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NO. COA14-594
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 11CRS033155, 305-06

ERIC EVERETT BLACKMON,
Defendant.

Appeal by defendant from judgments entered 5 August 2013 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 October 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Marc Bernstein, for the State.

Anne Bleyman, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgments convicting him of first degree murder, possession of a firearm by a felon, and robbery with a dangerous weapon. For the following reasons, we find no prejudicial error.

I. Background

The State's evidence tended to show that on 5 May 2011, a video surveillance camera recorded Michael Smith¹ entering Charlotte Check Cashers ("CCC") and removing his wallet from his right jean pocket. Shortly thereafter, defendant entered CCC wearing a red shirt with his hair in dreadlocks; defendant did not conduct any business and left. Thereafter, Mr. Smith returned his wallet to his right jeans' pocket and left. Later, an eyewitness saw two individuals together; one was a man in a red shirt with his hair in dreadlocks who shot Mr. Smith; the two individuals left together in a white Volvo and the eyewitness identified the passenger in the white Volvo as defendant. Mr. Smith died due to a gunshot wound. Mr. Smith's jeans' front pockets were inside-out and his wallet was not on him; DNA consistent with defendant's and another person's was found inside Mr. Smith's jeans' front pocket.

Defendant was indicted for murder, robbery with a dangerous weapon, and possession of a firearm by a felon; a jury convicted defendant on all the charges against him. The trial court sentenced defendant to life imprisonment without parole for the first degree murder and possession of a firearm by a felon

¹ A pseudonym will be used to protect the identity of the victim and his family.

convictions and arrested judgment for the robbery with a dangerous weapon conviction. Defendant appeals.

II. Jury Instructions

Defendant contends that "the trial court committed error in instructing the jury on acting-in-concert in violation of . . . [defendant]'s rights when that theory was not supported by the evidence." Essentially, defendant contends that the evidence shows he alone "did the acts necessary to constitute murder, robbery with a firearm, or possession of a firearm by a felon. There was insufficient corresponding evidence . . . [defendant] was present with another who did the acts necessary to constitute the crimes." Defendant challenges only the sufficiency of the evidence to support the acting in concert instruction because there was not enough evidence as to the other man's role in the crimes.

Properly preserved challenges to the trial court's decisions regarding jury instructions are reviewed *de novo*, by this Court. But jury instructions are not reviewed in isolation.

This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears

the burden of showing that the jury was misled or that the verdict was affected by the instruction. *Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.*

State v. King, ___ N.C. App. ___, ___, 742 S.E.2d 315, 319 (2013) (emphasis added) (citations and quotation marks omitted).

"The following are the elements of acting in concert: (1) being present at the scene of the crime, and (2) acting together with another person who commits the acts necessary to constitute the crime pursuant to a common plan or purpose." *State v. Jackson*, 215 N.C. App. 339, 344, 716 S.E.2d 61, 65 (2011).

Here, the State's evidence tended to show that defendant entered CCC in a red shirt with his hair in dreadlocks while Mr. Smith was in CCC conducting business involving his wallet; an eyewitness testified that he saw two men and that the man in a red shirt with dreadlocks shot Mr. Smith; the eyewitness then witnessed both individuals leave in a white Volvo and identified the passenger as defendant; and DNA consistent with defendant's and another person's was found on Mr. Smith's inside-out jeans' front pocket. The State presented sufficient evidence for the

trial court to instruct the jury on acting in concert as defendant was identified as being at the scene of the crime with another man when he shot Mr. Smith and then both left the crime scene together with the other man driving the Volvo, and defendant's own and another person's DNA was found on Mr. Smith. See *id.* This argument is overruled.

III. Surveillance Recording

Defendant next contends that "the trial court erred in admitting a surveillance recording and related evidence from an indeterminate and irrelevant time in violation of . . . [his] rights. (Original in all caps.)

The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible. . . .

Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of

evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

State v. Royster, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 21, 2014) (COA14-100) (citations and quotation marks omitted).

Defendant contends that the video is irrelevant because of the "the uncertainty that the footage was recorded on a particular date during a particular time that would make it relevant." In summary, the evidence showed that the time stamp on the CCC recording system "would fall either behind or it would be faster[,] " and thus the time stamps were not always accurate. In fact, the State acknowledged that the time codes on the surveillance video did not exactly coincide with the evidence of when the shooting occurred.

But, as the State points out, other extrinsic evidence indicated that the video of the defendant at the CCC was taken at a relevant time before Mr. Smith was shot. The State introduced a "contemporaneously timed and dated transaction receipt from Charlotte Check Cashers that was found in Mr. [Smith's] vehicle[.]" And despite the time-stamp discrepancies,

the State presented evidence from the computer engineer who installed and maintained the recording system and testified that he visited the store on a regular basis and that the video equipment was working correctly on the day of the murder. The State's evidence was sufficient to show that the video surveillance, showing defendant and Mr. Smith at CCC, was made at the time just preceding the shooting of Mr. Smith, and the trial court did not err in determining that it was relevant, as it had "a logical tendency to prove any fact that is of consequence in the case being litigated." *Id.*

Furthermore, even if defendant had demonstrated to this Court that an evidentiary rule violation occurred, "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). Here, due to the eyewitness testimony placing defendant at the scene of the crime, noting that the man with the red shirt and dreadlocks shot Mr. Smith, and then positively identifying the man in court who left the scene in a red shirt with dreadlocks as defendant, along with DNA consistent with defendant which was found on Mr. Smith's jeans' inside-out front

pocket, we cannot say that even assuming there was an evidentiary error "a different result would have been reached at trial." *Id.* Accordingly, this argument is overruled.

IV. Indictment

Lastly, defendant contends that

the indictment purporting to charge . . . [defendant] with first-degree murder is fatally defective because it does not sufficiently allege the essential elements of the offense and the trial court did not have jurisdiction and committed error in not dismissing this charge in violation of . . . [defendant's] rights.

(Original in all caps.) Defendant himself admits that as to his short-form indictment, "the North Carolina Supreme Court has previously held this not to violate a defendant's constitutional protections[,] but he raises the issue "for preservation purposes[;]" defendant is correct. See *State v. Mitchell*, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842 (determining short-form murder indictments are constitutional), *cert. denied*, 534 U.S. 1000, 151 L.Ed. 2d 389 (2001). As such, this argument is overruled.

V. Conclusion

For the foregoing reasons, we find no prejudicial error.

NO ERROR.

Judges GEER and BELL concur.

Report per Rule 30(e).