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NO. COA09-1585

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v.

Vance County  
Nos. 08 CRS 50913, 2793

RODNEY FLYNN MCNEILL

Appeal by defendant from judgment entered 16 April 2009 by Judge Thomas D. Haigwood in Vance County Superior Court. Heard in the Court of Appeals 13 April 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Angel E. Gray, for the State.*

*M. Alexander Charns, for defendant-appellant.*

CALABRIA, Judge.

Rodney Flynn McNeill ("defendant") appeals a judgment entered upon a jury verdict finding him guilty of conspiracy to commit second degree burglary and/or felonious larceny. Defendant also appeals the trial court's determination that he attained the status of an habitual felon. We reverse the judgment for conspiracy to commit second degree burglary and/or felonious larceny. Since the trial court sentenced defendant as an habitual felon, we vacate that judgment.

#### I. BACKGROUND

On 6 March 2008, Jeff Watson ("Watson") was fishing with his sons and a neighbor's child at a pond across the street from a church on Nutbush Bridge Road in Henderson, Vance County, North Carolina. The pond was approximately five minutes from Watson's home on Hedrick Drive. At about 6:45 p.m., Watson observed two people in a dark-colored Dodge pickup truck drive into the church parking lot. The truck was parked in such a way that its tail lights were facing Watson. Watson observed a person of unknown gender exit the passenger side of the truck, reach into the bed of the truck, and remove a light-colored bicycle. Watson saw the person ride the bicycle down Nutbush Bridge Road toward Hedrick Drive, and then saw the pickup truck drive away. Watson then dropped off the neighbor's child at the child's home and arrived at his home at 991 Hedrick Drive in Henderson.

At approximately 7:15 p.m., Hilda Garrett ("Mrs. Garrett") and Herbert Garrett ("Mr. Garrett") (collectively "the Garretts") arrived home at 901 Hedrick Drive. When Mrs. Garrett entered her home through the door in their carport, she observed an individual wearing dark clothing exiting their home through a kitchen window that Mrs. Garrett had previously locked. Mrs. Garrett screamed and her husband subsequently entered the home. Mrs. Garrett told her husband that she saw someone exit their home through the window. Mr. Garrett ran out to the deck and fired a shot from his gun. Mrs. Garrett then called 911 while her husband ran out the front of the home.

At approximately the same time as the Garretts were entering their home, their next-door neighbor, Brian Montgomery ("Montgomery"), was walking his mother to her car in his driveway when he heard a gunshot. At that moment, Montgomery was standing in his walkway, which was illuminated by two outside lights. Montgomery then observed a man wearing dark clothing, a camouflage jacket and a dark-colored bookbag, riding a bicycle. Montgomery observed the man ride the bicycle from the Garretts' back yard onto Montgomery's driveway, approximately eight feet from him. Montgomery estimated the man to be between five-feet-seven-inches and five-feet-eleven-inches tall and approximately two hundred pounds. Montgomery subsequently identified the man on the bicycle as defendant. Montgomery asked defendant, "Who the hell are you?" Defendant replied, "Don't worry about who I am." Montgomery then realized defendant may have broken into the Garretts' home and began to pursue him on foot.

Also at this time, Watson heard the gunshot and looked out his window toward the Garretts' home. His wife then entered the house screaming that someone had broken into the Garretts' house and that Montgomery was chasing a man on a bicycle. Montgomery slipped while attempting to detain defendant, and subsequently entered his vehicle and began pursuing defendant toward Nutbush Bridge. Watson entered his vehicle and drove quickly toward the church parking lot. Watson arrived at the church parking lot in less than a minute, and he did not see the truck or the bicycle. Montgomery arrived at Nutbush Bridge in approximately one minute. There he

noticed a dark-colored Dodge truck parked in the Nutbush Bridge parking lot. The truck had backed into the parking lot.

Montgomery then drove his vehicle toward the church parking lot where he met Watson. Both men then drove back to Montgomery's home, where Watson told Montgomery that, earlier that evening, he saw a person driving a dark-colored Dodge truck drop another person on a bicycle off at the church. Montgomery told Watson that the same pickup truck was sitting at the parking lot near Nutbush Bridge. Less than two minutes later, Watson and Montgomery drove their separate vehicles "as fast as [they] could go" back to the Nutbush Bridge parking lot.

When Watson and Montgomery arrived at the Nutbush Bridge parking lot, they saw the Dodge truck parked in such a way that it was "backed into the far corner of the parking lot" in the dark. The truck was "back down toward the water's edge, where you can't back any further where the ropes are." Watson and Montgomery "hemmed in" the truck with their vehicles and shined their high beam headlights on the truck. Approximately one minute later, Watson and Montgomery observed the driver, later identified as Jason McNeill ("defendant's brother"), exit the truck. Defendant's brother was wearing a camouflage hat and a camouflage coat. He pulled out a fishing rod from the back of the truck and started tinkering with it "acting like he was going fishing." However, Watson did not see defendant's brother get out any bait or lighting devices, and the truck was parked in the "least lighted part of the parking lot." Montgomery noted that defendant's brother was taller

and heavier than defendant. Watson then heard sirens and observed defendant's brother enter the truck. Law enforcement officers from the Vance County Sheriff's Department ("VCSD") then arrived on the scene.

Deputy Todd Poteat ("Deputy Poteat") of the VCSD responded to a call directing him to the Nutbush Bridge parking lot. When Deputy Poteat arrived, he discovered defendant's brother sitting in a dark-colored Dodge pickup truck parked in a dark corner of the parking lot. Defendant's brother exited his truck, whereupon Deputy Poteat exited his patrol vehicle and approached him. Deputy Poteat patted him down for weapons and felt drug paraphernalia in his front pocket. Deputy Poteat searched defendant's brother and found a small marijuana pipe and a bag of marijuana in his front pocket. When Deputy Poteat searched the truck, he found a gun and fishing rods that were dry. Deputy Poteat did not find a bicycle near the truck.

Captain Weldon Bullock ("Captain Bullock") and Deputy Scott Coker ("Deputy Coker") of the VCSD subsequently responded to the scene. After the officers read defendant's brother his *Miranda* rights, Deputy Coker noticed that defendant's brother's "carotid artery [was] pounding and his heart was pounding so hard that his shirt was literally moving on his chest." Defendant's brother was also "somewhat agitated and aggravated" while the officers interviewed him. Defendant's brother began sweating heavily, and Deputy Coker heard defendant's brother's cell phone ring constantly for approximately thirty minutes.

Officers from the VCSD conducted an inspection of the Garretts' home that evening and found the screen had been torn off and the kitchen window had been broken. In the Garretts' bedroom, there were marks on a safe; the safe had been pried open and approximately \$60,000.00 in currency was missing. In addition, approximately \$13,000.00 in jewelry was missing from Mrs. Garrett's jewelry box.

On 12 March 2008, officers from the VCSD brought defendant to the Sheriff's Department where Detective Joseph Ferguson ("Detective Ferguson") read defendant his *Miranda* rights. Defendant subsequently refused to answer any of Detective Ferguson's questions, but he consented to a search of his residence and his vehicle. Deputies from the VCSD searched defendant's vehicle and discovered a green book bag and various tools. A search of defendant's residence revealed twenty-one one-hundred-dollar bills in a cigar box stored above defendant's bed. Detective Ferguson also found a cell phone on defendant's kitchen table. The phone number for the cell phone matched cell phone records showing that defendant's name was on the account for that number. Cell phone records also showed that on the evening of 6 March 2008, defendant's cell phone was used approximately twenty-two times, and a majority of the calls originated from the Henderson cell tower.

Defendant was arrested and indicted on charges of second degree burglary, felony larceny, possession of stolen goods, safecracking, and conspiracy to commit second degree burglary,

safecracking, and felony larceny. Defendant was also indicted on a charge of attaining the status of an habitual felon. Defendant was tried before a jury at the 13 April 2009 criminal session of Vance County Superior Court. Defendant moved to dismiss all charges at the close of the State's evidence and at the close of all the evidence, and the trial court denied both motions. On 16 April 2009, the jury returned a verdict finding defendant guilty of conspiracy to commit second degree burglary and/or felonious larceny and not guilty on the remaining charges. Also on that day, defendant entered a guilty plea to the charge of attaining the status of an habitual felon. The trial court sentenced defendant to a minimum term of 168 months to a maximum term of 211 months in the custody of the North Carolina Department of Correction and ordered defendant to pay restitution and court costs in the amount of \$75,614.95. Defendant appeals.

## II. MOTION TO DISMISS

Defendant argues that the trial court erred in denying his motion to dismiss the conspiracy charge based on the insufficiency of the evidence. We agree.

"This Court reviews a trial court's denial of a motion to dismiss criminal charges *de novo*, to determine 'whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant[] being the perpetrator of such offense.'" *State v. Davis*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 678 S.E.2d 385, 388 (2009) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

"Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion." *State v. Hargrave*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 680 S.E.2d 254, 261 (2009). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]" *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. "The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both." *Id.*

Defendant argues that the State failed to present sufficient circumstantial evidence of a conspiracy. We agree.

Our Supreme Court set out the elements of a criminal conspiracy in *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975):

A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. To constitute a conspiracy it is not necessary that the parties should have come together and agreed in *express* terms to unite for a common object: A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense. The conspiracy is the crime and not its execution. Therefore, no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.

*Id.* at 615-16, 220 S.E.2d at 526 (internal quotations and citations omitted).

"Direct proof of conspiracy is rarely available, so the crime must generally be proved by circumstantial evidence.'" *State v.*



*Clark*, 137 N.C. App. 90, 95, 527 S.E.2d 319, 322 (2000) (quoting *State v. Aleem*, 49 N.C. App. 359, 363, 271 S.E.2d 575, 578 (1980). "Those who aid, abet, counsel or encourage, as well as those who execute their designs are conspirators." *State v. Covington*, 290 N.C. 313, 342, 226 S.E.2d 629, 648 (1976). However, "[m]ere passive cognizance of the crime or acquiescence in the conduct of others will not suffice to establish a conspiracy." *State v. Merrill*, 138 N.C. App. 215, 221, 530 S.E.2d 608, 612 (2000).

In *Merrill*, we reversed the defendant's conviction on the charge of conspiracy to commit murder due to insufficiency of the evidence. 138 N.C. App. at 222, 530 S.E.2d at 613. The State's evidence showed that the defendant and a third person were at the defendant's house having a conversation at the kitchen table while the defendant's husband sat nearby. *Id.* at 218, 530 S.E.2d at 611. The third person told the defendant that he had an idea of how to "take care of" the victim, who was the defendant's ex-husband. *Id.* When the third person described his plan on how to kill the defendant's ex-husband, the defendant did not reply. *Id.* at 219, 530 S.E.2d at 611. We held that "[a]bsent some suggestion of assent, not even a mutual, implied understanding is established by this evidence." *Id.* at 220, 530 S.E.2d at 612.

Furthermore, in *Merrill*, the State argued that evidence that the third person arranged for the defendant and her husband to borrow money to go camping on the day of the crime established the defendant's assent through the furtherance of the third person's plan. *Id.* at 221, 530 S.E.2d at 612. We disagreed, stating that

"[a]bsent any evidence linking this arrangement to the proposed plan, it may be reasonably inferred only that [the third person] arranged for defendant and [her husband] to go camping." *Id.*

Finally, in *Merrill*, we discussed the State's evidence that a phone call was made to the victim's residence on the date before his death:

The State's evidence established that a telephone call was made to [the victim's] residence on 23 May 1997, the day before his death. It was established that a call made from defendant's residence to the victim's residence would be long distance. [The defendant's husband] testified he placed a block on the telephone in their residence, such that no long distance calls could be made from their telephone. Marshall Johnson, defendant's neighbor, testified that defendant, [her husband] and [the third person] had used his telephone to make long distance calls on several occasions. The phone jack they used when making these calls was located outside. The State introduced into evidence Johnson's telephone bill, which revealed a telephone call placed to the victim's residence on 23 May. Johnson testified he was not home when the call was made. *The State presented no evidence as to the identity of the caller. Evidence that defendant placed the 23 May phone call may have supported a reasonable inference that defendant assisted in furthering [the third person's] plan. This could have provided a basis to infer her taking part in a conspiracy. Without such evidence, there is no inference.*

*Id.* at 220-21, 530 S.E.2d at 612 (emphasis added). Thus, in sum, the fact that the defendant (1) listened to a third person talk about killing her ex-husband; (2) took money from that third person to take her husband camping out of town on the night of the crime; and (3) may have made, along with her husband and the third person,

a phone call to her ex-husband the day before his death, was not substantial evidence to survive a motion to dismiss the charge of conspiracy against the defendant. *Id.* at 218-21, 530 S.E.2d at 611-12.

In the instant case, the State's evidence tended to show that at approximately 6:45 p.m. on 6 March 2008, defendant's brother parked a dark-colored Dodge pickup truck in a church parking lot on Nutbush Bridge Road. One person of unknown gender exited the passenger side of the truck, reached into the bed of the truck, and removed a light-colored bicycle. This person rode the bicycle toward Hedrick Drive, and then defendant's brother drove the pickup truck away.

At approximately 7:20 p.m., Montgomery, Watson, and Deputy Poteat all saw defendant's brother sitting inside the dark-colored pickup truck parked in a dark corner of the nearby Nutbush Bridge parking lot. Defendant's brother exited the truck, tinkered with some fishing equipment, and got back in the truck when law enforcement officers approached. After law enforcement officers read defendant's brother his *Miranda* rights at the scene, defendant's brother's heart began beating rapidly and he began sweating heavily. During this time, defendant's brother's cell phone rang constantly for approximately thirty minutes from "back-to-back calls." However, no evidence was presented stating which person or persons made the calls to defendant's brother's cell phone. While defendant's cell phone was used approximately twenty-two times on the evening of 6 March 2008, the State failed to

present any evidence to identify a person who used defendant's cell phone or the identity of the person or persons on the telephone accounts of the numbers dialed from defendant's cell phone.

Just as the facts in *Merrill* were insufficient to survive a motion to dismiss a conspiracy charge, here the scant facts in the instant case are even less sufficient. There is no substantial evidence that defendant and his brother united "to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *Bindyke*, 288 N.C. at 615, 220 S.E.2d at 526. At most, defendant's brother's conduct was "[m]ere passive cognizance of the crime or acquiescence" in defendant's conduct, which is insufficient to establish a conspiracy. *Merrill*, 138 N.C. App. at 221, 530 S.E.2d at 612. Defendant's conviction for conspiracy must be reversed.

Because we reverse defendant's conviction for conspiracy, we must also vacate defendant's habitual felon guilty plea, which is predicated solely on the felony conspiracy conviction. See *State v. Marsh*, 187 N.C. App. 235, 245, 652 S.E.2d 744, 749 (2007), *overruled in part on other grounds by State v. Tanner*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2010) (vacating habitual felon guilty plea where State failed to present substantial evidence of underlying felony offenses).

Judgment for conspiracy is reversed.

Judgment imposed for habitual felon status is vacated.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).