NO. COA07-1162

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v. Robeson County
Nos. 04 CRS 53161-62
CHAD ELLIOTT OXENDINE 53160

and

KIMBERLY LOCKLEAR

Appeal by defendants from judgments entered 18 September 2006 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 20 March 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields III, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche for Chad Elliott Oxendine defendant appellant.

Geoffrey W. Hosford for Kimberly Locklear defendant appellant.

McCULLOUGH, Judge.

Defendant appeals his conviction of first-degree murder. Codefendant appeals her conviction of second-degree murder. We determine there was no prejudicial error.

FACTS

Chad Elliott Oxendine ("defendant") and Kimberly Locklear ("codefendant") were both indicted for the first-degree murder of

Jonathan Hunt ("Hunt"). The State presented evidence at trial that tended to show the following:

On the evening of 9 May 2004, codefendant parked her vehicle in a parking lot next to a car wash. Defendant and witnesses A.K., J.L., A.C. and R.L. were also with codefendant. Defendant's wife, Yolanda Oxendine ("Mrs. O"), their two children, and Mrs. O's boyfriend Hunt were at the car wash. Defendant's group spotted Hunt at the adjacent car wash. An altercation ensued between the parties resulting in codefendant escorting defendant's group away from the car wash. While defendants departed the car wash, Hunt clubbed defendant in the leg with a stick rigged with nails. The clubbing resulted in a laceration to defendant's leg. Defendant and his group left town and drove to defendant's house to, among other things, care for defendant's wound.

Later on in the evening, defendant and his group picked up D.G. Codefendant then drove defendant and his group to the same nearby town where Hunt clubbed defendant. Defendant was armed with a gun provided to him that evening by D.G. While codefendant drove her passengers through the town, they identified the vehicle Mrs. O was driving. Seated inside of Mrs. O's vehicle was Hunt, in the passenger's seat, and Mrs. O's two children in the backseat. Eventually, Mrs. O stopped her vehicle and some occupants of both vehicles, including Hunt, exited their vehicles and another altercation ensued. Mrs. O was standing outside of her vehicle, on the driver's side, arguing with defendant, who was armed with the gun. Hunt returned to the front passenger's seat of Mrs. O's

vehicle and her two children remained in the backseat. Codefendant, armed with a stick, was attempting to open up Hunt's door. Moments later, upon the command of codefendant, defendant fired his gun several times into the vehicle at Hunt. Hunt was shot four times and died shortly thereafter.

Defendant's evidence tended to show that Hunt was armed and aimed his gun at defendant before he was shot. Gunshot residue tests on Hunt's hands came back positive. The gun Hunt was allegedly armed with was never found.

On 12 July 2004, defendant was indicted for first-degree murder by the grand jury for his involvement in the 9 May 2004 killing of Hunt. Defendant was also indicted for discharging a weapon into occupied property. Codefendant was indicted for first-degree murder for her involvement in the murder of Hunt. During the trial both defendants chose not to testify. The passengers in codefendant's vehicle, the majority of whom were minors, provided most of the eyewitness testimony. Defendants were tried jointly on 11 September 2006 in the Robeson County Superior Court, the Honorable Gary L. Locklear presiding. On 15 September 2006, the jury found defendant guilty of first-degree murder and codefendant guilty of second-degree murder for the killing of Hunt. At sentencing, Judge Locklear sentenced defendant to life imprisonment without parole and codefendant to a minimum term of one hundred and twenty-five months and a maximum term of one hundred and fifty-nine months. Defendants now appeal from the judgment of the trial court.

I.

First, defendants argue that the trial court erred in joining their trials. We disagree.

The decision whether to join two parties charged with the same crime is ordinarily within the sound discretion of the presiding judge. *State v. Mitchell*, 288 N.C. 360, 218 S.E.2d 332 (1975), *vacated in part*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). Absent a showing that a defendant has been deprived of a fair trial by joinder, the court's decision will not be overturned on appeal. *State v. Green*, 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

"Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, 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)(2007). Parties should not be joined when their defenses "are so discrepant as to pose an evidentiary contest more between defendants themselves than between the state and the defendants." *State v. Nelson*, 298 N.C. 573, 587, 260 S.E.2d 629, 640 (1979), *cert. denied*, 446 U.S. 9290, 64 L. Ed. 2d 282 (1980). "'The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial.'" *State v. Lowery*, 318 N.C. 54, 59, 347 S.E.2d 729, 734 (1986) (quoting Nelson, 298 N.C. at 587, 260 S.E.2d at

640); *see also State v. Pickens*, 335 N.C. 717, 725, 440 S.E.2d 552, 556 (1994).

The defendant's positions must be "so irreconcilable that 'the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty[]' [or] so discrepant as to pose an evidentiary contest more between defendants themselves than between the state and the defendants[] [resulting in a] spectacle where the state simply stands by and witnesses 'a combat in which the defendants [attempt] to destroy each other.'" *Nelson*, 298 N.C. at 587, 260 S.E.2d at 640 (citations omitted).

In the present case, both defendants were indicted for the murder of Hunt. At trial, both defendants objected to the parties being joined. After considering defendants' objections, the trial court ruled that it is "appropriate that these matters be joined and are in fact joined for trial." On appeal, defendant argues the parties should not have been joined for trial. According to defendant, evidence regarding codefendant's prior statements was antagonistic to defendant's claim of self-defense.

There are two statements at issue made by codefendant to the police prior to trial. Codefendant's first statement indicated that neither defendant nor codefendant were present at the scene of Hunt's murder. In codefendant's second police statement, she retracted her previous statement and described the events that occurred the night of Hunt's murder. Because this second statement made several references to defendant, the trial court conducted a hearing outside of the presence of the jury to determine whether

portions of the statement should be redacted. After reviewing codefendant's statement and redacting those portions that tended to incriminate defendant, the trial court admitted the codefendant's second statement into evidence.

On review, we hold the trial court did not err in admitting codefendant's statements. First, we note that codefendant's second statement, as redacted, poses no apparent conflict with defendant's claim of self-defense. Therefore, the statement is not antagonistic to defendant's trial defense. We next address defendant's first statement, which supposedly provided an alibi for defendant and codefendant at the time of the murder. Although we note that this statement conflicts with defendant's claim that he was present during the murder, we find the contradiction did not rise to the level of antagonism that would deprive defendant of a fair trial. Further, the State did not "stand by and rely on" codefendant's statement to prove its case. *See State v. Golphin*, 352 N.C. 364, 400-01, 533 S.E.2d 168, 195-96 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). To the contrary, the State presented substantial evidence tending to show that defendant was present at the time of Hunt's murder. This evidence tended to contradict codefendant's first statement, and to bolster defendant's argument that he was, indeed, at the scene. In addition, neither the first nor the second statement was admitted for the purpose of proving the truth of the matter asserted. Instead, the two statements were admitted to show that codefendant possessed a "guilty conscience" at the time the murder was committed. Therefore, it cannot be said

that the introduction of this statement denied defendant his right to a fair trial. Defendant's assignment of error is overruled.

II.

Defendants argue that the trial court erred in allowing the State to introduce testimonial statements into evidence. Specifically, defendants argue that the introduction of two police statements violated their confrontation rights provided by the Sixth Amendment to the United States Constitution. We disagree.

Alleged violations of defendant's constitutional rights are reviewed *de novo* on appeal. *State v. Gainey*, 355 N.C. 73, 558 S.E.2d 463, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Generally, the Confrontation Clause of the Sixth Amendment to the United States Constitution bars the introduction of testimonial statements of a witness who does not appear at trial. *Crawford v. Washington*, 541 U.S. 36, 53-54, 158 L. Ed. 2d 177, 194 (2004). However, "[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." *Bruton v. U.S.*, 391 U.S. 123, 135, 20 L. Ed. 2d 476, 484 (1968). "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619, 97 L. Ed. 593, 605, *reh'g denied*, 345 U.S. 919, 97 L. Ed. 1352 (1953).

However, the Confrontation Clause does not prevent the introduction of a testimonial statement for a purpose other than

proving assertions made therein. *See Tennessee v. Street*, 471 U.S. 409, 413-17, 85 L. Ed. 2d 425, 430-33 (1985).

In *Bruton*, 391 U.S. at 123-25, 20 L. Ed. 2d at 478-79, the United States Supreme Court examined the admission of statements, made by a non-testifying codefendant, where the defendant and codefendant were joined for trial. In one such statement, codefendant indicated that he had committed armed robbery with the help of an accomplice, though codefendant would not name him. *Id.* at 124, 20 L. Ed. 2d at 478. Although the trial court allowed the evidence to be considered with respect to the codefendant, the trial court instructed the jury that it was to disregard this evidence when considering the defendant's guilt or innocence. *Id.* at 124-25, 20 L. Ed. 2d at 478. On appellate review, the defendant argued that the introduction of this evidence violated his constitutional right to cross-examination. *Id.* at 126, 20 L. Ed. 2d at 479. The United States Supreme Court, after considering the matter, determined that the codefendant's statements were "powerfully incriminating" and held that

> the introduction of [codefendant's] confession posed a substantial threat to [defendant's] right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard [this] inadmissible hearsay evidence inculpating [defendant], in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for [defendant's] constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.

Bruton, 391 U.S. at 137, 20 L. Ed. 2d at 485-86. Accordingly, the court reversed the defendant's conviction. *Id.*

When the United States Supreme Court was presented with a similar case in *Tennessee v. Street*, 471 U.S. 409, 85 L. Ed. 2d 425, it distinguished the circumstances in *Street* from those in *Bruton*. In *Street*, the defendant made the argument at trial that his confession had been coerced by the police. *Id.* at 411, 85 L. Ed. 2d at 429. According to the defendant, the police had used the confession of his accomplice to coerce him into writing a similar confession. *Id.* In rebuttal, the State sought to have a witness read the accomplice's confession to demonstrate the differences between the two confessions. *Id.* at 411-12, 85 L. Ed. 2d at 429. The trial judge allowed the testimony, but twice instructed the jury that the accomplice's confession was being admitted not for the truth of the matter asserted but to rebut the defendant's claim of coercion. *Id.* at 412, 85 L. Ed. 2d at 429. On appeal, the defendant argued that the introduction of this confession violated his right to confront the witnesses against him. *Id.* The United States Supreme Court rejected the defendant's argument and held the introduction of the evidence did not violate the Confrontation Clause because (1) the statement was not admitted as proof of the defendant's guilt, and (2) the trial court gave appropriate instructions to limit the jury's use of the statement. *Id.* at 413-16, 85 L. Ed. 2d at 430-32.

In the case *sub judice*, the State sought to introduce evidence of codefendant's two police statements as evidence of codefendant's

"guilty conscience." The first statement, which mirrored a police statement given by defendant, was introduced to show that the two realized the criminal nature of their actions and concocted an alibi to allay suspicion. *Id.* The second statement, which contradicted codefendant's first statement, was used to further bolster the argument that the first police statement was not credible. *Id.* During the trial, defendant objected to the introduction of these statements on the grounds that such an introduction would deprive defendant of his right to confrontation provided by the Sixth Amendment to the United States Constitution.

As previously discussed, the trial court held a hearing in response to defendant's objection, outside of the presence of the jury, to redact those portions of codefendant's statement that tended to inculpate defendant in Hunt's murder. The trial court then allowed the State to introduce the two statements as redacted. Later, in its charge to the jury, the trial court gave the following instruction:

> Members of the jury, the State contends that the defendants made false, contradictory and conflicting statements. If you find that the defendants made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience seeking to divert suspicion or to exculpate himself or herself, and you should consider that evidence along with all the other believable evidence in the case. However, if you find that the defendants made such statements, they do not create a presumption of guilt, and such evidence, standing alone, is not sufficient to establish guilt.

Upon review, we find the circumstances in the instant case closer to those presented to the United States Supreme Court in *Street* than those that gave rise to a reversal in *Bruton*. Here, the trial court allowed the State to introduce codefendant's statements as proof of codefendant's "guilty conscience" at the time of the murder. Prior to deliberations, the trial court instructed the jury that these statements were to be used as evidence of "the mental process of a person possessed of a guilty conscience." Therefore, we hold codefendant's statements did not amount to the "inadmissible hearsay" found in *Bruton*. Further, the trial court redacted all portions of the statements that tended to inculpate defendant in the murder of Hunt in an effort to ensure the statements would not be misused by the jury. The resulting statements, as admitted at trial, were not "powerfully incriminating" and did not "pose[] a substantial threat" to defendant's right to confront the witnesses against him. *See Bruton*, 391 U.S. at 137, 20 L. Ed. 2d at 485. Defendant's assignment of error is therefore overruled.

III.

Both defendants argue that the trial court erred when it denied their motions to set aside the verdict. Codefendant also asserts the court erred when it denied her motion to dismiss. According to defendants, there was insufficient evidence presented at trial to support their convictions. We disagree.

The standard of review of a trial court's denial of a motion to set aside a verdict and a motion to dismiss is *de novo*. *State*

v. Duncan, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000). The court should deny the motions if there is substantial evidence to support each essential element of the crimes charged. *Id.* Substantial evidence is understood to mean evidence that is existing, not just seeming or imaginary, and of "which a reasonable mind may accept as adequate to support a conclusion." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996), *cert. allowed in part*, 348 N.C. 507, 506 S.E.2d 252 (1998); *see also State v. Smith*, 40 N.C. App. 72, 78, 252 S.E.2d 535, 539 (1979). Upon a motion to dismiss or a motion to set aside the verdict, "[t]he evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may reasonably be deduced therefrom." *State v. Allen*, 127 N.C. App. 182, 184, 488 S.E.2d 294, 296 (1997). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *King*, 343 N.C. at 36, 468 S.E.2d at 237.

A.

Here, codefendant asserts there was insufficient evidence to support her conviction for aiding and abetting defendant in the killing of Hunt. "An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). The intent to aid or abet is also required. *State v. Sanders*, 288 N.C. 285, 290-91, 218 S.E.2d 352, 357 (1975), *cert.*

denied, 423 U.S. 1091, 47 L. Ed. 2d 102 (1976). The element of intent may be satisfied if the jury can infer defendant's intent from his relation to the principal. *Allen*, 127 N.C. App. at 185, 488 S.E.2d at 296. A defendant's "mere presence at the scene of the crime," does not present sufficient evidence to allow a jury to infer intent. *Id.* However, mere presence may be sufficient when the defendant "is a friend of the perpetrator and the perpetrator knows the friend's presence will be regarded as encouragement and protection." *Id.*

In *Allen*, the defendant was convicted of murder under the theory of aiding and abetting. *Id.* at 184, 488 S.E.2d at 296. On appeal, we held that the evidence presented by the State was sufficient to uphold the conviction for four reasons. *Id.* at 185, 488 S.E.2d at 496. First, the evidence showed defendant helped escort the decedent to the scene of the murder. *Id.* Second, the evidence showed defendant was aware of the principal's intent to commit the murder. *Id.* Third, the evidence showed defendant was present at the scene of the murder and watched as the decedent was shot. *Id.* Fourth, the evidence showed the defendant had a "long-standing" friendship with the principal. *Id.* Thus, the State presented sufficient evidence to allow the jury to infer that defendant's mere presence communicated his intent to assist the principal. *Id.*

In the case at bar, testimony indicated that: (1) codefendant drove defendant to and from the scene of the murder; (2) codefendant tried to open the car door where Hunt was seated; (3)

codefendant was armed with a stick when she approached the car in which Hunt was seated; (4) codefendant was present at the scene of the murder; and (5) codefendant was dating defendant. Moreover, Mrs. O testified that codefendant commanded defendant to shoot Hunt. Thus, the trial court was presented with sufficient evidence that codefendant aided and abetted defendant to support her conviction of second-degree murder. Accordingly, we affirm the trial court's decision to deny codefendant's motion to set aside the verdict and codefendant's motion to dismiss.

B.

Defendant argues his motion to set aside the verdict was erroneously denied because the jury's verdicts, with regard to defendant and codefendant, were inconsistent. Defendant alleges defendant's conviction for first-degree murder and codefendant's conviction for second-degree murder were "so inconsistent that they both could not have been supported by the evidence."

"[M]ost modern authorities agree that criminal verdicts as between two or more defendants tried together need not demonstrate rational consistency." *State v. Bagnard*, 24 N.C. App. 54, 60, 210 S.E.2d 93, 97 (1974), *cert. denied*, 286 N.C. 416, 211 S.E.2d 796 (1975). "It is well established in North Carolina that a jury is not required to be consistent and that incongruity alone will not invalidate a verdict." *State v. Rosser*, 54 N.C. App. 660, 661, 284 S.E.2d 130, 131 (1981).

In the present case, defendant does not dispute that the trial court was presented with sufficient evidence to satisfy each of the

elements of first-degree murder under the theory of felony murder. The State presented evidence at trial which tended to show: (1) defendant fired his weapon into a vehicle he knew was occupied, (2) defendant's bullet hit Hunt, and (3) Hunt died as a result of the felony. Thus, the trial court was presented with sufficient evidence to support defendant's conviction. As both verdicts were supported by sufficient evidence, defendant's assignments of error are overruled.

IV.

Codefendant argues that the trial court erroneously admitted evidence. Specifically, codefendant argues that the trial court abused its discretion by admitting photographs of Hunt's body. We disagree.

Rule 403 of this State's Rules of Evidence excludes evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2007). When the judge determines that evidence may be admitted based on its probative value, this decision will not be overturned absent an abuse of discretion. *State v. Williams*, 334 N.C. 440, 460, 434 S.E.2d 588, 600 (1993). "[T]he trial court's ruling should not be overturned on appeal unless the ruling was 'manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999) (citation omitted).

In the present case, codefendant argues on appeal that the trial court erred by admitting six repetitive, gruesome photographs. Codefendant contends that these pictures "served only to inflame the jury's passions against [codefendant]."

Our Supreme Court has held that an excessive number of photographs that tend solely to inflame the passions of the jurors may be sufficient to warrant a new trial. *State v. Hennis*, 323 N.C. 279, 287, 372 S.E.2d 523, 528 (1988). In *State v. Locke*, 333 N.C. 118, 423 S.E.2d 467 (1992), the Court analyzed seven photographs of a decedent's body that were admitted into evidence. The photographs illustrated testimony of witnesses, wounds suffered by the decedent, and the manner of killing. *Id.* at 126-27, 423 S.E.2d at 472. The Supreme Court held that the trial court did not err by admitting the photographs because the probative value of the photographs outweighed the danger of unfair prejudice and the photographs were not "particularly repetitive or numerous." *Id.* at 127-28, 423 S.E.2d at 472-73.

In the present case, codefendant objects to the admission of six photographs of Hunt's body. The photographs in question depicted four bullet wounds and tended to show that the victim was shot from behind, apparently contradicting defendant's claim that he fired in self-defense. After reviewing the record, we hold these photographs, which were not "particularly repetitive or numerous," were unlikely to cause unfair prejudice to defendant. Therefore, we hold the trial court did not abuse its discretion by

admitting the photographs into evidence. Codefendant's assignment of error is overruled.

V.

Both defendants argue that the trial court erred when it submitted certain instructions to the jury. We disagree.

This Court reviews jury instructions for an abuse of discretion. *State v. Shepherd*, 156 N.C. App. 603, 607, 577 S.E.2d 341, 344 (2003). An abuse of discretion will be found when the instruction is "'manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Hutchinson*, 139 N.C. App. 132, 137, 532 S.E.2d 569, 573 (2000) (citation omitted).

A.

Defendant argues the trial erred in its instruction of the jury. Specifically, defendant argues he was prejudiced by the trial court's initial instruction regarding a prior encounter between Hunt and defendant.

"It is well accepted that a proper subsequent instruction corrects any harmful effect of an earlier improper instruction." *State v. Kelly*, 120 N.C. App. 821, 825, 463 S.E.2d 812, 814 (1995). Therefore, where the trial court's first instruction was given in error, a new trial is not required where the second instruction is correct. *Id.*

Here, the jury instruction in dispute concerned a prior incident involving Hunt and defendant. In November 2003, Hunt allegedly fired a shotgun into an occupied home. The State

attempted to prove that defendant was standing in the yard of the home at the time of the shooting. At trial, defendant sought to elicit testimony from Mrs. O concerning this incident. After an objection by defense counsel, and a subsequent conference, the trial court instructed the jury that they only consider evidence concerning the incident "to show the state of mind of [the defendant] at the time." At the close of the evidence, the trial court issued a second instruction regarding this incident, stating that the evidence could now be used to prove that Hunt "had engaged in violent and aggressive behavior toward the defendant . . . [and it] may be considered by [the jury] in determining whether or not [Hunt] was the aggressor . . . and whether [Hunt] had a propensity for violence."

On review, we find defendant's claim to be without merit. As we have previously discussed, a trial court's initial, erroneous instruction may be corrected by a subsequent instruction. *See Kelly*, 120 N.C. App. at 825, 463 S.E.2d at 814. Here, defendant has made no contention that the subsequent instruction, provided to the jury by the trial judge, was incorrect. Further, after review, we hold the subsequent instruction represented a correct statement of the law. Therefore, we hold there was not a "'reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]'" *Id.* (citation omitted). Defendant's assignment of error is overruled.

B.

Codefendant argues that the trial court erroneously instructed the jury that she could be found guilty of second-degree murder. According to our Supreme Court:

> The test . . . in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged.

State v. Strickland, 307 N.C. 274, 283, 298 S.E.2d 645, 652 (1983) (footnote omitted), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). "[T]he mere fact that the evidence might support a verdict on the lesser crimes does not dictate that the trial judge instruct on the lesser grades." *Id.* at 283, 298 S.E.2d at 652. His decision rests on whether the evidence is sufficient to support the charge and uncontradicted by evidence from the defense; that is, whether, in a murder case, the evidence raises a question with respect to premeditation and deliberation or malice, either under the facts or as raised by defendant's defenses. *Id.*

> Under the theory of aiding and abetting, a defendant may be convicted of a crime when: "(i) the crime was committed by some other person; (ii) the defendant *knowingly* advised, instigated, encouraged, procured, or aided the other person to commit that crime; and (iii) the defendant's actions or statements caused or contributed to the commission of the crime by that other person."

State v. Bowman, 656 S.E.2d 638, 648 (2008) (quoting *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999)). Under this theory,

the defendant is guilty as a principal. *State v. Noffsinger*, 137 N.C. App. 418, 425, 528 S.E.2d 605, 610 (2000).

Here, codefendant was convicted of aiding and abetting defendant in the killing of Hunt. According to codefendant, the evidence presented at trial was insufficient to support a conviction for second-degree murder. Therefore, the trial court erred by instructing that jury that she could be convicted of either first-degree or second-degree murder.

"If the evidence only supports a finding of first degree murder a charge of second degree murder may not be submitted to the jury." *State v. Webster*, 111 N.C. App. 72, 79, 431 S.E.2d 808, 812, *disc. review denied*, 335 N.C. 180, 438 S.E.2d 206 (1993), *aff'd*, 337 N.C. 674, 447 S.E.2d 349 (1994). First-degree murder is "the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997). Second-degree murder is defined as "the unlawful killing of another with malice, but without premeditation and deliberation." *State v. Spivey*, 102 N.C. App. 640, 649, 404 S.E.2d 23, 28 (1991). An indictment for murder includes both first- and second-degree murder. *Webster*, 111 N.C. App. at 79, 431 S.E.2d at 812.

We have previously outlined the following test to determine whether the trial court should have instructed the jury on second-degree murder:

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden

> of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Strickland, 307 N.C. at 293, 298 S.E.2d at 658.

In the present case, conflicting evidence was presented as to whether defendant, the principal, acted with premeditation and deliberation. The evidence presented at trial tended to show that Hunt was armed with a gun, which he pointed at defendant, prior to being shot by defendant. Thus, the jury could determine that defendant's actions were not premeditated, but rather, taken in response to the possible threat posed by plaintiff. Given that the evidence was conflicting as to one or more elements of first-degree murder, the trial court properly instructed the jury that defendant could be convicted of either first- or second-degree murder. Further, as codefendant was charged with aiding and abetting defendant in his commission of the crime, she too could be charged with these felonies. Therefore, we hold the trial court did not err by instructing the jury on both first- and second-degree murder.

VI.

Defendant argues that the trial court erred when it issued admonitions to multiple witnesses. We disagree.

"The presiding judge is given large discretionary power as to the conduct of a trial." *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 635 (1976). "Generally, in the absence of controlling

statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion." *Id.* When the necessity arises, the trial judge may caution the witness to testify truthfully and point out the general consequences of perjury, provided he does so in a judicious manner. *Id.* at 23, 224 S.E.2d at 636.

On appellate review, this Court will "examine the circumstances under which a perjury . . . admonition was made to a witness, the tenor of the warning given, and its likely effect on the witness's intended testimony." *State v. Melvin*, 326 N.C. 173, 187, 388 S.E.2d 72, 79 (1990). An analysis of the specific facts is required. *Id.* After the jury is excused, a judge's admonitions concerning perjury should be made carefully and with prudence. *Id.* Judges are authorized to "judiciously warn" a witness against perjury in order to avoid injustice. *Id.* The remarks should not: (1) invade the province of the jury to make findings of fact or determinations as to the credibility of a witness; (2) cause a witness to change his testimony to fit the judge's interpretation of the facts; (3) intimidate or discourage the defendant's attorney from eliciting essential testimony from the witness; or (4) infringe upon the defendant's due process right to a trial before an impartial tribunal. *Rhodes*, 290 N.C. at 24-28, 224 S.E.2d at 636-39. Such cautionary remarks do not violate a defendant's right to due process so long as: (1) the circumstances "reasonably indicate a need for it[;]" (2) the caution is made "judiciously[;]" and (3) the cautions

have the effect of "merely preventing testimony that otherwise would likely have been perjured[.]" *Melvin*, 326 N.C. at 188, 388 S.E.2d at 89.

In *Locklear*, the trial court singled out a witness and repeatedly interrupted the witness's testimony. *Locklear*, 309 N.C. at 430-34, 306 S.E.2d at 775-77. When a witness did not answer questions to the satisfaction of the trial judge, he issued an ultimatum to the witness. The judge stated that if the witness's conduct continued, the witness would "be in the custody of the Sheriff." *Id.* at 433, 306 S.E.2d at 777. After this threat, the witness provided the court with detailed testimony. Our Supreme Court found that "it [could] be fairly inferred that this testimony resulted from the admonitions of the judge to [the witness]. *Id.* at 437, 306 S.E.2d at 779. Thus, the trial court's admonition amounted to error and the defendant was entitled to a new trial. *Id*.

In the instant case, A.K., who was then fifteen, was the first witness to testify. During A.K.'s testimony, (1) he could not remember where he and his friends rode four wheelers for more than six hours during the day of Hunt's murder; (2) he answered, "I didn't see. I mean, I seen one time--twice[]" when asked how many times he saw Hunt club defendant with the stick rigged with nails; (3) he answered "I can't remember" or "I don't know" eleven times after questions during the direct examination; (4) he could not remember who drove codefendant's vehicle; (5) he could not remember

whether he saw a gun; and (6) he gave testimony that was slightly different from his prior police statements.

After A.K.'s testimony, the trial judge advised the parties that he would conduct a *voir dire* of the "young witnesses testifying" for the purpose of "assur[ing] them that they should testify truthfully, [and to] remind them of the consequences of failing to testify truthfully." Thereafter, the judge questioned witnesses J.L., A.C., and D.G. outside the presence of the jury to determine if they appreciated the importance of the oath they had taken to tell the truth and the consequences of perjury.

The trial court also provided an admonition to Mrs. O outside the presence of the jury after she provided testimony that conflicted with her previous statements. Although he noted that "memories come and memories go," the trial court expressed his concern that Mrs. O may have willfully lied under oath and asked her to reaffirm that her testimony was truthful. After receiving Mrs. O's affirmation, she was allowed to leave the witness stand.

On review, we hold it could not be fairly inferred that the witnesses' testimony resulted from the trial court's admonitions. From the record, it is apparent that the first young witness, A.K., was having difficulty recounting his activities the day of Hunt's murder. These apparent memory lapses caused the trial court to become concerned that A.K. may have been providing false testimony, so the trial court informed the witness of the consequences of perjury. Further, when questioned by the trial court, J.L. and D.G. explicitly indicated they did not understand the consequences of

perjury and the importance of an oath respectively. Therefore, we hold the circumstances of the case reasonably indicated a need to admonish the younger witnesses. With regard to Mrs. O, we hold that her testimony at trial, which deviated from her previous statements, indicated that such admonitions were appropriate. Upon additional examination, we find the record contains no evidence suggesting that the judge's admonitions (1) discouraged a witness from testifying freely or intimidated the witness into altering their testimony; (2) caused a witness to change his testimony to fit the judge's interpretation of the facts; (3) intimidated or discouraged defendant's attorney from eliciting essential testimony from the witness; or (4) infringed upon defendant's due process right to a trial before an impartial tribunal. Therefore, defendant's assignment of error is overruled.

VII.

Lastly, codefendant argues that the trial court erred by allowing the State to mis-characterize the evidence in its closing argument. According to defendant, this mis-characterization denied her a fair trial. We disagree.

In a closing argument, trial counsel is allowed wide latitude to argue the facts and make reasonable inferences based on the evidence provided. *State v. Craig and State v. Anthony*, 308 N.C. 446, 454, 302 S.E.2d 740, 745, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983), *disc. review denied*, 354 S.E.2d 720 (1987). If the opposing party objects to the trial counsel's closing argument, we "must determine whether the trial court abused its discretion by

failing to sustain the objection." *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (citation omitted), *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003).

"Application of the abuse of discretion standard to closing argument requires this Court to first determine if the remarks were improper." *Id.* Improper remarks by the trial counsel "'include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others.'" *Id.* at 105, 588 S.E.2d at 366 (citation omitted). "Upon finding improper remarks were made, '"we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court."'" *State v. Frink,* 158 N.C. App. 581, 591, 582 S.E.2d 617, 623 (2003) (citations omitted). "In order to demonstrate prejudicial error, a defendant must show that there is a reasonable possibility a different result would have been reached had the error not occurred." *State v. Allen*, 353 N.C. 504, 509, 546 S.E.2d 372, 375 (2001).

Here, in the closing argument, the State argued that "everyone says [codefendant] got out the stick." Codefendant immediately objected and was overruled by the court. Codefendant alleges the State's remark was "a complete mischaracterization of their evidence." She adds that the remark "constituted grossly improper closing argument depriving [codefendant] of a fair trial."

On review, we note that Mrs. O was the only witness whose testimony corroborated the State's remark. Thus, the State's

argument that "everybody says [codefendant] got out the stick" amounted to an exaggeration. However, even assuming *arguendo* that this remark amounted to an error, we find defendant has failed to show that absent this remark a different outcome was likely to have resulted at trial. Defendant's assignment of error is therefore overruled.

We have reviewed defendants' additional assignments of error and find them to be without merit.

Affirmed.

Judge ARROWOOD concurs.

Judge STEELMAN concurs in result only.

Report per Rule 30(e).