

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA08-13

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 04 CRS 256356
04 CRS 257975

MANOLO ORTEGA GOMEZ

Appeal by defendant from judgment entered 10 August 2007 by Judge Richard D. Bener in Superior Court, Mecklenburg County. Heard in the Court of Appeals 06 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Patrick S. Wooten, for the State.

Tin Fulton & Owen, PLLC, by Noell A. Hill and Matthew G. Pruden, for defendant-appellant.

WYNN, Judge.

When the trial court fails to give a requested instruction, the defendant on appeal "must show that substantial evidence supported the omitted instruction and that the instruction was correct as a matter of law."¹ Defendant Manolo Gomez argues the trial court erred by refusing to instruct the jury on mere presence. Because Defendant failed to show substantial evidence supporting an instruction on mere presence, we find no error.

The State's evidence tends to show that at approximately 3:15

¹*State v. Farmer*, 138 N.C. App. 127, 133, 530 S.E.2d 584, 588, *disc. review denied*, 352 N.C. 358, 544 S.E.2d 550 (2000).

a.m. on 12 December 2004, Amil Acar Bonilla, his wife, and daughter arrived in a pickup truck at their home in Charlotte. Two men wearing masks approached their truck. One man carried a handgun and the other man carried a shotgun. The man with the shotgun pointed it at Mr. Bonilla and stated, "Give me the money. Give me the money." Mr. Bonilla opened the door of the truck and grabbed the barrel of the shotgun, causing the gun to fire. Mr. Bonilla and both men then fell to the ground and fought. During the course of the struggle, Mr. Bonilla pulled off the mask of the man with the shotgun, who was later identified as Defendant. Meanwhile, a neighbor who heard the sound of a gun firing came to assist Mr. Bonilla. Together the neighbor and Mr. and Mrs. Bonilla, wielding a handgun, held the man at bay while the daughter ran and knocked on neighbors' doors seeking help. The police arrived shortly thereafter and arrested Defendant. The second masked man fled while Defendant was engaged in the struggle with Mr. Bonilla.

Defendant gave a statement to the police in which he indicated that he was in the area because his car had broken down. Defendant stated that he approached the Bonilla family to seek a ride but they attacked him. At trial, Defendant did not testify; however, Defendant's wife testified that she sent Defendant at 11:00 p.m. to collect rent from a tenant and she did not hear from him again until the next day when he called from the county jail. Defendant's wife testified that she then went to pick up his car, but had to call a tow truck to take it away because it would not start.

At the close of all the evidence, Defendant requested the trial court instruct the jury that mere presence at the scene of a crime at the time of the commission does not make Defendant a principal in its commission. The trial court denied the request because Defendant failed to "present[] evidence that he was there, but didn't do anything."

Defendant's sole argument on appeal is that the trial court erred by refusing to instruct the jury on mere presence. We disagree.

A court must give a requested instruction if it is a correct statement of the law and is supported by the evidence. *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). When the trial court fails to give a requested instruction, the defendant on appeal "must show that substantial evidence supported the omitted instruction and that the instruction was correct as a matter of law." *State v. Farmer*, 138 N.C. App. 127, 133, 530 S.E.2d 584, 588, *disc. review denied*, 352 N.C. 358, 544 S.E.2d 550 (2000).

Pursuant to the mere presence rule:

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.

State v. Goode, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999) (citation omitted). However, a defendant is not entitled to an instruction on mere presence where there is undisputed evidence that the defendant actively participated in the crime and thus

could not have been "merely present." *State v. Cheek*, 351 N.C. 48, 74, 520 S.E.2d 545, 560 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

In the present case, there was substantial evidence that Defendant was more than merely present at the scene of the crime. Indeed, the record shows that Defendant armed himself with a loaded weapon, pointed the weapon at Mr. Bonilla, and demanded money from Mr. Bonilla. During the course of the struggle between Defendant and Mr. Bonilla, Defendant's mask was removed, revealing his identity. Additionally, Defendant was identified by Mr. Bonilla's neighbor and the arresting officer as the armed individual. Although Defendant stated he approached Mr. Bonilla to ask for a ride, the evidence supports the conclusion that Defendant was an active participant, rather than a bystander, in the commission of the attempted robbery. Because Defendant failed to "show that substantial evidence supported the omitted instruction," *Farmer*, 138 N.C. App. at 133, 530 S.E.2d at 588, we conclude the trial court did not err in refusing to give the instruction on mere presence.

No error.

Judges ELMORE and GEER concur.

Report per Rule 30(e).