NO. COA11-352
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 09 CRS 213379, 212480,
38732, 213352, 213364

AVERY FORNEY

Appeal by Defendant from judgments and orders entered 29 September 2010 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Durwin P. Jones, for the State.

Anne Bleyman for Defendant.

STEPHENS, Judge.

On 4 May 2009, Defendant Avery Forney ("Forney") was indicted on two counts of felonious larceny, four counts of misdemeanor larceny, and six counts of breaking and entering a motor vehicle. On 15 June 2009, Forney was indicted on one additional count of breaking and entering a motor vehicle. On 27 September 2010, the State dismissed two counts of breaking

and entering a motor vehicle and two counts of misdemeanor larceny. Forney pled not guilty to the remaining charges and was tried before a jury at the 27 September 2010 Criminal Session of Mecklenburg County Superior Court, the Honorable James W. Morgan presiding.

The evidence presented at trial tended to show the following: During the night of 13 February 2009, security guards at Club Onyx in Charlotte were patrolling the parking lot when they noticed the driver's door of a vehicle open and a man later identified as Tomontre McCray ("McCray") leaning in the door rummaging in the vehicle. One of the security guards also saw a man later identified as Forney in the front seat of a nearby vehicle with a firearm on his lap; the rear driver's side door of that vehicle was open and the vehicle's dome light was on. When security guards approached McCray and Forney, McCray ran toward Forney's vehicle and was hit by the vehicle as Forney sped toward the parking lot's exit. Forney was unable to exit the parking lot and ultimately ran his vehicle into an embankment in front of the club. It was later determined that the vehicle in which McCray was seen rummaging belonged to Giovanni Nunez-Acuna, a patron that night at Club Onyx. Forney

and McCray were detained by Club Onyx security guards until Charlotte-Mecklenburg police arrived.

Police officers searched Forney's vehicle and found the following items that were later identified as items stolen from other vehicles in the Charlotte area that same night: a backpack, a laptop computer, a mobile phone, an external hard drive, a canvas bag, a DVD player, several DVDs, a camera, a checkbook, an MP3 player, a diamond engagement ring, and Valentine's Day presents. These items were reported stolen by Murvi Dennis, whose vehicle was robbed outside of a club, Margaret Everette, whose vehicle was robbed outside of a Fairfield Inn, and by Billy Bradley and Ryan Johnson, whose vehicles were robbed outside of the Hyatt Place in Charlotte.

Following the presentation of evidence, the trial court instructed the jury on misdemeanor larceny, felonious larceny, and breaking and entering a motor vehicle. The jury returned verdicts finding Forney (1) guilty of breaking and entering Nunez-Acuna's vehicle, (2) guilty of felonious larceny from Murvi Dennis' and Billy Bradley's vehicles, (3) guilty of misdemeanor larceny from Ryan Johnson's and Margaret Everette's vehicle, and (4) not guilty of the remaining charges. Thereafter, the trial court ordered Forney to pay restitution

totaling $2,647 and sentenced Forney to six to eight months imprisonment for the felonious larceny from Billy Bradley's vehicle. The trial court consolidated the remaining charges, sentenced Forney to six to eight months imprisonment for the consolidated charges, suspended that sentence, and placed Forney on supervised probation for 36 months beginning at the end of his imprisonment. Forney gave notice of appeal in open court.

On appeal, Forney first argues that it was plain error for the trial court to instruct the jury on flight. Specifically, Forney contends that because he fled from Club Onyx security guards who, according to Forney, "do not possess a law enforcement officer's power to arrest," the instruction was erroneous. We are unpersuaded.

Forney presents no authority, and we are aware of none, to support the conclusion that a defendant's flight following the commission of a crime must be flight from direct pursuit of "sworn law enforcement officers with the power to make arrests." The relevant flight of a defendant is his flight *after the commission of the crime* and not simply *from immediate arrest*. *State v. Fisher*, 336 N.C. 684, 706, 445 S.E.2d 866, 878 (1994) (flight instruction justified where "evidence in the record reasonably support[s] the theory that the defendant fled *after*

the commission of the crime charged" (emphasis added)). Although the two could be the same, evidence of a defendant's flight after commission of a crime, but before authorities are aware of his commission of that crime, is admissible as evidence of the defendant's guilt or consciousness of guilt, regardless of whether the authorities are hot on his trail. *See, e.g.*, *State v. King*, 343 N.C. 29, 38-39, 468 S.E.2d 232, 238-39 (1996) (evidence that defendant left the state after committing murder justified flight instruction although there was no evidence defendant was under investigation prior to flight). Furthermore, this Court has previously defined flight as an act of fleeing to evade *prosecution* of a crime, not simply *capture* by an officer. *See State v. Roberts*, 142 N.C. App. 424, 429, n.1, 542 S.E.2d 703, 707, n.1 (2001) (defining flight as an act of fleeing to evade prosecution).

The evidence here tended to show that when Club Onyx security guards yelled to Forney and McCray, Forney attempted to flee the parking lot to avoid apprehension by the security guards, who could have held Forney until police arrived to arrest Forney for breaking and entering into Nunez-Acuna's vehicle. This evidence is sufficient to warrant an instruction

on flight, and we, therefore, conclude that the trial court's flight instruction was neither error nor plain error.

Forney next argues that the trial court committed plain error by submitting to the jury acting-in-concert instructions. The doctrine of acting in concert may be summarized as follows:

> If "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. Mann, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (2002) (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)) (ellipsis in original). On appeal, Forney contends that there was insufficient evidence of a "common plan or purpose to commit breaking and entering or larceny." We disagree.

The evidence tending to support the acting-in-concert instruction is as follows: aside from Nunez-Acuna's vehicle, four vehicles in the Charlotte area had been robbed on the night of 13 February 2009; items stolen from those vehicles were found in Forney's vehicle; while Forney was waiting in the Club Onyx parking lot with the rear driver's side door open and with a firearm on his lap, McCray was a few feet away rummaging through

Nunez-Acuna's vehicle; and when Forney attempted to flee the Club Onyx parking lot, McCray ran toward Forney's vehicle. This evidence, taken together and in the light most favorable to the State, *see Mann*, 355 N.C. at 307, 560 S.E.2d at 784 (reviewing propriety of acting-in-concert instruction and viewing evidence in light most favorable to State), shows that Forney and McCray had a shared plan or purpose to break into vehicles and steal contents of value such that the trial court did not commit plain error by instructing the jury on acting in concert. Forney's argument is overruled.

Forney next argues that the trial court committed plain error by failing to give the jury a "mere presence" instruction with regard to the alleged crimes committed in the Club Onyx parking lot. Assuming, without deciding, that failure to give the requested instruction was error, we cannot conclude that any such error amounted to plain error. The trial court's instructions to the jury made clear that in order to find Forney guilty of larceny or breaking and entering with respect to Nunez-Acuna's vehicle, the jury had to find that Forney joined together with McCray in a common purpose to commit those crimes. Because such instruction adequately conveyed the principle that Forney's presence, by itself, was insufficient to support a

conviction, we conclude that the failure to give the mere presence instruction was not plain error. *See State v. Lucas*, 353 N.C. 568, 592, 548 S.E.2d 712, 728 (2001) (finding no plain error where the trial court's instructions as a whole "adequately convey the principle that defendant's presence alone is not sufficient to support a conviction").[1]

Finally, Forney argues that the trial court erroneously ordered him to pay restitution because that order was not supported by the evidence. Although Forney neither objected to the State's requests for, nor the trial court's imposition of, restitution, he asserts that this argument is nevertheless preserved for review. We agree. *State v. Smith*, __ N.C. App. __, __, 707 S.E.2d 779, 781-82 (2011) (holding that "no objection is required to preserve for appellate review issues concerning the imposition of restitution"). However, we disagree with Forney's contention that the order was erroneous because it was not supported by competent evidence.

As previously held by this Court, evidence supporting a restitution order need not be presented where the defendant agrees with or stipulates to the restitution order. *State v.*

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[1]Although *Lucas* was overruled on other grounds by *State v. Allen*, 359 N.C. 425, 438, 615 S.E.2d 256, 265 (2005), the opinion from *Allen* was withdrawn by our Supreme Court on 17 August 2006. 360 N.C. 569, 635 S.E.2d 899 (2006).

Buchanan, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992) ("In the absence of an agreement or stipulation between defendant and the State, evidence must be presented in support of an award of restitution."). Such an agreement or stipulation must be definite and certain. *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) ("Issues at a sentencing hearing may be established by stipulation of counsel if that stipulation is definite and certain." (quoting *State v. Alexander*, 359 N.C. 824, 828, 616 S.E.2d 914, 917 (2005)) (internal quotation marks omitted)).

In this case, following the State's request for restitution, defense counsel stated as follows:

> Your Honor, with regard to restitution, I think it might be appropriate to have just a brief hearing on these because I'm not quite sure. There's so many different victims, and I know the State dismissed two of the [breaking and entering] motor vehicle and accompanying larceny charges. So we'd certainly ask that those not be included in the matters that the State has already dismissed.
>
> But if we could maybe briefly go over those. I don't think we have any objections to most of them at least, but it might be appropriate and go through those.

Thereafter, the State itemized its request for restitution, explaining which victim required what amount of restitution for what damage; to each explanation defense counsel responded with

"[d]on't wish to be heard on that matter" or something similar. At the end of the State's explanation, the following exchange took place:

> THE COURT: Okay. What do you have to say about that?
> [DEFENSE COUNSEL]: Don't wish to be heard on that, Your Honor.
> THE COURT: When you say you don't wish to be heard, do you mean you don't object to those figures?
> [DEFENSE COUNSEL]: That's correct, Your Honor.
> [THE STATE]: That's all the State is seeking.
> THE COURT: Does the defendant have any problem with that?
> [DEFENSE COUNSEL]: No, Your Honor.

As evidenced by the above colloquy, defense counsel agreed to all restitution amounts. By his own explanation, defense counsel requested the itemization of restitution solely to be sure nothing was included for charges the State had previously dismissed. While we recognize that defense counsel was not required to object to the restitution to preserve that issue for appeal, we note the vast difference between silence/lack of objection and an affirmative statement that defense counsel has no problem with the restitution request. Because defense counsel specifically and definitely agreed to the restitution requested by the State, we overrule Forney's argument that the order of restitution was erroneous.

We hold that the trial court did not err in entering the order for restitution and we further conclude that Forney received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR AT TRIAL, ORDER OF RESTITUTION AFFIRMED.

Judges ERVIN and BEASLEY concur.

Report per Rule 30(e).