NO. COA03-1289

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2004

STATE OF NORTH CAROLINA

v. Gaston County
No. 02-67461, 67462, 67467

MICHAEL KEITH SPENCER

Appeal by defendant from judgment entered 22 May 2003 by Judge J. Gentry Caudill in Gaston County Superior Court. Heard in the Court of Appeals 25 August 2004.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

Charlotte Gail Blake for defendant-appellant.

LEVINSON, Judge.

Defendant (Michael Spencer) appeals from convictions of first degree burglary, common law robbery, and impersonating a police officer. For the reasons that follow, we find no error.

Defendant was tried upon indictments charging first degree burglary, robbery with a dangerous weapon, two counts of common law robbery, first degree kidnapping, and impersonating a police officer. The evidence at trial tended to show, in pertinent part, the following: In the early morning hours of 22 October 2002 defendant was driving his pickup truck in Gastonia, North Carolina, when an acquaintance, Sidney Watson, asked him for help moving or

selling some furniture. Watson and the defendant loaded a couch and chair into the back of the truck, and continued driving around Gastonia. The charges against defendant arose from two incidents occurring shortly thereafter.

Ricardo Diaz testified through an interpreter that he was sitting in his car on a street in Gastonia, at around 5:45 a.m. on 22 October 2002, when a black male, later identified as Watson, got out of a pickup truck with furniture in the back and approached him. Watson pointed a gun at Diaz, stated he was with the FBI, and demanded money. After Diaz gave Watson his wallet, Watson got back in the truck and it drove away. During the encounter, Diaz did not see or hear the driver of the truck, and could not identify defendant at trial.

Jaime Ruiz testified through an interpreter that in October 2002 he and his wife, Crystal Willhide, lived on Ann Street, in Gastonia. Shortly before 6:00 a.m. on 22 October there was a knock at his door. He assumed that it was Serafine Guillen, a friend who gave him a ride to work every morning. However, when he opened the door, he saw two men he did not know, later identified as Watson and the defendant. Watson pushed him back inside the house, while defendant "just stayed in the doorway." Watson announced that he was with the police and had an order for his arrest. He placed a gun to Ruiz's head, pushed him down on the couch, and demanded money. Ruiz gave Watson his wallet, containing seventy or eighty dollars. Crystal then came in and spoke with Watson. While Watson and Crystal were talking, Serafine Guillen arrived to take Ruiz to

work, so Crystal went outside to talk to him. Ruiz testified that Watson never pointed his gun at the defendant, and that the defendant walked in and out of the doorway several times during the robbery.

After taking Ruiz's wallet, Watson left the house and approached Guillen's truck. Ruiz stepped out briefly, then went back inside to retrieve a weapon. When he came out again, Watson and defendant drove away in defendant's truck, taking Guillen with them. Shortly thereafter the police arrived. While Ruiz and Crystal were outside with the police, defendant's truck returned to Ann Street, still carrying Guillen. Within a few minutes, defendant and Watson were arrested.

Crystal testified that at 6:00 a.m. on 22 October 2002 she was still in bed, when she heard her husband answer a knock at the door. Hearing a man say words to the effect of "I'm with the police; you're under arrest," she got up and went to investigate. When she entered the living room, only Ruiz and Watson were present. Watson had Ruiz pushed face down on the couch, and was holding a gun while he looked through Ruiz's wallet. She asked to see some police identification. Watson tucked the gun under his arm and got out his wallet, flashing it briefly at Crystal. He told her it was "an FBI matter," that he had been chasing Ruiz "since Texas," and that he was there to arrest Ruiz. Crystal testified that she "didn't feel right about it," so she went to the bedroom and called 911 to summon the police, before returning to the living room. She stood there for a few minutes observing the

situation, during which time defendant walked in and out of the house three times. Each time he entered the living room he would announce that "backup is on the way" before leaving again. The last time defendant did this, Watson directed him to search the house. The defendant flipped over some sofa cushions and disturbed papers lying in the living room, before telling Watson that he had "found it" or words to that effect. At about the same time, Guillen arrived, and Crystal ran outside to intercept him. She tried to warn Guillen in English, but he did not understand her. Crystal heard her phone ringing, and while she was inside answering it, the defendant and Watson left with Guillen. Ruiz and Crystal then waited outside for the police, who arrived shortly. While they were giving a report to the police, the defendant drove by. Law enforcement officers followed defendant and apprehended him and Watson a few blocks away.

Guillen testified through an interpreter that he went to Ruiz's house before dawn on 22 October 2002, to give Ruiz a ride to work. When he arrived, Crystal ran out to talk with him, but he had trouble understanding her. Crystal was followed by defendant, who got into his own truck; and by Watson, who held a gun to Guillen's head. Watson told Guillen he was a law enforcement officer, ordered Guillen out of his truck, and patted him down "looking for money." Watson then pushed Guillen towards defendant's truck, while telling Guillen that he planned to kill him. Watson shoved Guillen into the truck between himself and defendant, and told defendant to drive. Without speaking,

defendant drove "up a few blocks, turned around, [and] came right back." The police stopped the truck a few blocks later, and Guillen was released without harm.

At the close of the State's evidence, defendant moved for dismissal of all charges. The trial court dismissed the charge of robbery with a dangerous weapon, because the evidence had established that the "firearm," alleged in the indictments for robbery with a dangerous weapon, was actually an unloaded plastic pellet gun. The trial court denied defendant's motion to dismiss the remaining charges.

Defendant's testimony corroborated in large measure that of the State's witnesses. However, he testified generally that he only cooperated with Watson's requests because he was frightened of Watson's gun. Defendant also testified as follows: In the early morning hours of 22 October, defendant was fishing at Lake Wylie. He caught eight or nine fish, cleaned them, then loaded his fishing equipment into the truck and returned to Gastonia. Watson approached him at around 4:00 a.m., while defendant was stopped at a red light, and asked defendant for help moving or selling items of furniture. After they loaded the furniture into defendant's truck, Watson told him where to drive next. At one point Watson told him to stop the truck, and he got out. Defendant could neither see nor hear what happened during this stop. After Watson got back in the truck, he directed defendant to drive to Ann Street, and then to stop at a particular house (the Ruiz home). Once there, Watson got out a gun, pointed it at him, and ordered

him to get out of the truck and come with him to the house. Defendant admitted that he walked in and out of the house several times while Watson was robbing Ruiz, but he denied saying that "backup is on the way" or saying he had "found it" when Watson told him to search the house.

Several law enforcement officers testified in rebuttal that when defendant was arrested he did not smell of fish, and his truck had no fish or fishing equipment in it. Detective Gibson of the Gastonia Police Department testified that after defendant was confronted with certain inconsistencies in his initial statement to police, he admitted that he had not been fishing that night.

While the jury convicted defendant of first degree burglary of the Ruiz house, common law robbery of Ruiz, and impersonation of a police officer, it acquitted him of the common law robbery and first degree kidnapping of Guillen, and of the common law robbery of Diaz. Defendant received a prison sentence of 82 to 108 months for first degree burglary, to be followed by ten to twelve months for the consolidated offenses of common law robbery and impersonating a police officer. From these convictions and judgments, defendant appeals.

Defendant argues first that the trial court erred by denying his motion to dismiss the charges against him, on the grounds that the State failed to present sufficient evidence to submit the case to the jury. Specifically, defendant contends that the evidence

that he acted in concert with Watson was legally insufficient. We disagree.

"On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). "Substantial evidence is such relevant evidence as is necessary to persuade a rational juror to accept a conclusion." *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003) (citing *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899 (2000)). "The trial court must review the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *Id.* (citing *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

In the instant case, defendant's convictions of first degree burglary of Ruiz's house, common law robbery of Ruiz, and impersonating a police officer were based on the State's theory that defendant and Watson acted in concert to commit the offenses. Defendant does not dispute the sufficiency of the evidence that Watson committed the offenses. He argues, however, that there was insufficient evidence of his acting in concert with Watson.

> The correct statement of the doctrine of acting in concert in this jurisdiction is that . . . '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. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)). "The principle of concerted action need not be overlaid with technicalities. . . . To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose. . . . These terms mean the same in the law of crimes as they do in ordinary parlance." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979). However, "[t]o render one who does not actually participate in the commission of the crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrators of the crime, or by his conduct made it known to such perpetrators that he was standing by to lend assistance when and if it should become necessary." *State v. Ham*, 238 N.C. 94, 97, 76 S.E.2d 346, 348 (1953).

In the instant case, there was evidence from which a jury could find that: (1) defendant and Watson were acquainted with each other; (2) defendant's truck was the vehicle used to commit the offenses, and defendant was the driver; (3) while defendant and Watson were at Ruiz's home, defendant walked freely in and out of the house, but never tried to leave or drive away; (4) defendant several times announced to Watson, Ruiz, and Crystal that "backup is on the way," and purported to conduct a search, thus supporting Watson's assertion that they were law enforcement officers; (5)

Watson never threatened defendant or pointed a gun at him while the two were at the Ruiz house; (6) when defendant left Ruiz's and got in his truck, he waited for Watson to force Guillen into the truck before driving away; and (7) after he was stopped by the police, defendant initially lied and claimed he had been fishing that night. We easily conclude that this evidence, taken in combination and viewed in the light most favorable to the State, is sufficient to submit to the jury the question of whether defendant and Watson acted with a common purpose. This assignment of error is overruled.

Defendant next argues that the trial court erred by failing to find the existence of the following two statutory mitigating factors submitted by defendant:

> (1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.
> (2) The defendant was a passive participant or played a minor role in the commission of the offense.

N.C.G.S. § 15A-1340.16(e)(1) and (2) (2003).

"The burden is on the defendant to establish a mitigating factor by a preponderance of the evidence." *State v. Marecek*, 152 N.C. App. 479, 513, 568 S.E.2d 237, 259 (2002). "The trial court must find a mitigating factor where evidence to support the factor is substantial, credible, and uncontradicted." *State v. Wiggins*, 159 N.C. App. 252, 270, 584 S.E.2d 303, 316 (2003) (citing *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E.2d 451, 454 (1983)).

However, "the judge weighs the credibility of the evidence and determines by the preponderance of the evidence whether such factors exist." *State v. Canty*, 321 N.C. 520, 523, 364 S.E.2d 410, 413 (1988). On appeal:

> When a defendant argues that the trial court erred in failing to find a mitigating factor, he must show that 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn and that the credibility of the evidence is manifest as a matter of law.'

State v. Hughes, 136 N.C. App. 92, 100, 524 S.E.2d 63, 68 (1999) (quoting *State v. Jones,* 309 N.C. 214, 219-20, 306 S.E.2d 451, 455 1983)).

In the instant case, the proffered mitigating factors were based primarily on defendant's testimony that he acted on Watson's orders only out of fear for his life. Defendant essentially contended that he was not a perpetrator of these offenses, but a victim. However, defendant's testimony was contradicted by other evidence tending to show that (1) defendant was the getaway driver; (2) defendant actively perpetrated Watson's false assertion he and defendant were law enforcement officers, by stating several times that "backup is on the way" and pretending to conduct a search; (3) defendant chose to remain at the Ruiz house even though he could have driven away while Watson was distracted; and that (4) defendant initially lied to the police about going fishing that night, and later repeated the same lie under oath at trial. The conflicting evidence clearly raised issues of credibility. "A defendant has the burden of proving factors in mitigation 'by a

preponderance of the evidence, and the trial court has the discretion to assess the credibility of defendant's evidence and either accept or reject it.'" *State v. Watkins*, 89 N.C. App. 599, 606, 366 S.E.2d 876, 881 (1988) (quoting *State v. McGuire*, 78 N.C. App. 285, 294, 337 S.E.2d 620, 626 (1985)). This assignment of error is overruled.

Finally, defendant argues that the trial court impermissibly punished him for exercising his constitutional right to a trial by jury. This argument is without merit.

The sole support for defendant's claim is his assertion that his codefendant, Watson, was sentenced pursuant to a plea bargain, and that for this reason Watson received consolidated sentences, resulting in a shorter overall term of imprisonment. Because the record on appeal does not include the judgment entered against Watson, this Court cannot determine the accuracy of defendant's contentions regarding Watson's sentence. Moreover, the trial court is not required to impose the same sentence on codefendants charged with similar crimes. *See State v. Shelman*, 159 N.C. App. 300, 312, 584 S.E.2d 88, 96 ("Nor did the court err by sentencing defendant to a greater sentence than that received by [his codefendant] pursuant to a plea bargain."), *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003). Defendant offers no other basis for his contention that the trial court punished him for not pleading guilty. This assignment of error is overruled.

For the reasons discussed above, we conclude that defendant received a fair trial, free of prejudicial error.

No Error.

Judges GEER and THORNBURG concur.

Report per Rule 30(e).