NO. COA10-350

NORTH CAROLINA COURT OF APPEALS

Filed: 4 January 2011

STATE OF NORTH CAROLINA

v. New Hanover County
No. 08 CRS 63263

JAMAR DEVINE AIKENS,
Defendant.

Appeal by defendant from judgment entered 6 August 2009 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 13 October 2010.

Attorney General Roy Cooper, by Assistant Attorney General Dru Lewis, for the State.

Attorney Paul Y. K. Castle for defendant-appellant.

HUNTER, Robert C., Judge.

Jamar Devine Aikens ("defendant") appeals from a judgment entered after a jury found him guilty of assault with a deadly weapon inflicting serious injury. Defendant argues that the trial court erred: (1) by allowing the State to impeach its own witness, Laquin Hines ("Hines"), with his prior inconsistent statements, and (2) by instructing the jury on the theories of acting in concert as well as aiding and abetting. After careful review, we find no error.

Background

The State's evidence tended to establish the following facts:

At approximately 12:45 p.m. on 29 October 2008, Hines was shot on Dawson Street in Wilmington, North Carolina. After being shot, Hines ran to his grandmother's house, where an unidentified female called 911. Sergeant Sharon Vincent ("Sergeant Vincent"), with the Wilmington Police Department, responded to the call and when she arrived at the house, Sergeant Vincent found Hines on the floor of his grandmother's house with what appeared to be one gunshot wound to the thigh and one gunshot wound to the ankle. Detective Kevin Tulley ("Detective Tulley"), with the Wilmington Police Department, met with Hines at the hospital. Hines told Detective Tulley that he had been shot by someone riding in a gold Toyota. Detective Tulley testified that based upon his training and experience, Hines did not appear to be impaired by drugs or alcohol at the time of their conversation.

Bill Ray Collins ("Collins") and Michael Patrick ("Patrick") witnessed the shooting and testified for the State at trial. According to Collins, the driver of the Toyota, a black male with dreadlocks, pulled over into the left hand lane and another black male exited the vehicle out of the passenger side. Soon thereafter, Collins and Patrick heard two gunshots. Patrick pulled behind the parked Toyota and Collins saw the black male running up the street with a gun. The man then returned to the passenger side of the Toyota and the driver pulled back onto Dawson Street and drove away. Collins followed the Toyota and obtained the license plate number.

Defendant was later arrested in connection with the shooting and was interviewed by Detective Tulley. Defendant initially denied any involvement in the shooting and claimed that he did not know Hines. Defendant later admitted to Detective Tulley that Hines was his girlfriend's ex-boyfriend. Defendant further admitted that at approximately 12:00 p.m. on 29 October 2008, he was driving his mother's gold Toyota Solara when he picked up Terrence Goodman, also known as "B-Fresh." About 45 minutes after picking up B-Fresh, the two men saw Hines walking along the sidewalk on the 600 block of Dawson Street. B-Fresh told defendant to stop the car when he saw Hines. Defendant moved into the far right lane and stopped the car. B-Fresh then jumped out of the car and ran across four lanes of traffic toward Hines. Almost immediately, defendant heard gunshots, but he did not actually see the shooting. B-Fresh then ran back across the street and jumped into the passenger side of the Toyota. Defendant drove away from the scene of the shooting to a parking lot in the Thomas Jervay Housing Area and abandoned the vehicle. Defendant insisted that he did not know that B-Fresh was going to shoot Hines or that B-Fresh was carrying a gun.

Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. On 4 August 2009, defendant's trial commenced and Hines, who had been subpoenaed, did not appear to testify. Upon the State's request, the trial court issued a material witness order. On 5 August 2009, Hines was taken into custody and the trial continued; however, the State did not

have the opportunity to speak with Hines. Defense counsel was able to speak with Hines briefly before trial resumed and informed the court that Hines would testify to being intoxicated and impaired both on PCP and alcohol the day of the shooting; that defendant had nothing to do with the incident; that he did remember being shot, running to his grandmother's house, and seeing a vehicle that resembled the one that defendant sometimes drove, but that he did not see defendant and would say that he could not place defendant at the scene of the shooting. The prosecutor claimed that although Hines had not responded to the subpoena, "[h]e was very cooperative the day that [B-Fresh] shot him. He had told at least two officers what had happened. He had told both of them that [defendant] was involved." The prosecutor further stated that he did not know what Hines would testify to; that the State could only go by what Hines told officers in the past; and that Hines had never recanted his statements or said he was high when he was shot. Defense counsel admitted that he did not have any affidavits to corroborate what Hines had told him. Defense counsel requested a *voir dire* of Hines, which the trial court declined to conduct.

Hines took the stand and testified that he remembered being shot, but denied knowing who shot him. He further claimed that he was high on PCP and alcohol at the time of the shooting and could not remember speaking to police officers. The State then requested to treat Hines as a hostile witness. Defense counsel objected stating that "the law says that you can't put him on the stand for the purpose of introducing prior inconsistent statements when you

have notice that he is going to say that's what happened." The trial court determined that the notice provided to the State was inadequate, stating "[t]hat's not equal notice. That doesn't [sic] equal notice. I'm going to treat [Hines] as a hostile witness." On direct examination by the State, Hines admitted that he had spoken to Officer Vincent at his grandmother's house, but he could not remember what he told the police. Hines stated that he remembered seeing a gold car like the one defendant sometimes drove, but that he did not remember seeing defendant that day. The prosecutor asked Hines if he remembered telling Officer Vincent and Detective Tulley that B-Fresh shot him and that defendant was present at the time. Hines stated that he did not remember making those statements and he consistently claimed that he was high on PCP at the time he was shot and did not remember any specific details pertaining to the shooting.

Defendant did not offer any evidence at trial. The jury was instructed on the elements of assault with a deadly weapon inflicting serious injury based on the theories of acting in concert and aiding and abetting. Defendant was found guilty, and the trial court sentenced defendant to 27 to 42 months imprisonment. Defendant entered notice of appeal in open court.

Discussion

I.

Defendant argues that the State had prior notice that Hines intended to testify in a manner inconsistent with his prior statements to police, and, therefore, the State was precluded from

impeaching him with his prior inconsistent statements.[1] We disagree.

As a preliminary matter, defendant relies exclusively on cases that were decided prior to the 1984 enactment of Rule 607 of the North Carolina Rules of Evidence. *See, e.g., State v. Pope*, 287 N.C. 505, 215 S.E.2d 139 (1975); *State v. Thomas*, 62 N.C. App. 304, 302 S.E.2d 196 (1983). At the time those cases were decided, the general rule was that the State was not permitted to impeach its own witness with his or her prior inconsistent statements. *Pope*, 287 N.C. at 510, 215 S.E.2d at 143. One exception to the general rule was that the State could impeach its own witness if the State was "misled and surprised, or entrapped to [its] prejudice." *Id.* at 512, 215 S.E.2d at 144 (citation and quotation marks omitted). However, "[t]he anti-impeachment rule and its exceptions (and apparently their technical requirements) were abolished with the adoption of N.C. Rule of Evidence 607[.]" *State v. Bell*, 87 N.C. App. 626, 633, 362 S.E.2d 288, 292 (1987). Rule 607 states that "[t]he credibility of a witness may be attacked by any party, including the party calling him." As a result:

> [W]here there is testimony that a witness fails to remember having made certain parts of a prior statement, denies having made certain parts of a prior statement, or contends that certain parts of the prior statement are false, . . . the witness [may] be impeached with the prior inconsistent statement.

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[1] In his argument heading, defendant states that the trial court erred in declaring Hines a hostile witness; however, defendant makes no argument in that regard. Defendant only argues that the trial court erred in allowing the State to impeach Hines with his prior inconsistent statements.

State v. Riccard, 142 N.C. App. 298, 303, 542 S.E.2d 320, 323, *cert. denied*, 353 N.C. 530, 549 S.E.2d 864 (2001). "However, it is well settled that in such situations the prior inconsistent statements may only be used to impeach the witness' credibility; they may not be admitted as substantive evidence." *State v. Miller*, 330 N.C. 56, 63, 408 S.E.2d 846, 850 (1991).

> True impeachment is, of course, a demonstration that a witness is not credible, not a method of presenting substantive evidence. In our opinion, the better practice continues to be for the trial court, before allowing impeachment of the State's own witness by a prior inconsistent statement, to make findings and conclusions *with respect to whether the witness's testimony is other than what the State had reason to expect or whether a need to impeach otherwise exists*. Otherwise, the rule too easily camouflages a ruse whereby a party may call an unfriendly witness *solely* to justify the subsequent call of a second witness to testify about a prior inconsistent statement. In our view, it is not the intent of Rule 607 to provide a subterfuge for getting otherwise impermissible hearsay before the jury in the guise of impeachment, and we expressly disapprove this tactic.

Bell, 87 N.C. App. at 633, 362 S.E.2d at 292 (first emphasis added) (internal citation omitted). Accordingly, the trial court must be satisfied that Rule 607 is not being used as a subterfuge for admitting evidence that would otherwise be inadmissible. *Id.* Although the element of surprise is not required by Rule 607, our courts have held that surprise remains an acceptable basis for allowing the State to impeach its own witness as it demonstrates

that the State is acting in good faith. *Id.*; *State v. Hunt*, 324 N.C. 343, 350, 378 S.E.2d 754, 758 (1989).[2]

The trial court in the present case, upon hearing arguments by counsel, determined that the State did not have "equal notice" that Hines planned to testify in a manner inconsistent with his prior statements to police. In other words, the State was surprised that Hines intended to change his testimony. Upon review of the trial transcript we hold that Hines' testimony was contrary to what the State expected, and that the State acted in good faith, absent subterfuge, in impeaching Hines with his prior inconsistent statements to police. The State was informed moments before trial began that Hines planned to testify that he was high on drugs at the time he was shot and could not place defendant at the scene. The State had not spoken to Hines, defense counsel did not have a written statement by Hines, and no *voir dire* was conducted.[3] The fact that Hines had not complied with the subpoena does not indicate that he planned to testify inconsistently with his prior statements to police. In sum, we hold that defendant's argument that the State was not surprised by Hines' inconsistent testimony at trial is without merit and the trial court did not err in allowing the State to impeach Hines with his prior inconsistent statements in accord with Rule 607.

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[2] To be clear, defendant does not argue that the prior inconsistent statements were offered for any purpose other than impeachment. Defendant only argues that the State was not surprised by Hines' change in testimony.

[3] Defendant does not contend that the trial court erred in failing to conduct a *voir dire* of Hines.

II.

Defendant argues that the trial court erred in its instructions to the jury because: (1) the trial court must instruct the jury on either aiding and abetting *or* acting in concert, and (2) neither theory was supported by the evidence. We disagree.

First, we address defendant's argument that the trial court is not permitted to instruct the jury on both the theory of acting in concert and the theory of aiding and abetting. Defendant's argument is without merit. Our Supreme Court has ruled that "the distinction between aiding and abetting and acting in concert -- is of little significance" and the trial court may instruct on both theories. *State v. Davis*, 301 N.C. 394, 398, 271 S.E.2d 263, 265 (1980); *see State v. Roache*, 358 N.C. 243, 312, 595 S.E.2d 381, 425 (2004) (stating that the defendant's argument that the theories of aiding and abetting and acting in concert are mutually exclusive was without merit).

Next, we address whether both theories were supported by the evidence in this case. As a preliminary matter, defense counsel arguably invited any alleged error as to the acting in concert instruction by stating, "if I had to ask for one [theory] I'd ask for the acting in concert . . . ." It is well established that "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991). However, since defense counsel was merely asserting his preference for an instruction of one theory over another in response to the State's

request that both theories be instructed upon, we hold that defense counsel did not invite the alleged error. Nevertheless, since defense counsel failed to specifically object to either instruction, our review as to these instructions is limited to plain error review. N.C. R. App. P. 10(a)(2). The plain error rule is only applied where, "after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted).

A. Acting in Concert

It is well settled that

> [b]efore the court can instruct the jury on the doctrine of acting in concert, the State must present evidence tending to show two factors: (1) that defendant was present at the scene of the crime, and (2) that he acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Robinson, 83 N.C. App. 146, 148, 349 S.E.2d 317, 319 (1986). Defendant argues that, while he was present at the scene of the crime, there was no evidence tending to show that defendant acted pursuant to a common plan or purpose with B-Fresh. Defendant cites *State v. Forney*, 310 N.C. 126, 134, 310 S.E.2d 20, 25 (1984), where our Supreme Court stated:

> While it is true that it is not necessary for a defendant to do any particular act constituting a part of the crime in order to be convicted of that crime under the principle of acting in concert, so long as he is present at the scene, it is nevertheless necessary that there be sufficient evidence to show he

> is acting together with another or others pursuant to a common plan or purpose to commit the crime.

The Court ultimately held that there was insufficient evidence to establish that the defendant acted in concert with several other assailants in raping the victim. *Id.* In that case, the defendant was charged with felony murder based on the underlying felony of burglary. *Id.* at 132, 310 S.E.2d at 24. During the burglary, the other men raped the victim, but there was no evidence that the defendant raped the victim. In fact, defendant made exculpatory statements to the effect that he was "'thrown'" on the victim, but "'didn't do nothin'". *Id.* at 134, 310 S.E.2d at 25. The Court held that the evidence indicated that defendant was unwilling to participate in the rape and perhaps had no knowledge that the rape was going to occur. *Id.* This case is distinguishable from the case at bar. In *Forney*, defendant was participating in a burglary during which the other burglars decided to rape the victim. There was no evidence that the defendant anticipated that a rape would occur during the burglary and all evidence established that the defendant was unwillingly observing a rape. In other words, the defendant was "caught in the middle" of a situation that he did not foresee occurring.

In the present case, although defendant denied knowing that B-Fresh intended to shoot Hines, there was evidence to the contrary. All evidence, including defendant's statement to police, established that defendant was driving when B-Fresh exited the vehicle and shot Hines. Defendant then allowed B-Fresh back into

the vehicle, fled the scene, did not call 911 or seek any assistance for Hines, and later abandoned the vehicle. The jury as the finder of fact could choose to believe defendant's claim that he had no knowledge of what B-Fresh intended to do, or the jury could infer from the evidence that defendant entered into a common plan with B-Fresh to shoot Hines. We hold that there was no error, much less plain error in the trial court's instruction regarding acting in concert.

B. Aiding and Abetting

An instruction on aiding and abetting is properly given if there is evidence:

> (1) that the crime was committed by another; (2) that the defendant *knowingly* advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person.

State v. Bond, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996) (emphasis added), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997).

> It is not necessary for any of those elements to be proven to the trial court beyond a reasonable doubt before the trial court may instruct on aiding and abetting; there needs only to be evidence supporting the instructions, and the jury is to determine whether the State has proved the elements beyond a reasonable doubt.

State v. Baskin, 190 N.C. App. 102, 111-12, 660 S.E.2d 566, 573-74 (2008). Similar to his argument pertaining to acting in concert, defendant asserts that the evidence failed to show that he knowingly aided and abetted B-Fresh in the commission of the crime. We disagree.

Again, the evidence at trial tended to establish that defendant was driving when B-Fresh exited the car and shot Hines. Defendant then allowed B-Fresh back into the vehicle, fled the scene, did not call 911 or seek any assistance for Hines, and later abandoned the vehicle. A jury could reasonably infer from these facts that defendant knowingly aided B-Fresh in the commission of the crime. Accordingly, we find no error, much less plain error, in the trial court's instruction to the jury regarding aiding and abetting.

Conclusion

Based on the foregoing, we hold that the trial court did not err in permitting the State to impeach Hines with his prior inconsistent statements. We further hold that the trial court did not commit error, much less plain error, in its instructions to the jury.

No Error.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).