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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-618

Filed: 1 December 2015

Cumberland County, No. 11 CRS 61196

STATE OF NORTH CAROLINA

v.

AUDWIN PIERRE LINDSAY, JR.

Appeal by defendant from judgment entered 21 March 2014 by Judge Rueben F. Young in Cumberland County Superior Court. Heard in the Court of Appeals 5 November 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

TYSON, Judge.

Audwin Pierre Lindsay, Jr. ("Defendant") appeals from judgment entered after a jury found him guilty of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. We find no error in Defendant's convictions or the judgment entered thereon.

I. Background

Carlos Sanchez ("Sanchez") moved from New York City to Fayetteville, North Carolina to "change [his] life" in 2004. Sanchez had not completed high school, so he began attending classes at Fayetteville Technical Community College ("FTCC") shortly after moving to North Carolina. While studying at FTCC, Sanchez met Defendant, Carl Powell ("Powell"), and Robert Sinko ("Sinko"). They all quickly became close friends. Regarding his relationship with Defendant, Powell and Sinko, Sanchez testified:

> I love these guys. I give my life to them, you know what I'm saying? They was (sic) like my brothers. You know, we all hanged out and chilled. We was all good friends. [Defendant] was considered one of my best friends. [Defendant] is my best friend because I didn't know nobody when I came out here so I was first – I'm from New York City, so I came out here. [Defendant is] basically the first guy that I met and I end up liking him and we end up becoming a family.

Sanchez also testified he and Defendant would hang out "all the time."

Sanchez testified he became involved in the Bloods gang at the age of 14 or 15 while living in New York City. Sanchez explained there "ain't no getting out of a gang. It's either you die, that's basically it[.]" When Sanchez moved from New York City to Fayetteville, his gang membership continued. Sanchez created a subsection of the gang, known in the Bloods as a "set," in Fayetteville called "9 Tre." During Sanchez's time studying at FTCC, Defendant approached Sanchez and asked if he could join the Bloods gang. Sanchez called a "higher authorit[y]" in the gang and received permission to initiate Defendant into the Bloods.

On cross-examination from Defendant's counsel, Sanchez testified he had to vouch for Defendant before he could be initiated into the gang with the rank of "soldier." Sanchez and Defendant were the only two members of the "9 Tre" set of the Bloods. Sanchez also admitted on cross-examination that an envoy of the Bloods was coming from New York City to Raleigh and Fayetteville on 27 May 2011 to discuss the lack of growth in Sanchez's "set." Sanchez was not able to attend the meeting because he had to work.

On 28 May 2011, Sanchez returned home at approximately 4:00 a.m. from his job at Smithfield Packing Co. in Tarheel, North Carolina. At the time, Sanchez was living in a trailer park located at 5608 Summerwind Drive in Fayetteville. Sanchez went to bed as soon as he returned home, and slept. Between 8:00 a.m. and 9:00 a.m., Sanchez was awoken by Mike Thompson ("Thompson"), a neighbor, who told Sanchez he was cooking breakfast, and Sanchez should come over. Sanchez told Thompson he would come over, but first wanted to get ready and brush his teeth.

A few minutes later, Defendant knocked on Sanchez's door. Defendant invited him inside. Sanchez testified he noticed another man accompanying Defendant, who Defendant identified as his "cousin." Sanchez told Defendant to "tell [his] cousin to come in." Sanchez, Defendant, and Defendant's cousin began to talk. Sanchez gave Defendant's cousin a high five and, after noticing he was wearing a red shirt, asked

if he was also a member of the Bloods gang. Defendant's cousin indicated he was not. Sanchez began talking to Defendant.

Sanchez was tired after work and due to his truncated sleep schedule, he sat in the lone chair in his living room as he and Defendant spoke. Defendant was standing on Sanchez's left side, and Defendant's cousin was standing on Sanchez's right side. Sanchez was talking to Defendant, with his head was turned to the left towards Defendant and away from Defendant's cousin. Sanchez and Defendant were "talking and I'm looking at [Defendant], you know, just talking and all I feel is a push and then I fly off the chair onto the carpet. Then I throw up and just laid there." Sanchez testified before he felt "the push," he was looking directly at Defendant, and Defendant's facial expression did not change nor did he say anything to Sanchez.

Sanchez testified he initially believed he had been hit on the head with something with "a lot of force." Sanchez had fallen onto his right side with his face down, and was looking at the carpet while pretending to be dead. Sanchez further testified that his ears were ringing, but he heard "a bunch of footstep[s]" as Defendant and his cousin moved about the trailer, and eventually into his bedroom.

Sanchez testified Defendant and his cousin were in his trailer for a total of approximately 15 minutes. At some point, Sanchez "heard the birds," indicating to him the front door had been opened and Defendant and his "cousin" had left. Defendant did not check on or render aid to Sanchez at any point.

After Defendant and his cousin left, Sanchez flipped himself onto his back. He reached his hand on the back of his head and saw "a lot of blood" on his hand. Sanchez realized he had been wounded in the head. Sanchez could not move, and began screaming for help. Sanchez testified he owned a gun, and the gun was present in his trailer before Defendant and his cousin's visit, but was missing after their visit. Sanchez also testified he had stored Defendant's phone number in his cellphone as "P."

Dwight Lewis ("Lewis") lived down the street from Sanchez. On 28 May 2011, Lewis was walking towards his trailer from his friend's trailer. As he walked down the street, he heard someone saying "help me. Help me." Lewis went back to his trailer. He recounted the event to his grandmother, who mentioned she had heard a shot earlier. With this information, Lewis decided to "make sure everything was all right (sic)."

Lewis went into Sanchez's trailer and discovered him lying on the carpet with blood on his head. Sanchez asked Lewis to retrieve his neighbor, Thompson, which he did. When Thompson arrived, Sanchez stated "it was [Defendant]" who shot him. Sanchez testified he identified Defendant "because I didn't know the other guy [sic] name, his cousin. I didn't know his cousin name." Thomas called 911.

Cumberland County Deputy Sheriff Derek Feely ("Deputy Feely") was patrolling as a "road deputy" on 28 May 2011, responding to calls and emergencies.

Around 11:00 a.m., Deputy Feely was dispatched to 5608 Summerwind Drive. Dispatch advised Deputy Feely of a live victim with a gunshot wound to the head.

When Deputy Feely arrived, he observed the injury to Sanchez, and began asking him questions, while waiting for emergency medical services to arrive. Sanchez advised Deputy Feely he could not move his extremities and gave a description of his shooter. Sanchez described his shooter as a "dark skinned black male with short hair, red shirt, black pants and about five foot seven." Sanchez was transported to the Cape Fear Valley Medical Center for treatment.

The State and Defendant stipulated to, among others, the following facts: (1) Sanchez received medical care at the Cape Fear Valley Medical Center from 28 May 2011 until his discharge on 20 June 2011; (2) Sanchez "received a single gunshot wound that entered the back of his head on the right near the base of his skull, tracked along the border of his neck, crossed the midline and ended up in his left chest;" and (3) "as a proximate result of the gunshot wound, [Sanchez] suffered several injuries, some of them being cervical spine fractures, spinal cord injury and shock and paraplegic."

Cumberland County Sheriff's Sergeant Adam Bean ("Sergeant Bean"), responded to 5608 Summerwind Drive and assisted Deputy Feely. After arriving on scene, Sergeant Bean located Sanchez's phone. Sergeant Bean looked at the last call received by Sanchez, and noticed a call was received at 9:47 a.m. on 28 May 2011

from a number stored in Sanchez's phone as "P." Sergeant Bean spoke to Sanchez, who told him Defendant and a man Defendant had identified as his cousin, came to his home on the morning of 28 May 2011.

In an attempt to locate Defendant, Sergeant Bean reviewed several of his known addresses. Sergeant Bean contacted the Charlotte Mecklenburg Police Department ("CMPD") to check a Charlotte address listed for Defendant. CMPD located Defendant at his Charlotte address, and Sergeant Bean set up an interview with Defendant in Charlotte for 28 June 2011.

At the interview, Defendant told Sergeant Bean he had received an unemployment check and used the money to spend time in Myrtle Beach, South Carolina. Defendant represented to Sergeant Bean he was in Myrtle Beach on 28 May 2011. Defendant told Sergeant Bean he was aware Sanchez had been shot. Sergeant Bean's interview of Defendant was recorded, and a transcript was made. A CD containing a copy of the interview was offered into evidence by the State without Defendant's objection.

On 30 January 2012, Defendant was indicted for attempted first-degree murder, assault with a deadly weapon with the intent to kill inflicting serious injury, and conspiracy to commit first-degree murder. Defendant's case was tried before a jury on 17 March 2014. At the close of State's evidence, the State dismissed the third

count of the indictment, conspiracy to commit first-degree murder. Defendant moved to dismiss the two remaining charges, both of which were denied.

During the charge conference, the State requested the trial court instruct the jury on attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury under a theory of aiding and abetting. Defendant agreed aiding and abetting was the proper instruction. The trial court instructed the jury on the agreed upon instruction.

During deliberations, the jury sent four questions to the judge. The second question asked whether the jury was "allowed to listen to the audio of the interview done by Detective Bean in Charlotte with [Defendant]." While outside the presence of the jury, the State, Defendant, and the court discussed whether to: (1) redact inadmissible portions of the tape and allow the jury to listen to the admissible portions; (2) read the admissible portions of the transcript of the interview to the jury in open court; or (3) to deny the request. The State advised the court N.C. Gen. Stat. § 15A-1233 provides the trial court with discretion in making the decision.

After reviewing the statute and conferring with the State and Defendant, the trial court stated "I will not exercise my discretion with regard to allowing [the jury] to hear that audio of the interview." The jury was then conducted to the courtroom and informed of the court's decision.

On 21 March 2014, Defendant was found guilty of attempted first-degree murder and assault with a deadly weapon with the intent to kill inflicting serious injury. Following the guilty verdict, Defendant made a motion to arrest judgment on the charge of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant argued consecutive sentences for two crimes arising out of a single act violated the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. The trial court denied the motion.

On the charge of attempted first-degree murder, the trial court sentenced Defendant to a minimum term of 157 months and a maximum of 198 months imprisonment. On the charge of assault with a deadly weapon with the intent to kill inflicting serious injury, the trial court sentenced Defendant to a minimum of 73 months and a maximum of 97 months imprisonment, to begin consecutively at the expiration of the sentence imposed on Defendant's conviction for attempted first-degree murder.

Defendant gave notice of appeal in open court.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to dismiss the charges at the close of State's evidence; (2) sentencing him consecutively for attempted murder and assault with a deadly weapon with the intent to kill inflicting serious injury when the two charges arose from a single act; (3) not allowing the jury

to review Defendant's recorded interview with Sergeant Bean conducted in Charlotte; and (4) repeatedly admitting evidence regarding Defendant's membership in the "Bloods" gang. We discuss Defendant's arguments *seriatim*.

III. Motion to Dismiss

Defendant argues the trial court erred by denying his motion to dismiss. He claims the evidence of Defendant's involvement in the attempted murder of Sanchez was insufficient to be presented to the jury. We disagree.

A. Standard of Review

This Court reviews the denial of a motion to dismiss in a criminal trial *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). Upon a defendant's motion for dismissal due to insufficient evidence, "the question for the Court is 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's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Nicholson*, 355 N.C. 1, 51, 558 S.E.2d 109, 143 (2002) (citations omitted). All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in

the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192-93, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Additionally, circumstantial evidence may be sufficient for the State to withstand a motion to dismiss when "a reasonable inference of defendant's guilt may be drawn from the circumstances." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citations and quotations omitted). If so, it is the jury's duty to determine whether the defendant is actually guilty. *Id.*

B. Analysis

Defendant was charged with attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury under a theory of aiding and abetting. Under such theory, the State must present 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), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997).

"As a general rule, an accused must aid or actively encourage the person committing the crime or communicate in some way his intent to help the principal[.]" *State v. Walker*, 167 N.C. App. 110, 132, 605 S.E.2d 647, 662 (2004), *vacated on other grounds*, 361 N.C. 160, 695 S.E.2d 750 (2006). Normally, "[m]ere presence at the

crime scene is insufficient to support a finding that a person is an aider and abettor; there must be some evidence tending to show that the alleged aider and abettor by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary." *State v. Penland*, 343 N.C. 634, 650, 472 S.E.2d 734, 743 (1996) (citations and quotation marks omitted). However, "when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement." *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999).

"In ruling on a motion to dismiss in the context of aiding and abetting, the court may also (1) infer a defendant's communication of his intent to aid from his actions and from his relationship to the actual perpetrators; (2) consider his motives to assist in the crime; and (3) consider the defendant's conduct before and after the crime." *Walker*, 167 N.C. App. at 132, 605 S.E.2d at 662.

Reviewed in the light most favorable to the State, sufficient evidence supports the trial court's denial of Defendant's motion to dismiss and to support Defendant's conviction of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury under the aiding and abetting theory of criminal

liability. The evidence presented was also sufficient to establish Defendant was a "friend of the perpetrator." *Goode*, 350 N.C. at 260, 512 S.E.2d at 422.

The State presented evidence tending to show: (1) Defendant was a close friend of Sanchez; (2) Defendant came to Sanchez's trailer on the morning of 28 May 2011; (3) accompanying Defendant was a man Defendant identified and represented was his "cousin;" (4) based upon that representation, Sanchez invited Defendant and the man inside; (5) as Defendant and Sanchez spoke, Sanchez was tired and sat in the lone chair in the trailer; (6) Defendant was on Sanchez left side and Defendant's cousin was on Sanchez's right side; (7) as Defendant and Sanchez spoke, Sanchez's head was turned towards Defendant and away from Defendant's cousin; (8) Defendant's cousin shot Sanchez in the back of the head; (9) Defendant's facial expression did not change as he witnessed Sanchez being shot in the head; (10) Defendant did not attempt to render aid to Sanchez; (11) Defendant and Defendant's cousin walked about the trailer and stole Sanchez's gun before leaving; and (12) when Defendant and his cousin left Sanchez's trailer, Sanchez was lying face down on the floor, having been shot in the back of the head by Defendant's cousin.

This evidence is sufficient to demonstrate Defendant was a "friend of the perpetrator," and that Defendant had knowledge his presence would provide "encouragement and protection" to the shooter. *Goode*, 350 N.C. at 260, 512 S.E.2d at 422. Defendant identified the shooter as his cousin, and the shooter was permitted

to enter into Sanchez's apartment based upon that representation; and Defendant positioned himself such that his cousin would be out of Sanchez's line of sight. A "reasonable inference" of Defendant's guilt may be drawn from his presence in the trailer at the time of the shooting, and that Defendant's presence was "regarded by the perpetrator as. . . encouragement and protection[.]" *Id.*

The evidence is also sufficient to demonstrate Defendant knew the shooter intended to shoot Sanchez in the head, and that he, in fact, assisted the shooter in doing so. Defendant and the shooter arrived at Sanchez's trailer together; Defendant showed no emotion as his "cousin" shot Sanchez in the back of the head; after the shooting, Defendant and Defendant's cousin moved about the trailer and stole Sanchez's gun; and Defendant did not check on or render aid to Sanchez. Viewed in the light most favorable to the State, the evidence presented was sufficient to show Defendant knew the shooter intended to shoot Sanchez. The trial court did not err in denying Defendant's motion to dismiss. Defendant's argument is overruled.

IV. Consecutive Sentences

Defendant argues the trial court erred by sentencing him to consecutive sentences for attempted first-degree murder and assault with a deadly weapon with the intent to kill inflicting serious injury when both crimes arose from a single act. Defendant contends the imposition of consecutive sentences for these offenses is

violative of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. We disagree.

A. Standard of Review

Constitutional issues are reviewed *de novo* on appeal. *State v. Ortiz-Zape*, 367 N.C. 1, 10, 743 S.E.2d 156, 162 (2013). Under a *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008). "If a defendant shows that an error has occurred, the State bears the burden of demonstrating the error was harmless beyond a reasonable doubt." *State v. Barnes*, 226 N.C. App. 318, 320, 741 S.E.2d 457, 460 (2013) (citing N.C. Gen. Stat. § 15A-1443(b)).

B. Analysis

The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989); *see also State v. Murray*, 310 N.C. 541,

547, 313 S.E.2d 523, 528 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988).

State v. Tirado

Defendant contends the trial court erred by imposing consecutive sentences for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. This argument had been squarely addressed and rejected by the Supreme Court of North Carolina in *State v. Tirado*, 358 N.C. 551, 578, 599 S.E.2d 515, 534 (2004), *cert. denied sub nom Queen v. North Carolina*, 544 U.S. 909, 161 L.Ed.2d 285 (2005).

In *Tirado*, our Supreme Court explained the elements of attempted first-degree murder include: "(1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing. *Id.* at 579, 599 S.E.2d at 534 (citing N.C. Gen. Stat. § 14-17). The elements of assault with a deadly weapon with intent to kill inflicting serious injury, however, are: "(1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death." *Id.* at 579, 599 S.E.2d at 534 (citing N.C. Gen. Stat. § 14-32(a)). Our Supreme court in *Tirado* concluded:

> Therefore, assault with a deadly weapon with intent to kill inflicting serious injury requires proof of the use of a deadly weapon, as well as proof of serious injury, neither of which are elements of attempted first-degree murder. *See* [N.C.

> Gen. Stat] §§ 14-17, [14]-32(a). Similarly, attempted first-degree murder includes premeditation and deliberation, which are not elements of assault with a deadly weapon with intent to kill inflicting serious injury. *Id.* Because each offense contains at least one element not included in the other, [Defendant has] not been subjected to double jeopardy.

Tirado, 358 N.C. at 579, 599 S.E.2d at 534. *Tirado* has been followed by later decisions of this Court. *See, e.g.*, *State v. Cousin*, ___ N.C. App. ___, ___, 757 S.E.2d 332, 342-43 (2014).

Defendant contends *Tirado* is inapposite because it "involved multiple assaults on multiple victims," while in the present case, "there was only one assault, a single gunshot, and one victim," Sanchez. Defendant contends *Tirado* should be distinguished on these facts. We do not agree.

"To determine if a single act constitutes one or two offenses, '[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.'" *State v. Boyd*, 154 N.C. App. 302, 310, 572 S.E.2d 192, 197 (2002) (quoting *State v. Sanderson*, 60 N.C. App. 604, 610, 300 S.E.2d 9, 14 (1983), *disc. review denied*, 308 N.C. 679, 304 S.E.2d 759 (1983)).

When the charges are based on "two distinct criminal statutes which require proof of different elements . . ., the punishment of each of these separate offenses by consecutive sentences does not violate the constitutional prohibition against double

jeopardy." *State v. Carter*, 153 N.C. App. 756, 762, 570 S.E.2d 772, 776 (2002) (quoting *State v. Evans*, 125 N.C. App. 301, 304, 480 S.E.2d 435, 436, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997)).

Here, Defendant was tried and convicted of two distinct criminal offenses which required proof by the State of different elements. *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534. Consecutive sentences for two crimes with different elements, which arise out of a single act, do not violate the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. *Carter*, 153 N.C. App. at 762, 570 S.E.2d at 776.

This Court has no authority to overrule decisions of the Supreme Court of North Carolina. *See Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (holding the Court of Appeals has a "responsibility to follow" decisions of the Supreme Court of North Carolina, "until otherwise ordered" by our Supreme Court). Likewise, a subsequent panel of this Court has no authority to overrule a previous panel on the same issue. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Our Supreme Court's holding in *Tirado* and this Court's ruling in *Cousin* and *Carter* hold that consecutive sentences for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising out of a single act do not violate the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534; *Cousin*,

___ N.C. App. at ___, 757 S.E.2d at 342-43; *Carter*, 153 N.C. App. at 762, 570 S.E.2d at 776. Defendant's argument is overruled.

V. Jury's Access to Defendant's Recorded Statements

Defendant argues the trial court erred by failing to allow the jury to review or listen to Defendant's recorded interview between Sergeant Bean and Defendant in Charlotte. We disagree.

A. Standard of Review

We review an alleged violation of N.C. Gen. Stat. § 15A-1233(a) for an abuse of discretion. *See State v. Long*, 196 N.C. App. 22, 27, 674 S.E.2d 696, 699 (2009). An abuse of discretion results where "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

B. Analysis

Defendant failed to object to the trial court's denial of the jury's request to review or listen to Defendant's recorded interview with Sergeant Bean. Both Defendant and the State agree this argument is reviewable for plain error. *See generally State v. Turner*, ___ N.C. App. ___, ___, 765 S.E.2d 77, 81 (2014) (noting "this Court reviews unpreserved. . . evidentiary issues for plain error."). However, this court had held when a defendant "failed to object regarding N.C. Gen. Stat. § 15A-1233(a) at trial, his argument is nonetheless preserved for appeal." *State v. Long*,

196 N.C. App. 22, 25, 674 S.E.2d 696, 698 (2009) (citation omitted); *see also State v. Ashe*, 314 N.C. 28, 40, 331 S.E.2d 652, 659 (1985) (citation omitted) ("[W]e have held that although failure to object to introduction of evidence ordinarily waives the right to complain about it on appeal, where the particular evidence sought to be offered is specifically rendered incompetent by statute it is the duty of the trial court to exclude it *sua sponte*. Its failure to do so may on appeal be held reversible error notwithstanding defendant's failure to object at trial.").

Notwithstanding Defendant's failure to object to the trial court's refusal to allow the jury to review the requested evidence, we review this argument under the standard for abuse of discretion. *Ashe*, 314 N.C. at 40, 331 S.E.2d at 659; *Long*, 196 N.C. App. at 25, 674 S.E.2d at 698.

During deliberations, the jury sent four questions to the judge. The second question asked whether the jury was "allowed to listen to the audio of the interview done by [Sergeant] Bean in Charlotte with [Defendant]." While outside the presence of the jury, the State, Defendant, and the court discussed possible options, including redacting the inadmissible portions of the tape, and reading the relevant portions to the jury in open court. The court, citing N.C. Gen. Stat. § 15A-1233, stated "I will not exercise my discretion with regard to allowing [the jury] to hear that audio of the interview." The jury was then conducted to the courtroom and informed of the court's decision.

N.C. Gen. Stat. § 15A-1233(a) provides:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge *in his discretion*, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. *In his discretion* the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat § 15A-1233 (2013) (emphasis supplied).

To comply with N.C. Gen. Stat. § 15A-1233,

> a court must exercise its discretion in determining whether or not to permit the jury to examine the evidence. A court does not exercise its discretion when it believes it has no discretion or acts as a matter of law. However, when a trial court assigns no reason for a ruling which is to be made as a matter of discretion, the reviewing court on appeal presumes that the trial court exercised its discretion.

State v. Maness, 363 N.C. 261, 278, 677 S.E.2d 796, 807 (2009) (citations omitted).

Here, it is clear the trial court exercised its discretion by declining to allow the jury to review or listen to the recording of Defendant's interview with Sergeant Bean. The trial judge recognized the decision rested within his discretion, and exercised that discretion to deny the jury's request. Defendant has failed to show, and we do not find, the trial court's decision was "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Defendant's argument is overruled.

VI. Evidence of Defendant's Gang Membership

Defendant argues the trial court committed plain error by repeatedly admitting evidence regarding Defendant's membership in the Bloods gang. Defendant contends Sanchez and Thompson testified regarding his gang affiliation, the admission of such evidence was irrelevant and prejudicial, and its admission rises to the level of plain error. We disagree.

A. Standard of Review

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). "Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2013). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2013).

"[T]his Court reviews unpreserved. . . evidentiary issues for plain error." *Turner*, ___ N.C. App. at ___, 765 S.E.2d at 81 (citing *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012)).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire

> record, the error "had a probable impact on the jury's finding that the defendant was guilty."

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

B. Analysis

Sanchez provided testimony on direct examination regarding Defendant's membership in the Bloods gang. Sanchez testified Defendant approached him while both were students at FTCC and asked to be inducted into the Bloods gang. Sanchez further testified he called a "higher authorit[y]" in the Bloods gang, vouched for Defendant, and admitted him into the gang.

On cross-examination, Sanchez was extensively questioned by Defendant regarding his and Defendant's membership in the Bloods gang. Sanchez's testimony on cross-examination revealed, *inter alia*: (1) Sanchez was 14 or 15 when he joined the Bloods gang; (2) Sanchez had "burns" or "brands" on his arm to signify his membership in the Bloods; (3) Defendant asked Sanchez about joining the Bloods gang during their time as students at FTTC; (4) Sanchez called a "higher authorit[y]" Blood member in New York to get permission to initiate Defendant into the gang's "set" in North Carolina; (5) Sanchez vouched for Defendant to the higher up Blood members so he could be accepted into the gang; (6) Defendant began his membership in the Bloods as a rank of "soldier;" and (7) Sanchez had not added additional members to the 9 Tre set since initiating Defendant into the gang.

Thompson did not provide any testimony regarding Defendant's gang affiliation on direct examination. On cross-examination by Defendant, Thompson testified, *inter alia*: (1) Sanchez was a member of the Bloods in the 9 Tre set; and (2) Thompson was also a member of the Bloods in another set, named "Sex, Money, Murder." Thompson did not provide any testimony regarding Defendant's gang membership.

1. Invited Error

Pursuant to N.C. Gen. Stat. § 15A-1443(c), "[a] defendant is not prejudiced by . . . error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2013). As a result, "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 142 (2002). Statements "elicited by a defendant on cross-examination are, if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) (citing *State v. Greene*, 324 N.C. 1, 11, 376 S.E.2d 430, 437 (1989), *vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990)); *see also State v. Chatman*, 308 N.C. 169, 177, 301 S.E.2d 71, 76 (1983) (holding that the defendant could not assign error to testimony elicited during defense counsel's cross-examination of the State's witness).

Testimony elicited by Defendant on cross-examination of Sanchez and Thompson regarding their and Defendant's membership in the Bloods gang, if error, constitutes invited error for which Defendant has waived all appellate review. *Gobal*, 186 N.C. App. at 319, 651 S.E.2d at 287. This waiver includes plain error review. *Id.*

2. Prejudice

Defendant has failed to show prejudice arising from testimony not elicited by his own cross-examination tending to show Defendant's membership in the Bloods gang. The same evidence admitted during Sanchez's direct examination was elicited by, and admitted during, Sanchez's and Thomas' cross-examination by Defendant.

Presuming testimony regarding Defendant's gang membership on direct examination by the State was error, Defendant elicited identical, and additional, testimony regarding his gang membership on cross-examination. Defendant has failed to show the court's allowance of testimony concerning his membership in the Bloods gang during direct examination was a "fundamental error" that "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and quotation marks omitted). This assignment of error is overruled.

VII. Conclusion

The State presented substantial evidence of each element of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious

injury under a theory of aiding and abetting. The trial court did not err in denying Defendant's motion to dismiss.

The trial court did not err in sentencing Defendant to consecutive sentences for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury under a theory of aiding and abetting. *Tirado*, 358 N.C. at 579, 599 S.E.2d at 534; *Cousin*, ___ N.C. App. at ___, 757 S.E.2d at 342-43; *Carter*, 153 N.C. App. at 762, 570 S.E.2d at 776.

Defendant has failed to show the trial court abused its discretion in declining to allow the jury to listen to or review the transcript of Defendant's interview with Sergeant Bean.

The trial court did not commit plain error in admitting evidence of Defendant's membership in the Bloods gang. Defendant waived any objection after he elicited identical testimony on cross-examination. Defendant received a fair trial, free from errors he preserved and argued. We find no error in Defendant's conviction or the judgment entered thereon.

NO ERROR.

Judges McCULLOUGH and DIETZ concur.

Report per Rule 30(e).