.

Tom Saunders (Saunders), a detective with the Reidsville Police Department, testified that he had known Thompson since the 1980's. Thompson called Saunders at his office in February 2000 and said he wanted to talk to Saunders regarding someone who had approached him about trying to find a hired killer to have a former wife killed. Saunders met with Thompson on 19 February 2000 and they talked about Thompson's desire to get defendant some help since defendant was suicidal and taking medication for depression. Thompson told Saunders that he had lived in an upstairs apartment above defendant's residence for about six months. Saunders testified Thompson told him that defendant had asked Thompson several times if Thompson could find someone to kill defendant's former wife, who was going to be remarried on 18 March 2000.

Saunders testified Thompson wore a body wire several times for meetings with defendant. Saunders said Thompson turned over to him a packet of information that had been given to him by defendant on 24 February 2000. Included in the packet was a newspaper clipping of an advertisement for a realty company with a picture of a woman named Alene Thomas, who worked for the realty company. The newspaper clipping was marked "no" with a handwritten notation in red ink. Also in the packet was a list of dates from 26 February to 18 March with the name of Alice R. Thomas and her address on the reverse side, along with vehicle descriptions and tag numbers of defendant's former wife's car and her fiancé's car. Defendant also gave Thompson a photograph of his former wife, which Thompson gave to Saunders. Thompson told Saunders that defendant wanted Thompson to take the information packet and forward it to a hired hit man if Thompson could locate one.

Saunders testified he assisted in the arrest of defendant on 2 March 2000, and that he, along with SBI agent Christopher Battista (Battista), interviewed defendant at the Reidsville Police Department. When Battista left the interview room, defendant told Saunders that, "I did things like I just wanted to get caught." When Battista returned, defendant said he had "just volunteered a statement to [Saunders]. I'm caught. I'm glad it's over. I owe you that much. When I was leaving today, I thought about going back to that room and calling things off but I didn't."

SBI agents Michael Wilson (Wilson) and Battista testified that Wilson posed as a member of a crime family from Florida who

was to be a hit man to murder defendant's former wife. Wilson agreed to meet with defendant at a Ramada Inn in Reidsville on 2 March 2000. Thompson entered the room first and told Wilson that defendant was nervous and wanted him to check out what was happening before defendant entered. Thompson told Wilson that defendant had given him two hundred dollars for Wilson's expenses and Wilson told Thompson to put the money on a table in plain view. When defendant came into the room, Wilson asked Thompson to leave.

Wilson testified he took a photograph of defendant's former wife from an envelope and asked defendant, "Is this what you want done?" and defendant said, "Yes." Wilson testified that he asked defendant if defendant wanted him "'to do,' meaning 'kill,'" the boyfriend of his former wife. Defendant told Wilson, "Only if you have to." Wilson asked defendant if he wanted anything special done to his former wife or if defendant wanted Wilson to bring him anything back and defendant answered "no." Defendant said he could not get a current photograph of his former wife but he had a picture of another woman with a similar name and similar appearance to his former wife who worked at the same location as defendant's former wife. Wilson told defendant that he had already received a picture of the other woman. Wilson testified he asked defendant if defendant wanted his former wife to disappear and defendant said, "That would be fine."

Wilson testified that the meeting between him and defendant was videotaped by a hidden camera and microphone placed in the motel room. The videotape and a transcript of the videotaped

discussion between Wilson and defendant were admitted into evidence and shown to the jury.

Defendant moved to dismiss the charges against him at the close of the State's evidence. The trial court reserved ruling on defendant's motion.

Defendant presented the testimony of four witnesses who each testified they had known Thompson for several years and that in their opinion Thompson was not truthful. Defendant's family members and friends testified that defendant had had mental health problems for twenty years and that they were surprised that defendant had been charged with solicitation to murder his former wife.

At the close of all the evidence defendant again moved to dismiss the charges against him, which the trial court denied. The jury found defendant guilty of soliciting Wilson to commit murder and guilty of soliciting Thompson to commit murder. On 7 December 2000, the trial court sentenced defendant to 84-110 months in prison for each count with the sentences to run concurrently. Defendant appeals.

In the record on appeal, defendant raises ten assignments of error; however, in his brief to our Court, he argues only three assignments of error. The assignments of error not argued in defendant's brief are deemed abandoned. N.C.R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.").

I.

Defendant first argues the trial court erred in its instructions to the jury on entrapment because the instructions lessened the State's burden of proof.

We first note that defendant did not object to the jury instructions at trial. We must review defendant's argument on this issue for plain error. N.C.R. App. P. 10(c)(4) ("In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error."). Plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). Issues not properly preserved for appeal may be reviewed on appeal for plain error "when . . . the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997) (citations omitted), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

A defendant has the burden of proving the affirmative defense of entrapment. *State v. Braun*, 31 N.C. App. 101, 103, 228 S.E.2d 466, 467, *appeal dismissed and disc. review denied*, 291 N.C. 449,

230 S.E.2d 766 (1976). Whether to submit the defense of entrapment to the jury is to be determined based upon the facts and circumstances of each case. *State v. Walker*, 295 N.C. 510, 513, 246 S.E.2d 748, 749 (1978). However, "'[b]efore a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law.'" *Id.* (quoting *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d 191, 197 (1955)).

> The defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

Id. at 513, 246 S.E.2d at 749-50 (citing *Sherman v. United States*, 356 U.S. 369, 2 L. Ed. 2d 848 (1958); *State v. Stanley*, 288 N.C. 19, 215 S.E.2d 589 (1975); *State v. Burnette*, 242 N.C. 164, 87 S.E.2d 191 (1955)).

North Carolina follows the majority rule of entrapment "which precludes the assertion of the defense of entrapment when the defendant denies one of the essential elements of the offense charged." *State v. Neville*, 302 N.C. 623, 625, 276 S.E.2d 373, 374 (1981). However, "[a] defendant can deny intent and still claim entrapment because 'the defense of entrapment itself is an assertion that it was the will of the government, and not of the defendant, which spawned the commission of the offense.'" *State v.*

Sanders, 95 N.C. App. 56, 61, 381 S.E.2d 827, 830 (1989) (quoting *Neville*, 302 N.C. at 626, 276 S.E.2d at 375). Therefore, "a defendant who denies an essential element which deals with intent but who admits committing the acts underlying the offense with which he is charged may employ an entrapment defense." *Id.*

In the case before us, defense counsel requested a jury instruction on entrapment during the charge conference, which the trial court allowed. The trial court noted that, although defendant did not introduce evidence of entrapment at trial, the trial court would allow an instruction on entrapment because defense counsel had referred to the defense of entrapment during opening statements and cross-examination of witnesses. The trial court added that it would give "additional instructions in the context of instructing the jury on what is and what is not entrapment." Defendant did not object, nor did he object when the trial court instructed the jury. The trial court instructed the jury in part as follows:

> Under our system of justice, when a person who has been accused of a crime pleads "not guilty," that person is not required to prove that he is innocent. The accused is presumed to be innocent. The State must prove to you that the defendant is guilty. The State must prove to you that the defendant is guilty beyond a reasonable doubt.
>
> . . .
>
> In this case the defendant . . . contends the defense of entrapment. . . . Entrapment under our law is a complete defense to the crime charged. . . .
>
> For you to find that the defendant was entrapped in these cases, you must be

satisfied of the following three things:

First, you must be satisfied that the criminal intent to solicit the murder of [defendant's former wife] did not originate in the mind of the defendant.

Second, the defendant must prove to you that he was induced to commit the act of solicitation to murder by another person.

Now, the law recognizes, . . . that merely providing an opportunity to commit a crime by a person would not be sufficient inducement to constitute entrapment. In order for there to be entrapment in any criminal case it must appear that the person used persuasion or trickery to cause the defendant to commit this crime which he was not otherwise willing to commit.

The third thing which the defendant must prove to you to your satisfaction in order to be entitled to the defense of entrapment is that the other person acted on behalf of a governmental agency.

. . .

Furthermore, North Carolina has set up as the following rules with regard to the issue of entrapment. The North Carolina Supreme Court has stated that North Carolina follows the majority rule which precludes the assertion of the defense of entrapment when the defendant denies one of the essential elements of the offense charged.

The law in North Carolina further recognizes that the rational[e] of this rule is that the law will not constitute as a claim that the defendant did not commit the offense and a claim that he was entrapped into the commission of the very offense which he denies committing.

The law recognizes in North Carolina that it is inconsistent for the defendant to assert on the one hand that he did not do certain acts and then to insist that the government induced him to do the very acts which he disavows doing.

Defendant argues that the jury instructions lessened the State's burden of proof because the instructions "negated defendant's pleas of not guilty and violate[d] [his] constitutional right to the presumption of innocence." Defendant further argues that the trial court's error was prejudicial because "for the jury to even consider the entrapment defense as instructed . . . the jury must believe defendant admitted the charges of solicitation to commit murder." According to defendant, because the jury instruction lessened the State's burden of proving defendant solicited Wilson, "it is reasonable to believe that the erroneous instructions caused the jury to also believe that defendant admitted the charge of soliciting . . . Thompson to commit murder."

We disagree. In this case, defendant presented virtually no evidence of entrapment. The only persuasion, trickery or fraud defendant has shown is that Wilson was in fact not a drug dealer from Florida who was going to act as defendant's hit man. Additionally, the evidence introduced at trial consistently indicates that the idea to murder defendant's former wife originated with defendant and it was defendant who came up with the idea of using Thompson's acquaintance from Florida as the hit man. To the extent that the jury instructions on entrapment were required at all, the trial court properly summarized the law of entrapment in North Carolina. Defendant has failed to show the trial court erred in its instructions. Defendant's eighth assignment of error is overruled.

II.

Defendant next contends the trial court erred in its instructions to the jury as to whether defendant solicited Thompson to commit murder because the jury instructions lessened the State's burden of proving the offense beyond a reasonable doubt. Defendant did not object to the trial court's instructions to the jury on this issue; therefore, we review defendant's arguments for plain error.

Solicitation of another to commit a felony is a crime in North Carolina "even though the solicitation is of no effect and the crime solicited is never committed." *State v. Furr*, 292 N.C. 711, 720, 235 S.E.2d 193, 199, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977). Solicitation is a specific intent crime and to prove a defendant guilty of solicitation to commit murder, the State must prove beyond a reasonable doubt (1) that the defendant "counsel[ed], entic[ed], or induc[ed]" another person to murder the victim and (2) that the defendant intended that the person he solicited murder the victim. *State v. Davis*, 110 N.C. App. 272, 275, 429 S.E.2d 403, 404-05, *disc. review denied*, 334 N.C. 436, 433 S.E.2d 180 (1993). *See also Furr*, 292 N.C. at 720, 235 S.E.2d at 199.

The trial court instructed the jury that defendant was accused of soliciting Thompson for the murder of defendant's former wife and in order to prove the offense,

> the State must prove two things . . . beyond a reasonable doubt:
>
> The law recognizes in North Carolina that it is inconsistent for the defendant to assert on the one hand that he did not do certain

> acts and then to insist that the government induced him to do the very acts which he disavows doing.
>
> The second thing which the State must prove to you beyond a reasonable doubt before you can find the defendant guilty in this case is that the defendant intended that the person he solicited murdered the victim or that the defendant intended that the person solicited arranged with another for the murder of the victim.
>
> Under the law of North Carolina, . . . a request by a defendant to one person whom I'll refer to as person (A), that (A) find the second person (B), to act as the so-called "hit man" to murder a victim constitutes the crime of solicitation to commit murder with regard to person (A).
>
> . . .
>
> [I]n that action if you do find from the evidence beyond a reasonable doubt that one or about the dates alleged, . . . the defendant solicited [] Thompson to murder [defendant's former wife], or that the defendant solicited [] Thompson to arrange the murder of the victim by another, the defendant intending that the murder be committed, then it would be your duty to return a verdict of guilty as charged of solicitation to commit murder [in this action].

Defendant first argues the trial court's instructions to the jury did not correspond with the evidence at trial because the evidence shows that "at no time did defendant want [] Thompson to kill" defendant's former wife. Our Supreme Court rejected this argument in *State v. Furr* where the defendant argued on appeal that the trial court failed to prove solicitation because the evidence showed only that the defendant had requested that a man named Huneycutt find someone to murder the intended victims, not that defendant requested that Huneycutt himself commit the crime. *Furr*,

292 N.C. at 720-21, 235 S.E.2d at 199. The Court found this to be a distinction without a difference stating that "[w]hether defendant solicited Huneycutt to commit the murder himself or to find another to perpetrate the crime is thus of no consequence; either act is a crime in this state." *Id.* at 721, 235 S.E.2d at 199. The *Furr* court explained that

> "'[i]n the usual solicitation case, it is the solicitor's intention that the criminal result be directly brought about by the person he has solicited; that is, it is his intention that the crime be committed and that the other commit it as a principal in the first degree, as where A asks B to kill C. However, it would seem sufficient that A requested B to get involved in the scheme to kill C in any way which would establish B's complicity in the killing of C were that to occur. Thus it would be criminal for one person to solicit another to in turn solicit a third party, to solicit another to join a conspiracy, or to solicit another to aid and abet the commission of a crime.'"

Id. at 720-21, 235 S.E.2d at 199 (quoting W. LaFave and A. Scott, Criminal Law, § 58 at 419 (1972)). In this case, the crime of solicitation to commit murder occurred whether defendant solicited Thompson to commit murder, or whether defendant solicited Thompson to find another person to perpetrate the murder. The trial court properly instructed the jury on this issue.

Defendant also argues that the trial court's instructions to the jury were erroneous because they vary from the indictment which stated that defendant "unlawfully, willfully and feloniously did SOLICIT [] THOMPSON TO COMMIT THE FELONY OF FIRST DEGREE MURDER . . . AGAINST ALICE THOMAS." However,

> [n]ot every variance between the indictment

> and the proof is a material variance. The gist of this crime is the solicitation itself and not the nature of the crime solicited. . . . In this regard an indictment for soliciting to commit a felony is analogous to one for conspiracy, in which it is sufficient to allege generally the object of the conspiracy. Thus an indictment alleging defendant solicited another to murder is sufficient to take a case to the jury upon proof of solicitation to find someone else to commit murder, at least where there is nothing to indicate defendant insisted that someone other than the solicitee commit the substantive crime which is his object.

Id. at 721-22, 235 S.E.2d at 200 (internal citations omitted).

The evidence at trial showed that the object of the crime in this case was the murder of defendant's former wife. The indictment alleging that defendant solicited Thompson to murder defendant's former wife was sufficient to take the case to the jury because although the evidence at trial showed that defendant solicited Thompson to hire a hit man to murder his former wife, the indictment properly alleged the murder of defendant's former wife as the object of the crime. The trial court did not err in its instructions to the jury on this issue. Defendant's ninth assignment of error is overruled.

III.

By his final argument, defendant contends the trial court erred in denying his motion to dismiss the charges against him. In ruling on a motion to dismiss for insufficiency of the evidence, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v.*

Crawford, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Substantial evidence is evidence "which a reasonable juror would consider sufficient to support the conclusion that each essential element of the crime exists." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). The evidence is to be viewed in the light most favorable to the State, and the State is entitled to all reasonable inferences to be drawn therefrom. *State v. Duncan*, 75 N.C. App. 38, 47, 330 S.E.2d 481, 488, *disc. review denied*, 314 N.C. 544, 335 S.E.2d 317 (1985).

Defendant argues the evidence presented at trial was insufficient to convict defendant on the charge that he solicited Thompson to murder defendant's former wife because no evidence was presented at trial that defendant wanted Thompson himself to commit the murder. As noted above, whether defendant solicited Thompson to commit the murder himself or to find another person to perpetrate the crime is of no consequence; either act constitutes the crime of solicitation. *See Furr*, 292 N.C. at 721, 235 S.E.2d at 199 (1977).

Substantial evidence was admitted at trial to support a conclusion that defendant committed the crime of solicitation as to Thompson. Thompson testified that defendant repeatedly told him that defendant wanted to have his former wife murdered. All the evidence shows that defendant himself formed the intent to have his former wife murdered. Defendant suggested to Thompson that Thompson call in a favor from acquaintances in Florida "for the purpose of asking one of them to kill" defendant's former wife.

The evidence also shows that defendant provided Thompson with pictures of his former wife and her fiancé, their addresses, a description of and directions to her residence, as well as three hundred dollars in cash. Defendant gave Thompson a list of dates when defendant did not want his former wife killed because defendant would not have an alibi on those dates. The evidence further shows that defendant gave Thompson a picture of a woman who resembled his former wife and who had a similar name to ensure this other woman was "not targeted by a hit man." Additionally, defendant gave Thompson a description of his former wife's car and the car's license tag number. Thompson testified that he never suggested to defendant the idea that defendant's former wife be murdered. From this evidence, a reasonable juror could determine that the essential elements of solicitation exist. The trial court did not err in denying defendant's motion to dismiss on this issue.

Defendant also argues the evidence was insufficient to show defendant willfully solicited Wilson to murder defendant's former wife. Defendant contends that he "was entrapped to solicit [] Wilson to commit first-degree murder in that defendant did not possess the requisite intent." We disagree. There was sufficient evidence introduced at trial to show that defendant solicited Wilson. As stated in section I, the only evidence of persuasion, trickery or fraud carried out by law enforcement in this case was that of Wilson pretending to be a drug dealer from Florida who was going to act as a hit man. Further, as stated above, all the evidence shows that defendant himself formed the intent to have his

former wife murdered. There is no evidence that Wilson ever suggested to defendant that defendant should have his former wife murdered. Sufficient evidence was presented at trial from which a reasonable juror could find defendant solicited Wilson to commit murder and that defendant himself formed the intent that the crime be committed. The trial court did not err in denying defendant's motion to dismiss. Defendant's seventh assignment of error is overruled.

No error.

Chief Judge EAGLES and Judge TYSON concur.

Report per Rule 30(e).