NO. COA01-634

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

STATE OF NORTH CAROLINA

v. Orange County
Nos. 95CRS013980,
CHARLES WENDELL ALSTON 95CRS015816-17

Appeal by defendant from judgments entered 1 November 2000 by Judge Wade Barber in Orange County Superior Court. Heard in the Court of Appeals 13 February 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Osborn & Tyndall, P.L.L.C., by J. Kirk Osborn and Amos Granger Tyndall, for defendant-appellant.

HUNTER, Judge.

Charles Wendell Alston ("defendant") appeals convictions of two counts of robbery with a dangerous weapon and one count of assault with a deadly weapon with intent to kill inflicting serious injury. We conclude there was no error in the guilt-phase of defendant's trial, but we remand for resentencing.

Evidence presented at trial tended to establish that defendant met State's witness James Devone, Jr. in December 1995. Devone testified that around that time, defendant informed him and Paul Bullock (a co-defendant in this case) that he knew of a house in Chapel Hill where the residents kept drugs and money on the

premises. On 6 December 1995, Devone rented a car, and together with defendant and Bullock, drove to the residence which defendant had described. Defendant pointed out the exact residence to the other two men. Later that evening, the three men as well as two others, Jason Devone (James Devone's cousin) and Irwin Hargraves, drove to the house with the intention of robbing it. Defendant drove the rental car. When the men arrived at the house, defendant and Hargraves remained in the car while Devone, Bullock, and Jason Devone burst into the house wearing masks and carrying guns. The occupants of the house, Nathaniel Farrington, Jr. and his wife Jacqueline, were held at gunpoint during the robbery. Devone testified that as the three men were leaving, Mr. Farrington came towards him, at which point Devone shot him in the leg. Defendant drove the getaway car to Durham where the men then divided the stolen money.

A few days later, on 12 December 1995, defendant drove to the residence of James and Cecile Pettiford in a beige-colored truck. Ms. Pettiford testified that defendant came to the door, introduced himself, and stated he was interested in buying a hunting dog from her husband. Ms. Pettiford gave defendant directions to her daughter's house where Mr. Pettiford was working. She testified she noticed another man in the truck with defendant as he drove away. Within moments, defendant returned stating that he was unable to locate Mr. Pettiford. He requested the Pettiford's telephone number so that he could call when Mr. Pettiford returned home. Ms. Pettiford gave defendant their number.

Devone testified that on that afternoon, defendant drove him, Bullock, and Hargraves to the Pettiford residence in a dark-colored Ford Thunderbird that Devone had rented. Devone testified that defendant pointed out the Pettiford's house and stated that the residents had a lot of money. The men left and drove to Durham. Before leaving Durham to return to the Pettiford residence that evening, defendant called the Pettifords a few times in an effort to determine whether Mr. Pettiford was home. The men then drove to a store nearby the Pettiford residence where defendant made a final call to the Pettifords to determine if Mr. Pettiford was home. The men then proceeded to the Pettiford house. Defendant rode in a truck with another man. Devone drove the Ford Thunderbird with Bullock and Hargraves. As the men approached the house, Devone noticed defendant's truck lights flashing, and he pulled over. Defendant's truck pulled up, and defendant asked the men in the Thunderbird if they remembered which house it was. The three responded that they did, at which time defendant said "[g]o ahead." Devone testified that defendant stayed in the truck up the road. Devone, Bullock and Hargraves proceeded on to the house where Devone and Bullock robbed the Pettifords at gunpoint while Hargraves stayed in the car.

Defendant was indicted and tried on two counts of robbery with a dangerous weapon (a firearm), one for the Farrington robbery, and one for the Pettiford robbery, and one count of assault with a deadly weapon with intent to kill inflicting serious injury, based on the shooting of Mr. Farrington. On 15 October 1996, the jury

returned verdicts of guilty as to all charges. On 1 November 2000, the trial court sentenced defendant to 118 to 151 months for one count of robbery with a dangerous weapon, and 146 to 185 months for the consolidated charges of robbery with a dangerous weapon and assault with a deadly weapon.

In sentencing defendant, the trial court found the presence of three aggravating factors: (1) that defendant joined with more than one other person in committing the offense and was not charged with conspiracy; (2) that the offense involved the sale or delivery of a controlled substance to a minor; and (3) that defendant "absconded from this jurisdiction during jury deliberations and secreted himself for almost 4 years." Defendant appeals.

Defendant brings forth seven assignments of error in the following five arguments: (1) the trial court erred in denying his motion to dismiss the Pettiford robbery charge for insufficient evidence; (2) the trial court erred in joining his offenses; (3) the trial court erred in finding as an aggravating factor that the robberies involved the sale or delivery of a controlled substance to a minor; (4) the trial court erred in finding as an aggravating factor that defendant joined with more than one other person in committing the offenses, but was not charged with conspiracy; and (5) the trial court erred in failing to consider mitigating factors. We hold that defendant's trial was free of error; however, we hold the trial court erred in finding the aggravating factor that the offenses involved the sale or delivery of a controlled substance to a minor, and thus remand for resentencing.

I.

Defendant first argues the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon based upon the Pettiford robbery for lack of sufficient evidence. Specifically, defendant contends the evidence showed that although he assisted in the planning of the robbery, he withdrew from the plan prior to reaching the scene of the robbery. He argues there was no evidence to support a finding that he was either actually or constructively present at the scene of the Pettiford robbery. We disagree.

"Upon a defendant's motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom." *State v. Sams*, __ N.C. App. __, __, 557 S.E.2d 638, 640 (2001). The trial court must grant a motion to dismiss where the State fails to present substantial evidence of each element of the offense. *Id.* "'Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt.'" *Id.* (citation omitted).

In the present case, the State presented the theory that defendant was guilty of the Pettiford robbery because he acted in concert with Devone and the others to perpetrate the crime. "To act in concert means to act in conjunction with another according to a common plan or purpose." *Id.* at __, 557 S.E.2d at 641. Under this theory, the State need not show that defendant committed any particular act constituting at least part of a crime so long as

". . . 'he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.'" *Id.* (citation omitted).

Under the theory of acting in concert, a defendant's presence at the scene may be actual or constructive. *State v. Gaines*, 345 N.C. 647, 675, 483 S.E.2d 396, 413, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). Constructive presence does not require that a defendant be physically present at the scene of the crime. *State v. Barrett*, 343 N.C. 164, 175, 469 S.E.2d 888, 894, *cert. denied*, 519 U.S. 953, 136 L. Ed. 2d 259 (1996). Rather, the defendant may be constructively present during the commission of the crime "if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." *Gaines*, 345 N.C. at 676, 483 S.E.2d at 413.

In the present case, the evidence shows defendant organized a common plan with the others to rob the Pettiford residence. Defendant targeted the house, obtained the Pettiford's telephone number, drove the other perpetrators to the house to show them its location, and then made several calls to the Pettifords on the evening of the robbery, including from a nearby store moments before the crime, to determine whether Mr. Pettiford was home. Defendant then proceeded with the others down the road to the Pettiford's with the common plan to rob them. As the men approached the house, defendant confirmed with the others that they remembered which house it was, then told them to "[g]o ahead" with

the robbery. Devone testified that defendant stayed in his truck up the road.

Although the evidence does not establish that defendant was physically present at the actual scene, the evidence, taken in the light most favorable to the State, is sufficient to show defendant's constructive presence, in that he was nearby the scene and close enough to encourage the actual execution of the crime. *See State v. Ruffin*, 90 N.C. App. 712, 370 S.E.2d 279 (1988) (defendant waited down the street while other perpetrators forcibly entered victim's home); *State v. Hockett*, 69 N.C. App. 495, 317 S.E.2d 416 (1984) (defendant waited in car parked at apartment complex behind store which was robbed); *State v. Pryor*, 59 N.C. App. 1, 295 S.E.2d 610 (1982) (defendant dropped co-defendants near store to be robbed, drove some three miles away from the store, including to a car wash where he cleaned his car, then returned to pick them up).

Moreover, we reject defendant's contention that he withdrew from the common plan before reaching the scene. As our Supreme Court has noted:

> "Where the perpetration of a felony has been entered on, one who had aided or encouraged its commission cannot escape criminal responsibility by quietly withdrawing from the scene. The influence and effect of his aiding or encouraging continues until he renounces the common purpose and makes it plain to the others that he has done so and that he does not intend to participate further."

State v. Wilson, 354 N.C. 493, 507-08, 556 S.E.2d 272, 282 (2001) (citation omitted). There was no evidence that defendant informed

the other perpetrators that he was renouncing the common plan and did not intend to participate further. To the contrary, the evidence shows that as the men approached the Pettiford house, defendant confirmed that they remembered which house it was, and then told them to go ahead with the robbery. The trial court did not err in denying defendant's motion to dismiss this charge.

II.

By his second assignment of error, defendant argues the trial court erred in allowing the State's motion to join his offenses for trial. N.C. Gen. Stat. § 15A-926 (1999) permits the joinder of offenses within the discretion of the trial court where the offenses "are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a). A trial court's decision to join offenses under this statute "will only be disturbed on appeal where defendant demonstrates that joinder denied him a fair trial." *State v. Beckham*, 145 N.C. App. 119, 125, 550 S.E.2d 231, 236 (2001). In general, a defendant cannot be prejudiced by such joinder ". . . 'unless the charges are "so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant."'" *Id.* at 126, 550 S.E.2d at 237 (citations omitted).

Applying these principles here, we hold the trial court did not abuse its discretion in joining defendant's offenses based on the Farrington and Pettiford robberies, as the two incidents were neither so separate in time nor so distinct in circumstances as to

render consolidation prejudicial. Indeed, the robberies were strikingly similar in nature and occurred less than a week apart. In both cases, defendant singled out the homes to be robbed based upon his knowledge of whether the occupants had money or drugs in the house. Defendant then shared that information with the other men, who in both cases included Devone, Bullock, and Hargraves, and accompanied them to the target houses to point out their location. Defendant then accompanied the others to the homes during the actual robberies and waited in a vehicle during the robberies. In both cases, the robbers burst into the homes with guns and held the occupants at gunpoint while they rummaged around for drugs and money. Defendant has failed to establish an abuse of discretion in the trial court's consolidation of these offenses. *See, e.g.*, *State v. Evans*, 99 N.C. App. 88, 94, 392 S.E.2d 441, 445 (1990) (no error in joinder of robberies occurring approximately one week apart where circumstances of both crimes were sufficiently similar to establish a connection or that the crimes constituted parts of a single plan or scheme).

III.

Defendant next argues the trial court erred in finding the aggravating factor that the offenses involved the sale or delivery of a controlled substance to a minor. Defendant argues, and the State concedes, that there was no evidence to support this finding. Upon review of the record, we agree. We therefore reverse the trial court's finding of this aggravating factor and remand for resentencing.

IV.

Defendant next argues the trial court erred in finding the aggravating factor in N.C. Gen. Stat. § 15A-1340.16(d)(2) (1999), that "defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy." Defendant argues the trial court should not have been able to find this factor in aggravation where he was convicted under the theory of acting in concert. He contends the evidence that he acted with others was thus used both to convict him of the crime, and also to aggravate his sentence in violation of N.C. Gen. Stat. § 15A-1340.16(d), providing that evidence necessary to prove an element of an offense shall not be used to prove a factor in aggravation.

However, we do not agree with defendant that the State's use of the theory of acting in concert prohibits the trial court from finding that defendant acted with more than one person and was not charged with conspiracy for purposes of aggravation. As we have previously observed, our Supreme Court has indicated that many of the factors listed in N.C. Gen. Stat. § 15A-1340.16(d) contemplate a duplication in proof without violating the prohibition on using evidence necessary to prove a crime to then aggravate the sentence. *State v. Cinema Blue of Charlotte*, 98 N.C. App. 628, 634, 392 S.E.2d 136, 139-40 (citing *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983)) (fact that evidence essential to establish the giving of aid or advice for purposes of being an accessory to crime also tends to show aggravating factor that defendant persuaded the

principal to commit the offense does not prohibit court from using same evidence to find factor in aggravation), *appeal dismissed and disc. review denied*, 327 N.C. 142, 394 S.E.2d 181 (1990), *cert. denied*, 498 U.S. 1083, 112 L. Ed. 2d 1042 (1991); *see also State v. Bruton*, 344 N.C. 381, 393-94, 474 S.E.2d 336, 345 (1996) (fact that certain evidence tended to prove both theory of acting in concert and aggravating factor did not prohibit trial court from finding factor in aggravation). This assignment of error is overruled.

V.

In his final argument, defendant maintains the trial court erred in failing to find as a mitigating factor that defendant had a good reputation in his community since his 1996 trial. The record shows that during jury deliberations in his 1996 trial, defendant absconded from the courthouse, moved to a different location, changed his name, and for approximately four years lived a different life under a new identity. Defendant never turned himself in, but rather was apprehended as a result of a traffic violation. During sentencing, defendant submitted to the court various letters from people who had come to know him in his new identity in the four years that he was hiding from the law. Defendant concedes that the trial court considered the letters and found them to be mitigating, but argues the court erred in failing to find them as actual mitigating factors.

"Although the trial court must consider evidence of aggravating or mitigating factors, it is within the court's discretion whether to depart from the presumptive range." *State v.*

Brown, __ N.C. App. __, __, 553 S.E.2d 428, 430 (2001). The trial court need not make any findings with regard to mitigating factors unless, in its discretion, it departs from the presumptive sentencing range. *Id.* at __, 553 S.E.2d at 431.

The trial court clearly considered defendant's letters of good character as it was required to do. We discern no abuse of discretion in the court's failure to find defendant's good character to be an actual mitigating factor where during the time defendant asserts he was of good character he was hiding from the law under an assumed name, having absconded from his trial.

Defendant further argues the trial court erred in failing to consider that defendant played a minimal role in the offenses. However, the record shows that defendant never specifically requested that the trial court take this into consideration as a mitigating factor. Rather, when asked if he had anything to say, defendant stated that he was not guilty and had never hurt anyone. The trial court responded that it was bound by the jury's guilty verdict with regard to the strength of the evidence presented at trial as to defendant's guilt, and that the original trial judge was the appropriate judge to whom defendant should have expressed any concerns regarding the evidence of his guilt. The trial court appropriately considered the mitigating circumstances submitted by defendant for consideration. There was no abuse of discretion in its determination not to find any factors in mitigation.

Defendant has failed to establish the presence of prejudicial error in his trial. However, the trial court's finding in

aggravation that defendant's offenses involved the sale or delivery of a controlled substance to a minor was wholly unsupported by the evidence. Each case is remanded for resentencing.

No error; remanded for resentencing.

Judges WALKER and BRYANT concur.

Report per Rule 30(e).