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NO. COA01-1119

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v.

Wake County  
Nos. 00 CRS 89454  
00 CRS 94488

CLYDE HUBERT PENNY, JR.

Appeal by defendant from judgment entered 21 March 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 13 May 2002.

*Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley, Jr., for the State.*

*Ligon and Hinton, by Lemuel W. Hinton, for defendant-appellant.*

TYSON, Judge.

Clyde Hubert Penny, Jr. ("defendant") appeals from the trial court's entry of judgment after a jury returned a verdict finding defendant guilty of aiding and abetting felony larceny. Defendant was sentenced as a habitual felon to a minimum term of 134 months and a maximum term of 170 months.

### I. Facts

The State's evidence tends to show that the Hudson Belk store at Crabtree Valley Mall in Raleigh, North Carolina employed off-duty Raleigh Police Department officers to stop "hit and run"

thefts. A "hit and run" occurs when a person walks into a store, grabs a pile of clothing or other merchandise near an exit door, and immediately exits the store. Sergeant Andrew Lull and Officer Paul Boyer maintained surveillance of the north exit door of the mall on 5 October 2000, where previous thefts had occurred. Both officers were seated in Sergeant Lull's personal vehicle. They observed a vehicle containing a driver and a single passenger stop on the driveway in front of the walkway located at the north side of the store. The passenger exited the vehicle and walked toward the north entrance door of the store. After observing that the vehicle did not move, Sergeant Lull walked toward the vehicle to intercept in the event the passenger returned carrying an armful of clothes. Within fifteen to thirty seconds, the passenger, later identified as Marzette Toomer, ran out of the store carrying a large pile of clothes. Sergeant Lull chased Toomer and yelled, "Stop. Police." Toomer dove through the open passenger window of the waiting vehicle. Toomer yelled at the driver, later identified as defendant, "Go, go, go, go, go, go." The vehicle lurched forward a short distance, but stopped abruptly when Officer Boyer stood in front of the vehicle, pointed his gun at defendant, and commanded defendant to stop the vehicle. Officer Boyer reached into the vehicle, placed the transmission lever into park, and turned off the ignition. The officers arrested defendant and Toomer. The pile of clothing contained thirty shirts, each shirt having a price of \$50.00.

## II. Motion to Dismiss

Defendant contends that the trial court erred by denying his motion to dismiss the charge for insufficient evidence. Upon a motion to dismiss, the court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) to identify the accused as a perpetrator. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). The court must examine the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that may be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The court must disregard contradictions and discrepancies in the evidence, leaving them for jury resolution. *Id.* The test is the same whether the evidence is direct, circumstantial or both. *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982). If the evidence supports a reasonable inference of guilt, then the court must deny the motion and allow the jurors to determine whether the evidence satisfies them beyond a reasonable doubt of the defendant's guilt. *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981).

Defendant argues the evidence is insufficient to show aiding and abetting. A person is guilty of a crime by aiding and abetting if (1) the crime was committed by another person; (2) the defendant knowingly advised, instigated, encouraged, procured or aided the other person; and (3) the defendant's actions or statements caused or contributed to the commission of the crime by the other person. *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997). The defendant

must aid or actively encourage the person committing the crime or communicate to the perpetrator his intent to assist. *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999). The defendant's intent to aid may be inferred from the defendant's actions and from his relation to the actual perpetrators. *Id.*

Defendant drove the vehicle to the north entrance/exit of the store and remained in the vehicle, with its motor running and passenger window down, while his passenger, Toomer, exited the vehicle and walked into the store. Within fifteen to thirty seconds, Toomer darted from the store carrying an armful of stolen shirts, jumped into defendant's vehicle through the open passenger window, and implored defendant to drive. Defendant drove forward until he was stopped by one of the officers pointing a gun at defendant.

The foregoing evidence is sufficient to permit a jury to find that defendant aided and abetted in the commission of the crime. We hold the court properly denied the motion to dismiss.

### III. Requested Instruction

Defendant also contends that the court erred by failing to submit a requested instruction that the mere presence of one at the scene of a crime is insufficient to make the person guilty as an aider and abettor. The trial court must give a requested instruction if it is a correct statement of the law and is supported by evidence. *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). The requested instruction need not be given in the exact language of the request as long as the gist of

the instruction is given in substance by the court. *State v. Townsend*, 99 N.C. App. 534, 538, 393 S.E.2d 551, 553 (1990).

Defendant requested the following instruction:

However, a person is not guilty of a crime merely because he is present at the scene, even though he may silently approve of the crime or secretly intend to assist in its commission. To be guilty he must aid or actively encourage the person committing the crime, or in some way communicate to this person his intention to assist in its commission.

The court instructed the jury that in order to find defendant guilty, it had to find defendant "knowingly committed acts that aided and assisted" Toomer in the commission of the crime or defendant's "actions caused or contributed to the commission of the crime" by Toomer.

The instructions given by the court adequately expressed defendant's requested instruction that the defendant must actually aid or actively encourage the perpetrator. See *State v. Hockett*, 69 N.C. App. 495, 500, 317 S.E.2d 416, 420 (1984). This assignment of error is overruled.

Defendant received a trial free from errors he assigned.

No error.

Judges GREENE and HUDSON concur.

Report per Rule 30(e).