NO. COA10-76

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Alamance County
Nos. 07-CRS-58631 and
08-CRS-9746-7

JOHN LEWIS GRAVES, II,
Defendant.

Appeal by Defendant from judgments entered 26 March 2009 by Judge Robert H. Hobgood in Superior Court, Alamance County. Heard in the Court of Appeals 31 August 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan Babb, for the State.

Russell J. Hollers III for Defendant-Appellant.

McGEE, Judge.

John Lewis Graves, II (Defendant) was indicted for first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon, and was convicted of these charges on 26 March 2009. The trial court sentenced Defendant to: life imprisonment without parole for first-degree murder; a consecutive term of 50 months to 69 months in prison for conspiracy to commit robbery, to run at the expiration of his life sentence for first-degree murder; and 120 months to 153 months in prison for robbery with a dangerous weapon, but abated that judgment.

Defendant appeals.

I. Factual Background

The evidence at trial tended to show that Toreano Graham (Mr. Graham) was found dead in a creek bed near 711 Wicker Street in Burlington on 25 October 2007. Mr. Graham was a cocaine dealer. Nicole Hooker (Ms. Hooker) testified that on 19 October 2007, she was unemployed, "in need of money[,]" and had received an eviction notice. Ms. Hooker told Defendant, who was living with her, that she needed money to pay her rent and that she did not care how Defendant got the money. Stephen Rumsey (Mr. Rumsey) testified that on 19 October 2007, he was visiting his girlfriend, Jennifer Wiley (Ms. Wiley), at her home. Ms. Wiley was a neighbor of Ms. Hooker. While Mr. Rumsey was at Ms. Wiley's home, Ms. Hooker approached him and asked him about committing a robbery. Mr. Rumsey and Ms. Wiley then went to Ms. Hooker's apartment and met with Ms. Hooker and Defendant.

Mr. Rumsey testified that he, Ms. Wiley, Defendant, and Ms. Hooker then began to discuss and plan the execution of a robbery. Ms. Hooker knew that Mr. Graham was a drug dealer and sold large amounts of cocaine. Ms. Hooker testified that she, Mr. Rumsey, and Defendant developed a plan to approach Mr. Graham on the pretense of conducting a drug deal and then to rob him of his cocaine. Mr. Rumsey testified that, while discussing the plan with Defendant, Mr. Rumsey asked if Defendant had a gun. Defendant responded by showing Mr. Rumsey a handgun.

After rejecting several potential locations for the robbery,

Defendant called Mr. Graham and arranged to meet at Defendant's mother's house (the house) on Wicker Street in Burlington. Upon reaching the house, Defendant and Mr. Rumsey exited the car and had a conversation with Defendant's stepfather, Richard Jones (Mr. Jones). Mr. Graham arrived at the house shortly thereafter in a car driven by another drug dealer. Mr. Rumsey testified that, after arriving at the house, he changed his mind about the robbery and wanted to leave. Defendant told Mr. Rumsey that he intended to go through with the plan. Mr. Rumsey, Ms. Wiley, and Ms. Hooker then drove away from the house, leaving Defendant and Mr. Graham. As Mr. Rumsey, Ms. Wiley, and Ms. Hooker left, the drug dealer who drove Mr. Graham to the house sat in his parked car in the street in front of the house. Defendant, Mr. Graham and Mr. Jones entered the house.

Mr. Rumsey, Ms. Wiley and Ms. Hooker drove around the neighborhood for a while and when they returned to the house, they observed that the vehicle Mr. Graham arrived in, and its driver, had left the house. Defendant was standing in the yard and got into the car with Mr. Rumsey, Ms. Wiley and Ms. Hooker. Defendant was sweaty and shaking and was in possession of a different handgun than the one he had earlier shown to Mr. Rumsey. He also had a hat that Ms. Hooker had previously seen Mr. Graham wearing. Defendant later produced "a big chunk of cocaine" and divided it between Mr. Rumsey and Ms. Hooker.

Ms. Hooker further testified that she thought something was wrong with Defendant several days later. She testified that she

"had continuously asked [Defendant] what happened" the night of the drug deal. Defendant told her that Mr. Graham had pulled out a gun and that Defendant had shot Mr. Graham. Defendant also told Ms. Hooker that, after shooting Mr. Graham, he dragged Mr. Graham's body "around the back of his mother's house into a creek." On 23 October 2007, Defendant and Ms. Hooker learned of a missing person flier regarding Mr. Graham. Defendant and Ms. Hooker fled to Tennessee and were eventually arrested.

Defendant testified at trial about the events leading to Mr. Graham's death. Defendant testified that he "never agreed to rob" Mr. Graham. Rather, Defendant wanted only to purchase cocaine from Mr. Graham as a business deal that could "lead to bigger business." When Mr. Graham arrived at the house, Defendant told Mr. Graham that he no longer wanted to go through with the drug deal. However, Mr. Graham still wanted to do business.

Defendant reluctantly agreed to go inside the house to talk about a drug deal. Defendant and Mr. Graham entered the house and Defendant's mother's dog began barking at Mr. Graham. The dog continued to bark and nip at Mr. Graham. Defendant and Mr. Graham carried out their drug deal, and began to leave the house.

As Mr. Graham was leaving, he kicked the dog. Mr. Jones, who was also present in the house, "jump[ed] up" and told Mr. Graham to "keep his . . . feet off the dog." Mr. Jones and Mr. Graham then got into an argument which led to a physical confrontation. Mr. Graham drew his gun, and Mr. Jones grabbed for it. During the struggle, Mr. Graham was shot. Defendant then took the gun from

Mr. Jones and left the house without touching Mr. Graham's body.

II. Jury Instructions

Defendant first argues that the trial court erred by failing to instruct the jury on withdrawal from conspiracy. Specifically, Defendant contends the trial court erred in denying his written request for an instruction on withdrawal because there was sufficient evidence to support the instruction. We disagree.

Defendant filed a written request that the trial court give the following instruction:

> If you find that . . . Defendant in this case has committed a criminal conspiracy and that he has withdrawn from the further execution of that conspiracy, then you shall not find him responsible for acts committed by others in furthering the conspiracy.

Defendant argued to the trial court that the evidence presented at trial was sufficient to allow the jury to find that Defendant withdrew from the conspiracy. The State countered that there was no evidence of withdrawal because Defendant never gave "notification . . . to the other parties involved [that he intended] to withdraw from the conspiracy." The trial court denied Defendant's request and gave the pattern jury instruction regarding acting in concert.

"It is well established that when a defendant requests a special instruction which is correct in law and supported by the evidence, the trial court must give the requested instruction, at least in substance." *State v. Tidwell*, 112 N.C. App. 770, 773, 436 S.E.2d 922, 924 (1993) (citations omitted). "Refusal to give a requested instruction which is a correct statement of the law and

which is supported by the evidence constitutes reversible error." *Id.*

Our Supreme Court addressed the issue of withdrawal from a common purpose in *State v. Spears*, 268 N.C. 303, 150 S.E.2d 499 (1966), and set forth the following rule:

> Where the perpetration of a felony has been entered on, one who had aided or encouraged its commission cannot escape criminal responsibility by quietly withdrawing from the scene. The influence and effect of his aiding or encouraging continues until he renounces the common purpose and makes it plain to the others that he has done so and that he does not intend to participate further.

Spears, 268 N.C. at 310, 150 S.E.2d at 504. "Although *Spears* dealt with the law of aiding and abetting, we hold that for the purposes of acting in concert the above statement is equally applicable to withdrawal from a common plan." *State v. Wilson*, 354 N.C. 493, 508, 556 S.E.2d 272, 282 (2001), *disavowed in non-pertinent part by State v. Millsaps*, 356 N.C. 556, 567, 572 S.E.2d 767, 775 (2002). Thus, Defendant's requested jury instruction is a correct statement of the law, and we must therefore determine whether the instruction was supported by the evidence presented at trial. *See Tidwell*, 112 N.C. App. at 773, 436 S.E.2d at 924.

In his brief, Defendant contends the following evidence supported his requested instruction: (1) that Defendant "told the jury that he never was a part of a plan to rob Mr. Graham[;]" (2) that, after nearing the site of the planned robbery, Defendant "again told them that he was not going along with their plan and separated himself from them[;]" (3) while at the site of the

robbery, Defendant told Ms. Hooker that he intended only to make a drug deal with Mr. Graham, and not to rob him; (4) that Defendant at one point tried to call off the drug deal, but reluctantly agreed to go ahead with the deal after Mr. Graham insisted; and (5) that Mr. Graham was shot, not by any of the alleged conspirators but by Mr. Jones, over a fight regarding a dog.

The State counters that Defendant made insufficient outward display of withdrawal to warrant the requested instruction. Specifically, the State contends that, at best, Defendant's testimony suggests that Defendant "never entered into the robbery enterprise with [Mr.] Rumsey, and the shooting was unrelated to [Mr.] Rumsey's plan, a result of an argument over" the dog. We agree with the State's contention. Defendant's testimony that he was never part of a plan to rob Mr. Graham was addressed by the trial court's instruction to the jury that Defendant could be found not guilty of conspiracy. Likewise, Defendant's testimony that the shooting occurred as a result of Mr. Jones' dispute with Mr. Graham over the dog was addressed by the trial court's instruction to the jury on the felony murder theory. There was no evidence presented at trial that Defendant entered into the agreement to commit the robbery but then changed his mind and withdrew from the agreement and made outward displays of that withdrawal to the other parties to the agreement. Thus, there was no evidence supporting an instruction on withdrawal and the trial court did not err by refusing to give Defendant's requested instruction. *See e.g. State v. Barnette*, 96 N.C. App. 199, 202, 385 S.E.2d 163, 164 (1989)

("The possibility that a jury might partially accept or reject the State's evidence against a defendant is not sufficient to require instruction on the lesser included offense.").

III. Short-Form Indictment

Defendant next argues that the trial court erred by denying his motion to dismiss the short-form murder indictment. Specifically, Defendant argues that the trial court should have granted his motion to dismiss the first-degree murder charge because the short-form indictment did not allege all of the elements of first-degree murder. However, Defendant "acknowledge[s] that our Supreme Court has upheld the constitutionality of the use of the short-form murder indictment." Notwithstanding that acknowledgment, Defendant "asks this [C]ourt to reexamine these holdings, declare that all of the elements of an offense must be alleged in an indictment and found by a jury beyond a reasonable doubt, and vacate the murder judgment."

Our Supreme Court has consistently held that the short-form murder indictment satisfies state and federal constitutional requirements. *See State v. Wilkerson*, 363 N.C. 382, 435, 683 S.E.2d 174, 206 (2009) ("This Court has repeatedly held that short-form murder indictments satisfy the requirements of our state and federal constitutions."); *see also State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003). Because "'we are bound by the decisions of the Supreme Court, as well as those already decided by other panels of this Court, we refuse to'" grant Defendant's request that we "reexamine these holdings." *State v. Stitt*, ___ N.C. App. ___,

___, 689 S.E.2d 539, 546 (2009) (citation omitted). Defendant's argument is without merit.

No error.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N., concur.

Report per Rule 30(e).