NO. COA09-1422

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Guilford County
No. 07 CRS 100171

ERIC RICARDO HANDY

Appeal by defendant from judgment entered 26 March 2009 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 17 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

David L. Neal, for defendant-appellant.

CALABRIA, Judge.

Eric Ricardo Handy ("defendant") appeals a judgment entered upon a jury verdict finding him guilty of robbery with a firearm. We find no error.

I. BACKGROUND

On 6 August 2007 at approximately 4:00 a.m., Jesse East ("East") and Brandon Brammer ("Brammer") (collectively, "the victims") parked a white Jeep Cherokee in a parking lot near a public library in Greensboro, North Carolina and were playing video games in the tailgate area when a white Honda sedan ("the Honda") approached the white Jeep. The passenger in the front-seat of the

Honda asked the victims for cigarettes. When the victims responded that they had none, the passenger asked the victims for marijuana. The victims again answered in the negative, became suspicious and decided to leave.

As the victims attempted to leave, they were unable to do so because the Honda blocked their exit. A man holding a shotgun ("the gunman") exited the front passenger seat of the Honda and demanded money. East gave the man $20.00. At that time, East saw another man exit the Honda via the rear passenger door, stand beside the gunman, and then reenter the Honda. Brammer tried to "talk junk" to the gunman and opened the door to the white Jeep as if to retrieve a weapon to "try to scare them off." The gunman then attempted to reenter the Honda but the doors were closed and locked, so he turned and fled. When the driver in the Honda began to flee the scene, instead of leaving, he crashed into the library.

Brammer, who was unarmed, chased the gunman across the street. The gunman shot at Brammer, and a number of the pellets hit Brammer, causing him to fall to the ground. At this time, Corporal T.K. Brown ("Cpl. Brown") of the Greensboro Police Department ("GPD") drove by in his GPD vehicle. Cpl. Brown saw the shooting, radioed for backup, and provided aid to Brammer. East approached Cpl. Brown and told him about the robbery.

Neither Cpl. Brown nor the victims were able to identify the gunman, but East identified the other man who exited the Honda as someone other than the defendant. Officers from the GPD arrived to assist Cpl. Brown. One of them, Officer Paula Domitrovits

("Officer Domitrovits"), identified three suspects at the library: (1) Ashley Williams ("Williams"); (2) Timothy Frieson ("Frieson"), the owner of the Honda; and (3) Corderoy Jackson ("Jackson"). All three suspects gave conflicting accounts of what had occurred.

A nearby resident called the GPD after hearing the gunshot. Cpl. Brown spoke with the resident, who told Cpl. Brown that he saw where the gunman fled. Officers then searched the area and located a shotgun in the grass. When the officers examined the gun, a spent .410 shotgun shell popped out of the gun. A further examination of the gun revealed that it had recently been fired. The officers determined that the length of the gun's barrel was 15 and one-quarter inches and its overall length was 23 inches. Another .410 shotgun shell was located inside the Honda. Neither the gun nor the two shotgun shells were tested for fingerprints.

During the GPD's investigation, a crime scene investigator dusted the Honda for fingerprints. The fingerprint analysis revealed the following: (1) 27 prints belonging to Frieson were found on the Honda; the prints were found on various places, including the exterior driver's window, exterior rear window on the passenger side, the rear passenger door, and the hood; (2) 7 prints belonging to Jackson were found on the Honda; the prints were found on the exterior front passenger window, rear quarter panel on the passenger side, the hood, and the trunk; (3) 2 prints belonging to defendant were found on the car; 1 print was found on the exterior of the rear passenger door and the other was found on the hood; and

(4) 1 print on the front passenger window belonging to another person.

Detective K.R. Jones ("Detective Jones") of the GPD, who was on duty on 6 August 2007, continued the investigation. On 6 September 2007, Detective Jones spoke with Jackson and learned that defendant was present on the evening of the robbery. Based on this information, Detective Jones took defendant into custody the next day and questioned him. During the questioning, Detective Jones took rough, hand-written notes. Although the notes included details from the interview, they were not verbatim. Some of the details in the notes included defendant's admission that he held the shotgun, participated in the robbery with Jackson, and shot Brammer. Detective Jones never read the notes to defendant. Therefore, defendant never signed nor verified the notes.

Immediately after the questioning, Detective Jones asked defendant to provide a statement in writing. Defendant wrote the following statement:

> Whent [sic] to the guys and then they whent [sic] in S [sic] pockets and then we whent [sic] back to the car and the [dude] came by the car everybody rain [sic] they are family so they are sticking together the [sic] also say I shoot the gun that time I wish that I was not riding with them that night because my mind was not on that tipe [sic] of thing.

Defendant was arrested and later indicted for one count of assault with a deadly weapon with intent to kill inflicting serious injury, one count of possession of a weapon of mass destruction, and one count of robbery with a dangerous weapon. On the first

charge, the State proceeded on the lesser charge of assault with a deadly weapon inflicting serious injury.

At trial, Detective Jones testified for the State. Defendant objected because Detective Jones' testimony consisted of defendant's oral statements to Detective Jones. When defendant testified, he said that Jackson was a casual acquaintance who offered him a ride and then drove to a grocery store parking lot. Defendant added that he heard Jackson ask the victims for cigarettes. When Jackson and another man exited the Honda, defendant was unaware that they were armed, and did not see what happened until he exited the Honda. Defendant further testified that when he observed Jackson and the other man committing a robbery, he tried to get back in the Honda, and then fled the scene.

The State requested a jury charge of acting in concert, and the trial court granted the State's request. Defendant orally requested that the trial court instruct the jury on aiding and abetting and mere presence, but the trial court overruled defendant's request.

The jury returned a verdict of guilty of robbery with a dangerous weapon and not guilty on the remaining charges. The trial court sentenced defendant to a minimum term of sixty months to a maximum term of eighty-one months in the custody of the North Carolina Department of Correction. The trial court also ordered defendant to pay restitution and attorney's fees in the amount of $2,320.00. Defendant appeals.

II. DEFENDANT'S STATEMENT TO DETECTIVE JONES

Defendant argues that the trial court erred in admitting his purported confession to Detective Jones when it was neither verified by defendant nor a verbatim record of his words, thus it was inadmissible. We disagree.

As an initial matter, although defendant objected to the admission of his purported confession, he objected on different grounds than the grounds raised on appeal. Therefore, defendant asks this Court to review for plain error. N.C.R. App. P. 10(b)(1), (4); *State v. Odom*, 307 N.C. 655, 656, 300 S.E.2d 375, 376 (1983); *State v. Locklear*, 363 N.C. 438, 449, 681 S.E.2d 293, 303 (2009). Plain error applies only to jury instructions and evidentiary matters in criminal cases. *State v. Freeman*, 164 N.C. App. 673, 677, 596 S.E.2d 319, 322 (2004). Plain error is an error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002) (quotation and citation omitted).

> The general rule is that a "statement of an accused reduced to writing by another person, where it was freely and voluntarily made, and where it was read to or by the accused and signed or otherwise admitted by him as correct shall be admissible against him." *State v. Boykin*, 298 N.C. 687, 693, 259 S.E.2d 883, 887 (1979), *cert. denied*, 446 U.S. 911, 64 L. Ed. 2d 264 (1980); *see State v. Cole*, 293 N.C. 328, 334, 237 S.E.2d 814, 818 (1977). In other words, the defendant must in some manner indicate his "acquiescence in the correctness" of a written instrument tendered as his confession. *State v. Walker*, 269 N.C. 135,

> 141, 152 S.E.2d 133, 137 (1967). Nonetheless, the written instrument is admissible, without regard to the defendant's acquiescence, if it is a "verbatim record of the questions [asked] . . . and the answers" given by him.

State v. Bartlett, 121 N.C. App. 521, 522, 466 S.E.2d 302, 303 (1996).

Defendant cites *State v. Spencer*, 192 N.C. App. 143, 664 S.E.2d 601 (2008), to support his argument. In *Spencer*, the defendant challenged his purported confession, arguing that because it was never verified nor a verbatim record of his answers, it was inadmissible. *Id.* at 152, 664 S.E.2d at 607. During the investigation, a law enforcement officer met with the defendant and the defendant's mother at the sheriff's department. *Id.* at 146, 664 S.E.2d at 603. The defendant was told he was not in custody. *Id.* The officer engaged in a question-and-answer session with the defendant, and recorded the conversation in scratch notes. *Id.* at 146, 664 S.E.2d at 603-04. At the end of the conversation, the officer documented what was said and read it back to the defendant to make sure it was being recorded correctly. *Id.* at 146, 664 S.E.2d at 604. However, before the officer finished, the defendant's mother said she needed to leave, exited the interview room, and took the defendant with her. *Id.* The defendant understood that the officer would continue writing down what was discussed and that the officer expected the defendant to return later to proofread and sign the statement. *Id.* The defendant never returned to sign the statement. *Id.* At trial, the officer

read from the notes he took during his exchange with the defendant. *Id.* at 153, 664 S.E.2d at 608.

On appeal the defendant argued that the trial court committed plain error in admitting his purported confession. *Id.* at 152, 664 S.E.2d at 607. This Court held that, pursuant to *Bartlett*, the trial court erred in admitting the purported confession because the officer's rough, hand-written notes were not verbatim. *Id.* at 153, 664 S.E.2d at 608. The officer did not follow up with the defendant to have him review and confirm the notes as an accurate representation of the defendant's answers. *Id.* The defendant never returned to give his approval or indicated the notes were correct. *Id.* This Court held that the trial court committed plain error by allowing the purported confession to be read to the jury because it was the only evidence before the jury that the defendant maintained a dwelling for purposes of keeping or selling of a controlled substance. *Id.* at 154, 664 S.E.2d at 608.

However, *Spencer* is not controlling in the instant case. In *Spencer*, the State sought to introduce the defendant's purported confession into evidence, and the officer who took the confession read it into evidence. In the instant case, however, the State did not introduce the purported confession into evidence, and Detective Jones did not read it into evidence. Instead, Detective Jones was merely testifying about defendant's statements made to him during the interview and was using his notes to refresh his recollection. *See State v. Greenlee*, 22 N.C. App. 489, 490-91, 206 S.E.2d 753, 754 (1974) (finding no error where officers testified concerning

statements made by the defendant during interrogation and merely used their written memoranda summarizing interrogation to refresh recollection). Therefore, the trial court did not err in allowing Detective Jones to testify as to what defendant admitted in the interview. Defendant's assignments of error are overruled.

III. JURY INSTRUCTIONS

Defendant argues that the trial court erred in giving the jury an instruction on acting in concert over defendant's objection and in denying his request for an instruction on aiding and abetting and mere presence. We disagree.

A trial court does not err in denying a defendant's oral request for jury instructions when the request is not submitted in writing. *State v. Martin*, 322 N.C. 229, 237, 367 S.E.2d 618, 623 (1988); *see also* N.C. Gen. Stat. § 15A-1231 (2008). Since defendant orally requested that the trial court instruct the jury on aiding and abetting and mere presence, and did not submit this request in writing, the trial court did not err in denying defendant's request for these instructions.

Since defendant did not object to the instruction on acting in concert, defendant asks this Court to review for plain error. N.C.R. App. P. 10(b)(1), (4); *Odom*, 307 N.C. at 656, 300 S.E.2d at 376.

N.C. Gen. Stat. § 14-87(a) (2008) defines robbery with a firearm as follows:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a

> person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

Id.

> 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. Erlewine, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (brackets, internal quotations, and citation omitted).

> It is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle 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.

State v. Joyner, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). "If the defendant is present with another and with a common purpose does some act which forms a part of the offense charged, the judge must explain and apply the law of 'acting in concert.'" *State v. Mitchell*, 24 N.C. App. 484, 486, 211 S.E.2d 645, 647 (1975).

In the instant case, Detective Jones testified that defendant told him that on 6 August 2007, defendant, Frieson, Jackson, and Williams drove the Honda into the parking lot of the library and

saw a white Jeep. Detective Jones stated that defendant further told him that all four occupants exited the Honda and demanded money from East and Brammer. Defendant admitted carrying the gun and shooting it once, but denied receiving any money from the robbery.

Defendant also made a written statement in which he admitted exiting the Honda and observed two individuals searching one of the victims' pockets. Defendant then tried unsuccessfully to reenter the Honda when one of the victims approached, so defendant ran. Furthermore, defendant's fingerprints were found in two places on the Honda - a fingerprint found on the hood and a palm print on the outside of the rear passenger door. These prints indicate that defendant had exited the vehicle and closed the door.

This evidence, taken together, shows that defendant was present at the scene of the crime and acted together with another person pursuant to a common plan or purpose to commit robbery. Therefore, the trial court was required to instruct the jury on acting in concert. *Mitchell*, 24 N.C. App. at 486, 211 S.E.2d at 647. Defendant's assignments of error are overruled.

IV. QUESTIONS BY DEFENDANT'S COUNSEL

Defendant argues that the trial court erred in sustaining the State's objection to his trial counsel's questions to him regarding threats he had received from the other known suspects. We disagree.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in

evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). "Hearsay is not admissible except as provided by statute or by [the North Carolina Rules of Evidence]." N.C. Gen. Stat. § 8C-1, Rule 802.

In the instant case, defendant stated in his written statement to Detective Jones, "They are family, so they are sticking together." During his testimony at trial, defendant attempted to explain what he meant by this statement. The following exchange occurred:

> [Defendant's counsel]: All right. Okay. And you have the statement, "They are family, so they are sticking together." What did you mean by that statement?
>
> [Defendant]: Um, right after this, like it was 30 days before the officer came to my house. I had guys sitting outside of my house, [Jackson] telling me if I tell who - that he did it - I mean, well, I'm sorry. If I say anything, my sister and my house going [sic] to be -
>
> [The State]: Well, objection to what his -
>
> The Court: Objection sustained.
>
> [Defendant's counsel]: Well, let me ask you this, [defendant]. Did you have - between the time of robbery and the time you made this statement, did you have reason to fear for your safety or your family's safety?
>
> [The State]: Objection.
>
> The Court: Objection sustained. Members of the jury, if you heard what was just said in response to what the objection was sustained, do not consider it. The Court allows a motion to strike. Please proceed.

The trial court ruled that Jackson's purported statement threatening defendant was hearsay and excluded it.

Even assuming *arguendo* that this was error, defendant stated on cross-examination that Jackson threatened him:

> [The State]: So, you knew that at this point you'd been named by Tim Frieson and Corderoy Jackson, aka Corey, that you were the person with the gun and that you were involved in this robbery?
>
> [Defendant]: That's not the first time I heard it. It was in the streets where people come to my house, sitting outside. Corey said he going [sic] to kill you if you tell.

If defendant wished to say anything else regarding the threat, he made no offer of proof. Since there was no offer of proof, and the significance of the excluded evidence is not obvious from the record, defendant cannot meet his burden to show the purported error was prejudicial. *See State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007). Defendant's assignment of error is overruled.

V. CONCLUSION

Assignments of error not argued in defendant's brief are abandoned. N.C.R. App. P. 28(b)(6) (2008). Defendant received a fair trial free from error.

No error.

Judges HUNTER, Robert C. and ARNOLD concur.

Report per Rule 30(e).