NO. COA10-1244
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

STATE OF NORTH CAROLINA

v. Wake County
Nos. 08 CRS 77718-19,
08 CRS 79343
09 CRS 9469
08 CRS 77720-21
08 CRS 77724

DWANTE ANTWAN BARNES and
RONNIE LEON BROOKS, JR

Appeal by Defendants from judgments entered 14 January 2010 by Judge James E. Hardin, Jr., in Wake County Superior Court. Heard in the Court of Appeals 24 March 2011.

Roy Cooper, Attorney General, by Anne G. Kirby, Assistant Attorney General, and David W. Boone, Assistant Attorney General, for the State.

Duncan B. McCormick, for Defendant Barnes, and Haral E. Carlin, for Defendant Brooks.

THIGPEN, Judge.

The trials of Dwante Antwan Barnes ("Defendant Barnes") and Ronnie Leon Brooks ("Defendant Brooks") were joined, despite an objection to joinder and motion for severance. On appeal, both Defendants argue the trial court erred by joining their trials

and by finding aggravating factors at sentencing which were not found beyond a reasonable doubt by a jury or consented to by each Defendant. We find Defendants' arguments to be without merit.

The evidence of record tends to show that on the night of 6 June 2008, Ashley Wilson, Christy Small, Defendant Barnes, Defendant Brooks, and Bruce Gorham rode together in one vehicle to a house which Wilson said "had some drugs and some money in it" – the home of Ralph Wright, a drug dealer who owed Gorham $2,500. The four men loaded guns and planned how to take the drugs and money; Small was told to knock on the front door and say she "had car trouble" or needed "to use the phone[.]"

Lalarnie Lee and her daughter were at Wright's home on the night of 6 June 2008, but Wright was gone. Lee saw Small approach and knock on the front door, but Lee did not unlock the door for Small to enter. Small said she needed help with her car and asked to come inside to use the phone, to which Lee responded that she did not have a phone and could not help Small.

Lee then heard a "kick to the backdoor," after which two men came into the house. Lee later identified the men as Ashley Wilson and Defendant Brooks. Lee immediately tried to run out

the front door, but one man shot Lee in the stomach. The man then pointed the gun at Lee's head and asked, "Where's the [expletive deleted] money?" Lee responded that she did not know. The men took Lee's pocketbook, containing $120, and a briefcase containing heroin.

At trial, Christy Small and Ashley Wilson testified on behalf of the State against Defendants Barnes and Brooks.

After a jury trial, both Defendants were convicted of first degree burglary, conspiracy to commit robbery with a dangerous weapon, and robbery with a dangerous weapon. The jury found both Defendants not guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant Barnes was also convicted of having attained the status of an habitual felon and was sentenced to two consecutive terms of 107 to 138 months incarceration. Defendant Brooks was sentenced to two consecutive terms of 77 to 102 months incarceration. Both Defendants were sentenced in the presumptive range. From these judgments, Defendants appeal.

A: Appeal of Dwante Antwan Barnes

i: Motion to Sever

In Defendant Barnes' first argument on appeal, he contends the trial court erred by denying his motion to sever and allowing the State's motion for joinder. We disagree.

> 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 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. Cagle, 346 N.C. 497, 516-17, 488 S.E.2d 535, 548, *cert. denied*, 522 U.S. 1032, 118 S. Ct. 635, 139 L. Ed. 2d 614, (1997) (quotation omitted).

Objections to joinder and severance in criminal cases are governed by N.C. Gen. Stat. § 15A-927(c). N.C. Gen. Stat. § 15A-927(c)(2)(a) provides, "[t]he court . . . must deny a joinder for trial or grant a severance of defendants whenever . . . it is found necessary to . . . promote a fair determination of the guilt or innocence of one or more defendants[.]"

"A trial court's ruling on such questions of joinder or severance, however, is discretionary and will not be disturbed absent a showing of abuse of discretion." *State v. Escoto*, 162 N.C. App. 419, 424, 590 S.E.2d 898, 903, *disc. review denied*, 358 N.C. 378, 598 S.E.2d 138-39 (2004) (quotation omitted). "The trial court 'may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* (quotation omitted). "The defendant seeking to overturn the discretionary ruling must show that the joinder has deprived him of a fair trial." *State v. Porter*, 303 N.C. 680, 688, 281 S.E.2d 377, 383 (1981).

Both Defendants Barnes and Brooks were charged with the offenses of first degree burglary, conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury.

In the present case, Defendant Barnes argues on appeal that "[Defendant] Barnes did not allegedly enter the home"; "[n]o one identified [Defendant] Barnes as the shooter"; and Defendant Brooks, Defendant Barnes' co-defendant, "entered the home" and shot Lee. The foregoing, Defendant Barnes contends, "created

great potential for confusion with respect to [Defendant] Barnes' alleged role in the crime."

First, at trial, Lee affirmatively testified she did not see Defendant Barnes in her house. Therefore, there should have been no confusion regarding his presence in the house. Second, the theory of the State's case was that both Defendants were acting in concert. Based on this theory, it would have been immaterial whether Defendant Barnes was in the house or outside the house at the time the crimes were committed. The only requirement would have been his constructive presence at the time the crimes were committed. In addressing the State's theory of acting in concert, the trial court gave the following instruction:

> I further instruct you that for a person to be guilty of a crime, it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit robbery with a dangerous weapon, each of them, if actually or constructively present is not only guilty of that crime, if the other person commits the crime . . . but also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a dangerous weapon or as . . . a natural or probable consequence thereof. . . . [A] person is constructively present when he is close enough to the scene to render assistance to the perpetrator or is standing by to help the perpetrator.

There was sufficient evidence at trial of Defendant Barnes' constructive presence at the scene. "[W]e often rely on the common sense of the jury, aided by appropriate instructions of the trial judge, not to convict one defendant on the basis of evidence which relates only to the other." *State v. Paige*, 316 N.C. 630, 643, 343 S.E.2d 848, 857 (1986); *see also State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986) ("Even though the defendants in a joint trial may offer antagonistic or conflicting defenses, that fact alone does not necessarily warrant severance"). Based on the foregoing, we do not believe any alleged confusion which may have arisen from factual differences between the Defendants' roles in the crimes rose to the level of denying Defendant Barnes a fair determination of his guilt or innocence. *Porter*, 303 N.C. at 688, 281 S.E.2d at 383. We conclude the trial court did not abuse its discretion.

ii: Aggravating Factor

Defendant Barnes next argues that, although Defendant Barnes was sentenced in the presumptive range, the trial court erred by finding an aggravating factor that had not been stipulated to by the defendant or found by the jury. We find this argument without merit. *See State v. Norris*, 360 N.C. 507, 517, 630 S.E.2d 915, 921 (2006) ("The trial court did not

violate defendant's Sixth Amendment right to jury trial when it found a statutory aggravating factor but sentenced defendant within the presumptive range").

B: Appeal of Ronnie Leon Brooks, Jr.

i: Motion to Sever

In Defendant Brooks' first argument on appeal, he contends the trial court erred by denying the motion to sever and allowing the State's motion for joinder because Defendant Barnes' out-of-court statement to Christy Small implicated Defendant Brooks. We disagree.

"[A]t a joint trial, admission of a statement by a nontestifying codefendant that incriminate[s] the other defendant violate[s] that defendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *State v. Tucker*, 331 N.C. 12, 23, 414 S.E.2d 548, 554 (1992) (citing *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). However, "[a] statement is inadmissible as to a codefendant only if it is made outside his presence and incriminates him." *Tucker*, 331 N.C. at 24, 414 S.E.2d at 554-55. "[T]he *sine qua non* for application of *Bruton* is that the party claiming incrimination without confrontation at least be incriminated." *State v. Jones*, 280 N.C. 322, 340,

185 S.E.2d 858, 869 (1972). The principles of *Bruton* are codified in N.C. Gen. Stat. § 15A-927(c).

"A trial court's ruling on such questions of joinder or severance, however, is discretionary and will not be disturbed absent a showing of abuse of discretion." *Escoto*, 162 N.C. App. at 424, 590 S.E.2d at 903. "The defendant seeking to overturn the discretionary ruling must show that the joinder has deprived him of a fair trial." *Porter*, 303 N.C. at 688, 281 S.E.2d at 383.

In the present case, Defendant Brooks specifically contends that "State's exhibit four, a letter written by [Defendant] Barnes to Small about Brooks' involvement in the conspiracy to commit robbery with a dangerous weapon violated his 6th Amendment right to confront the witnesses against him." Defendant Brooks cites *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and *State v. Tucker*, 331 N.C. 12, 414 S.E.2d 548 (1992), as authority.

As a witness for the State, Christy Small testified that after she was charged, she and Defendant Barnes, with whom she was in a relationship, had conversations through letters. State's exhibit number four, a letter from Defendant Barnes to Small, was introduced into evidence by the State. Defendant

Barnes objected to the introduction of the letter based on a lack of foundation. Defendant Brooks also objected to the introduction of the letter on the basis that the letter contained nicknames or "street names"; no real names were used in the letter. Counsel for Defendant Brooks argued that a "street name" has a "negative connotation[.]" In *voir dire*, the State agreed to proceed without referring to the names as "street names" but simply to ask Small whether she "[knew] them by other names." The court then asked Defendant Brooks whether he still had an objection to the testimony or the letter, and Defendant Brooks responded, "No[.]" Defendant Brooks withdrew his objection.

During *voir dire*, the court specifically asked Defendant Brooks whether he "contend[ed] that the letter contain[ed] statements that directly implicat[ed] [Defendant Brooks] in this activity." Counsel for Defendant Brooks responded, "I do not, and I don't think the State is contending that there is anything about my client in these letters." Counsel for Defendant Brooks elaborated, "[i]n these letters, it's my understanding from the State that they do not contain any information that is derogatory to Mr. Brooks' defense or any implication that he's involved in this whatsoever." The court asked the prosecutor

whether "the letter[] describe[s]" or whether Small would testify about "any activity of Mr. Brooks as described to her from Defendant Barnes." The State responded, "No, your Honor."

The State established a proper foundation for the introduction of the letter because Small recognized Defendant Barnes' handwriting, and apart from an objection on the basis of a lack of foundation and an objection to the term, "street name[,]" no other objection was made. Defendant Brooks did not object to the introduction of the letter on the basis that the letter incriminated him.

Because Defendant Brooks did not make a *Bruton* objection to the introduction of State's exhibit number four, we believe he has waived any *Bruton* argument. *See State v. Golphin*, 352 N.C. 364, 401-402, 533 S.E.2d 168, 196 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001) (holding that the defendant waived any *Bruton* objection, in part, because counsel for the defendant "stated in open court there was 'no objection to the introduction of the statement'") (citing *United States v. Flaherty*, 76 F.3d 967, 971 (8th Cir. 1996) (holding the defendant waived a *Bruton* challenge when he did not mention *Bruton* when the codefendant's statements were admitted and the trial court gave the cautionary instruction requested by

defendant); *State v. Hutchins*, 303 N.C. 321, 341-42, 279 S.E.2d 788, 801 (1981) (holding constitutional guarantees are not absolute as defendants "may waive the benefit of constitutional guarantees by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it").

Assuming *arguendo* the *Bruton* argument is properly preserved, we have reviewed State's exhibit number four, the letter written by Defendant Barnes to Small, and, contrary to Defendant Brooks' assertion, we conclude that this particular letter, State's exhibit four, does not make any reference to Defendant Brooks whatsoever. It logically follows that a letter which does not mention Defendant Brooks does not incriminate Defendant Brooks. *Tucker*, 331 N.C. at 24, 414 S.E.2d at 554-55 ("A statement is inadmissible as to a codefendant only if it is made outside his presence ***and incriminates him***") (Emphasis added); *see also State v. Brewington*, 352 N.C. 489, 509, 532 S.E.2d 496, 508 (2000), *cert. denied*, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001) (holding that "because [a co-defendant's] confession was fully redacted and did not incriminate defendant, its admission into evidence did not violate defendant's rights under the Confrontation Clause").

Based on the foregoing, we conclude the trial court did not abuse its discretion in denying the motion for severance and allowing the State's motion for joinder. Moreover, in light of the overwhelming evidence incriminating Defendant Brooks in this case, any error from the admission of the foregoing statements was harmless error. *See Brewington*, 352 N.C. at 513, 532 S.E.2d at 511 (holding the admission of incriminating statements of a co-defendant may be harmless error where there is other admissible or overwhelming evidence establishing the defendant's guilt).

ii: Statement of Witness Christy Small

In Defendant Brooks second argument, he contends the court erred by failing to instruct the jury *ex mero motu* at the time of the introduction of the evidence that the statements by Defendant Barnes to Christy Small could not be considered against Defendant Brooks. Specifically, Defendant Brooks contends that the letter, State's exhibit number four, was only admissible against Defendant Barnes, not Defendant Brooks, and the trial court erred by not so instructing the jury, *ex mero motu*. We find this argument without merit.

Primarily, we note that Defendant Brooks either did not object to these references at trial or did not move to strike

portions of testimony to which he did object. Moreover, on appeal, Defendant Brooks does not argue plain error. The foregoing constitutes waiver. *See State v. Barton*, 335 N.C. 696, 709, 441 S.E.2d 295, 302 (1994) (stating that "where the trial court sustains [the] defendant's objection, he has no grounds to except, [and] by failing to move to strike the objectionable testimony, the defendant waived his right to assert error on appeal"); *see also State v. Scott*, 343 N.C. 313, 332, 471 S.E.2d 605, 616-17 (1996) (The defendant waived appellate review after he failed to object to testimony at trial and fails to specifically allege plain error on appeal). For the foregoing reasons, we conclude Defendant Brooks has waived this argument.

However, assuming *arguendo* the argument is properly preserved, we reiterate that the letter, State's exhibit number four, does not make any reference to Defendant Brooks. During *voir dire*, counsel for Defendant Brooks stated, "[i]n these letters, it's my understanding from the State that they do not contain any information that is derogatory to Mr. Brooks' defense or any implication that he's involved in this whatsoever." As the letter in question did not incriminate Defendant Brooks, we conclude that the trial court did not abuse

its discretion in failing to intervene *ex mero motu* to instruct the jury that the letter could not be considered by the jury against Defendant Brooks.

Moreover, although the court did not intervene *ex mero motu* at the time of the admission of the letter, in its instructions to the jury, the trial court stated: "I would further instruct you . . . that as to each defendant, and the evidence presented against him, that this evidence shall be considered individually and separately from that of the other defendant in determining his guilt or innocence."

iii: Aggravating Factor

Defendant Brooks next argues that, although Defendant Brooks was sentenced in the presumptive range, the trial court erred by finding an aggravating factor that had not been stipulated to by the defendant or found by the jury. We find this argument without merit. *See Norris*, 360 N.C. at 517, 630 S.E.2d at 921 ("The trial court did not violate defendant's Sixth Amendment right to jury trial when it found a statutory aggravating factor but sentenced defendant within the presumptive range").

For the foregoing reasons, we conclude Defendants had a fair trial, free from error.

NO ERROR.

Judges STROUD and HUNTER, JR., concur.

Report per Rule 30(e).