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NO. COA01-1025

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v.

Durham County
No. 00 CRS 53060

RUEBEN A. MASON

Appeal by defendant from judgment dated 7 February 2001 by Judge Stafford G. Bullock in Durham County Superior Court. Heard in the Court of Appeals 26 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General E. Burke Haywood, for the State.

Miles and Montgomery, by Lisa Miles, for defendant-appellant.

GREENE, Judge.

Rueben A. Mason (Defendant) appeals a judgment dated 7 February 2001 entered consistent with a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury.

At trial, the State's evidence tended to show that on or about 4 March 2000, Defendant and two other men approached Norfolk Lee Mitchell (Mitchell) and attempted to rob Mitchell of his coat at gunpoint as he walked to his girlfriend's house. As the assailants were grabbing at his coat, Mitchell pushed them and walked away. Thereafter, Mitchell heard gun shots and subsequently collapsed but

was able to crawl to a nearby apartment for assistance. Mitchell was taken by ambulance to Duke University Medical Center, where it was determined he had been shot in the lower back. Because the bullet was lodged between two vertebrae and removal of the bullet posed a risk of paralysis, doctors left the bullet in Mitchell's back. Mitchell subsequently identified Defendant as one of the persons who attempted to rob him on 4 March 2000. In a statement made to law enforcement, Mitchell indicated Defendant was one of the assailants who brandished a gun and demanded his coat during the robbery attempt. During his testimony, Mitchell gave varying accounts of the degree to which he knew Defendant and of the number of shots fired. Mitchell was unable to state the time the shots were fired or how long after he had walked away from the three men the shots were fired.

On cross-examination, Mitchell testified the gun Defendant pointed at him was a silver handgun. Although Mitchell did not see the individual(s) who shot him, he testified there was no one, other than Defendant and the two men, in the parking lot after he walked away from Defendant.

Detective Craig Monroney (Detective Monroney) of the Durham Police Department testified that he spoke with Mitchell during his investigation of the 4 March 2000 shooting, at which time Mitchell gave him the name of a possible suspect. Detective Monroney then compiled a photographic lineup from which Mitchell identified Defendant as one of the men who approached him with a drawn gun on 4 March 2000. At that time, Detective Monroney also obtained a

statement from Mitchell in which he stated he was approached by three black males, "one being [Defendant]"; that Defendant "pull[ed] out a silver automatic handgun [and] said 'Give it up, your jacket, empty your pockets[]'"; that when he resisted, Defendant grabbed the jacket, but Mitchell pushed him and turned to walk away; Mitchell then heard five shots, at which time he collapsed but later crawled to a nearby apartment for help.

At the close of the State's evidence, Defendant moved to dismiss the charge against him. The trial court denied Defendant's motion. Defendant did not present any evidence. Over Defendant's objection, the trial court instructed the jury it could convict Defendant if he, either acting alone or with others, intentionally shot the victim with a handgun and intended to kill the victim and did seriously injure him. The jury subsequently found defendant guilty of assault with a deadly weapon inflicting serious injury.

The dispositive issue is whether the State presented substantial evidence Defendant, either acting alone or in concert with others, assaulted Mitchell with a deadly weapon inflicting serious injury.

Defendant argues the trial court erred in denying his motion to dismiss based upon the insufficiency of the evidence. We disagree.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that [the] defendant is the perpetrator of the

offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). When ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every favorable inference to be drawn therefrom. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct." *State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993) (citations omitted). "Contradictions and discrepancies [in the evidence] are for the jury to resolve and do not warrant [dismissal]." *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975).

In this case, Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury but was found guilty of the lesser-included offense of assault with a deadly weapon inflicting serious injury. To obtain a conviction for assault with a deadly weapon inflicting serious injury, the State must prove: (1) the defendant committed an assault on another, (2) with a deadly weapon, and (3) inflicted serious injury. N.C.G.S. § 14-32(b) (1999); *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997). This Court has held that where there is no evidence a defendant personally committed all the elements of a crime, he can be convicted of a crime "under the theory that he

acted in concert with another 'if [he] is present at the scene of the crime and . . . [he acts] 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. Ridgeway*, 137 N.C. App. 144, 149, 526 S.E.2d 682, 686 (2000) (quoting *State v. Hart*, 105 N.C. App. 542, 547, 414 S.E.2d 364, 367, *appeal dismissed and disc. review denied*, 332 N.C. 348, 421 S.E.2d 157 (1992)). All that is necessary is that the "two persons join in a purpose to commit a crime" and that each of them is either "actually or constructively present" when the crime is committed. *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972). If a defendant acts in concert with another, he is guilty of the planned crime and "also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof." *Id.*

In this case, viewing the evidence in the light most favorable to the State, Mitchell testified Defendant and two other men approached him and attempted to rob him, with at least two of the men brandishing firearms. After Mitchell walked away from Defendant and the two men, he heard the gun shots and later felt a wound to his lower back. Although the victim was unable to identify the shooter, there is no evidence that anyone other than Defendant and the two men were in the immediate vicinity at the time the shots were fired. This evidence is substantial evidence from which it can be inferred and a reasonable mind could conclude

Defendant, either acting alone or while "acting in concert" with others, fired the shots. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.¹

No error.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).

¹Defendant argues in his brief to this Court that Mitchell's testimony was equivocal in that he gave varying accounts of the degree to which he knew Defendant and of the number of shots fired. These contradictions and discrepancies in the evidence, however, "are for the jury to resolve and do not warrant [dismissal]." *McKinney*, 288 N.C. at 117, 215 S.E.2d at 581.