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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-12

Filed: 5 January 2016

Union County, No. 13 CRS 50434

STATE OF NORTH CAROLINA

v.

JADARRIUS DUNTAVIAS WILLIAMS, Defendant.

Appeal by Defendant from judgment entered 23 July 2014 by Judge Julia L. Gullett in Union County Superior Court. Heard in the Court of Appeals 10 September 2015.

Attorney General Roy Cooper, by Associate Attorney General Alexander Walton, for the State.

Richard J. Costanza, for Defendant-Appellant.

HUNTER, JR. Robert N., Judge.

Jadarrius Williams ("Defendant") appeals following a jury verdict convicting him of robbery with a dangerous weapon in which he received a sentence of 64 to 89 months imprisonment. Defendant contends the trial court violated his right to a unanimous jury verdict under N.C. Const. art. I, § 24, by giving a disjunctive jury instruction. Defendant argues the instruction presented two theories of guilt: (1) Defendant satisfied the elements of armed robbery himself; and (2) Defendant acted

in concert to commit an armed robbery. Defendant contends the first theory is error because there is no evidence that he stole any personal property during the robbery. Defendant contends the second theory is error because it is only supported by evidence that he joined in a common purpose to commit an armed robbery. We disagree.

I. Factual and Procedural History

On 1 April 2013, a Union County grand jury indicted Defendant for robbery with a dangerous weapon ("armed robbery"). Defendant pled not guilty and the case was called for trial on 21 July 2014. At trial, the State's evidence tended to show the following.

Zayne Johnson ("Johnson"), age 18 at the time of the trial, testified he was a new student at Sun Valley High School on 30 January 2013. On that day, Johnson decided to skip school to "play Frisbee golf or something" with his "buddy" Connor Jones ("Connor").

Johnson's other friend and classmate, Keith Gaines ("Gaines") text messaged Johnson, asking Johnson to pick him up so they could "go smoke some weed after school . . . ." Johnson declined, and stayed home at his mother's house with the garage door open, waiting for Connor to come over.

Johnson described the events at his mother's house: "I was just sitting there, just made some food . . . [Defendant] came in first [through the attached garage] with

a gun, and before I could do anything, it was already pointed at me, and behind him" came Kyle Holt ("Holt"). Defendant came into the house and threw Johnson's dog outside and locked the back door. Johnson continued:

> And [Defendant] told me to get up and go to the bathroom; so I went to the bathroom, and he went in the bathroom with me with the gun at my temple pointed at me the whole time . . . [and] he closed the door. So it was just me and him and I could hear [Holt] running around the house . . . slamming stuff and moving stuff trying to find whatever he could.

Defendant told Holt to hurry up and six minutes later Holt came into the bathroom joining Defendant and Johnson. Johnson described the crowded bathroom:

> I was sitting on the toilet seat with the toilet seat down, and [Holt] came in . . . and started walking real close and told [Defendant] to cock the gun. And [Holt] tried to swing at me and I kind of ducked and we fought for a little bit and tussled and took me to the ground, and that's when [Defendant] pistol whipped me. . . . [Holt] just kind of picked me up and sat me on the couch. And then [Holt] left my house, and [Defendant] was still in there looking for the piece to his gun because he saw he broke it . . . . And I kind of backed up towards the fireplace . . . . And before he left, he pointed the gun at me for like . . . five seconds or something, just looking at me pointing the gun and didn't say nothing, and then he left.

These events lasted ten minutes.

Johnson went outside, retrieved his dog, and found Connor standing in the driveway. Johnson called the police and his mother using Connor's cell phone because Defendant and Holt took his phone during the robbery.

At trial, the State introduced photographs of Johnson's injuries. The State called Holt as its next witness. Holt was also charged with armed robbery but he did not testify pursuant to a plea agreement. However, Holt acknowledged that in exchange for truthful testimony the State "would possibly try and help" him with his case.

Holt testified he and Defendant were "close friends" and knew each other for five or six years. He also knew Gaines, his cousin. On the morning of 30 January 2013, Holt met with Defendant and Gaines. They hatched a plan to go to Johnson's house to "find something worth money . . . to find something to try and get money for." "The plan was just to go to [Johnson's] house and just get what we could . . . nobody made a statement to go get anything specific." To the contrary, Gaines claimed there was no explicit group discussion, but rather "[Defendant] said he had to stop by somewhere and get some money from somebody."

Defendant drove his mother's burgundy Saturn car to take Gaines and Holt to Johnson's house. Defendant parked the car about one mile from the house and Gaines "went into the house to talk with [Johnson] or try and get some weed and then he came back out and took off walking." When Gaines exited the house he said "if [Defendant and Holt] wanted to go in there [Johnson] might have some weed." Defendant and Holt walked towards the house and carried backpacks with them to

"[p]ut the things in them that [they were] going to get." Defendant carried a chrome .22 caliber revolver with him, in addition to his backpack.

Holt described what happened as they went into the house: "[Defendant] ran in, I was behind him. He ran in and put the gun to [Johnson's] head . . . . And I went to another section of the house and started to grab stuff out of the house." Holt admitted he took a laptop, iPods, a jar of change, and some video game systems and controllers without Johnson's permission. Holt described the altercation inside the home, "[Defendant and Johnson] were tussling and I tried to help [Johnson] off of [Defendant] and just started tussling around with [Johnson] too." Defendant and Holt left the house and walked back towards the car, and opened the trunk. Holt put the stolen property in the trunk, and Defendant added the revolver. Then Defendant realized he lost the car keys and ran to his mother's house with Holt.

Holt stepped down from the witness stand and the State called Gaines as its next witness. Like Holt, Gaines was also charged for the armed robbery and testified without a plea agreement in place. Gaines stated that in exchange for his truthful testimony the State would "help me with my case." Gaines testified to the following:

> I remember [Defendant] told [Holt] to go with him to the . . . house, and I seen . . . when they went to the house [sic], but I stayed in the car. . . . [T]hey got to the house . . . [and I saw Defendant] rush in the garage and . . . I just heard a whole bunch of tumbling in the house. And after that, I seen [Holt] go . . . into the house.

Gaines walked home once he saw Defendant and Holt go into the house. [Following Gaines's testimony, the State called several police officers to testify to the following facts.

After the armed robbery, police went to Johnson's house to investigate. Johnson told them Gaines, Holt, and another "dark skinned black male" were involved in the robbery. Inside the house, police found the broken hammer of Defendant's revolver in the hallway between the bathroom and living room. They found Defendant's mother's burgundy Saturn parked on a nearby street and searched the area around the car. They found a backpack nearby, "just off the roadway." The officers ran the Saturn's license plate number and learned that the car was registered to Clara Williams, Defendant's mother. Shortly thereafter, officers received a call about a disturbance at Clara Williams's home and went there immediately. Officers found Defendant, Gaines, Holt, and Clara Williams at the house. Police took Defendant and Holt to the police station for questioning, and allowed Defendant to ride in the front seat of the police car without handcuffs.

At the station, Holt and Defendant talked to the police. Holt made incriminating statements about the robbery and was arrested. Defendant told the police about his mother's car and the revolver inside the trunk. Based on Defendant's statements, the officers obtained a search warrant for Clara Williams's Saturn and towed the car to the police impound lot. Police searched the car at the lot and found

a black backpack that contained various coins, a broken glass jar, three Nintendo Wii video game controllers, a Wii video game console, an iPod, an HTC cell phone, an Xbox controller, and a chrome .22 caliber revolver with a missing hammer. The broken revolver hammer found inside Johnson's house matched Defendant's revolver. Gaines also talked to police, and was charged for the armed robbery.

After the officers testified, the State called Johnson's mother, Carmen Johnson, as the next witness. Carmen Johnson testified that she was in Florida on business during the robbery, and her son called her right after the robbery using Connor's cell phone. She identified the items recovered from the Saturn's trunk and testified that they belonged to her son. After her testimony, the State rested its case.

The court dismissed the jury for the evening before Defendant made "a motion for a judgment of acquittal." The court denied the motion and recessed early to give Defendant time to think about testifying. Trial resumed the next morning and Defendant chose not to testify. Defendant did not put on any evidence before renewing his motion, which the court denied. The court held the charge conference and the State requested an acting in concert instruction under North Carolina Pattern Jury Instruction Crim. 202.10. Defense counsel objected to the acting in concert instruction, contending:

> [T]his proposed jury instruction broadens the theory propounded . . . by the State, so we are caught unaware and feel prejudiced by this last minute request and proposed theory. . . . [T]he indictment charges [Defendant] as having

> been the one who actually took the property from the victim. I'm now hearing the State suggest that the evidence is not so, that perhaps someone else took the property, and therefore [Defendant] can't be guilty of a clean pure robbery theory. . . . it causes us great undue prejudice.

The court overruled defense counsel's objection and noted it for the record. Afterwards, the court read a list of the proposed instructions and defense counsel preserved the objection again, stating "the Appellate Court is kind of persnickety sometimes on how these things are preserved."

The trial court handed each attorney a copy of the proposed instructions, and gave the attorneys an opportunity to look at them "carefully." The court asked for corrections to the instructions and defense counsel suggested modifying the model conclusion instruction, N.C.P.I.–Crim. 101.35, to read "Should you reach a unanimous verdict" instead of "When you have agreed upon a unanimous verdict . . . ." arguing that it might rise to the level of an *Allen* charge. The court denied the modification and defense counsel made no other objections.

Both attorneys gave closing arguments, and the court charged the jury. The court instructed the jury on the acting in concert doctrine, reading from N.C.P.I.–Crim. 202.10 as follows:

> For the defendant to be guilty of a crime, it is not necessary that the defendant do all the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit robbery with a dangerous weapon, each of them if actually or constructively present is part of the crime. If you find from the evidence beyond a reasonable doubt that

> on or about the alleged date, the defendant acting either by himself or herself, or acting together with other persons, joined in a common purpose to commit robbery with a dangerous weapon, it would be your duty to find the defendant guilty of robbery with a dangerous weapon. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to find the defendant not guilty.

Then the court instructed the jury on the elements of armed robbery. The trial court read from N.C.P.I.–Crim. 217.20 as follows:

> For you to find the defendant guilty of this offense, the State must prove seven things beyond a reasonable doubt. First, that the defendant took property from the person of another or in his presence. Second that the defendant carried away the property. Third, that the person did not voluntarily consent to the taking and carrying away of the property. Fourth, that the defendant knew that he was not entitled to take the property. Fifth, at the time of the taking, the defendant intended to deprive the person of its use permanently. Sixth, that the defendant had a firearm in his possession at the time he obtained the property. And seventh, that the defendant obtained the property by endangering or threatening the life of the person with that firearm.

After the court's charge, the jury began deliberating. The court asked the attorneys if there were any corrections to the jury instructions, and defense counsel preserved the earlier objection to the acting in concert instruction.

Thirteen minutes later, the jury returned a unanimous verdict finding Defendant guilty of robbery with a dangerous weapon The jurors were polled per defense counsel's request, and one-by-one, they confirmed the unanimous guilty verdict. The court dismissed the jurors and held the sentencing hearing.

The court found Defendant to be a prior record level I for the Class D felony. The court imposed a sentence at the top of the presumptive range, 64 to 89 months imprisonment. Defendant entered his oral notice of appeal. The trial court appointed appellate counsel to Defendant that same day, naming the Appellate Defender as counsel of record.

II. Standard of Review

Following settlement of the record, Defendant filed his appellant brief 3 March 2015, seeking review of whether his right to a unanimous jury verdict was violated by the jury instructions. Shortly after Defendant filed his appellant brief, our Supreme Court issued *State v. May*, 368 N.C. 112, 772 S.E.2d 458 (2015), changing the standard of review to be applied in "unanimous jury" issues on appeal.

Under our Supreme Court's precedent in *May*, Defendant's N.C. Const. art. I, § 24 challenge to the acting in concert instruction is not reviewed *de novo*. Instead, we must review it using plain error review. *Id*. at 112, 772 S.E.2d 462–63 ("Nevertheless, because the alleged constitutional error occurred during the trial court's instructions to the jury, we may review for plain error.") (citations omitted).

"[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655,

660, 300 S.E.2d 375, 378 (1983)). "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 (internal quotation marks and citations omitted).

III. Analysis

A. Unanimous Jury Verdict

Article I, Section 24 of the North Carolina Constitution provides, in relevant part, "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . . ." N.C. Const. art. I, § 24. To protect this right, a trial court has "the duty . . . to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989).

A trial court may instruct a jury on multiple theories of guilt. To do so, courts use disjunctive instructions, allowing a jury to impose guilt through alternative theories. Disjunctive instructions *per se* do not violate a defendant's right to a unanimous jury verdict. *State v. Lyons*, 330 N.C. 298, 302–03, 412 S.E.2d 308, 312 (1991) (comparing the *Diaz* and *Hartness* lines of jury instruction case law). Our Supreme Court discusses the acceptable use of disjunctive instructions in two seminal

cases: *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), and *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990).

In *Diaz*, our Supreme Court identified when disjunctive instructions violate jury unanimity. *Diaz*, 317 N.C. at 554, 346 S.E.2d at 494. The *Diaz* jury was instructed they could convict the defendant of trafficking in marijuana if they found he committed "either or both" of the underlying criminal acts presented in the instruction: that he knowingly possessed, or knowingly transported marijuana. *Id*. Knowing possession and knowing transportation of marijuana are separate trafficking offenses of their own, "for which a defendant may be separately convicted and punished." *Id*. Our Supreme Court held it was impossible to determine if the jury unanimously found possession or unanimously found transportation. *Id*. Therefore, the verdict violated unanimity because some jurors could find possession and others transportation. *Id*. Our Supreme Court held this issue was "fatally ambiguous" and violated N.C. Const. art. I, § 24. *Id*.

In contrast to *Diaz*, the *Hartness* Court held that jury unanimity is satisfied when a disjunctive instruction presents the elements of a crime, instead of presenting two separate crimes. *Hartness*, 326 N.C. at 564, 391 S.E.2d at 179. The trial court in *Hartness* instructed jurors on the elements of taking indecent liberties with a minor, stating, "[a]n indecent liberty is an immoral, improper or indecent touching or act by the defendant upon the child." *Id*. at 563, 391 S.E.2d at 178. These actions,

listed as elements of the overall offense, did not pose "discrete criminal activities" like possession and transportation in *Diaz*. *Id*. at 564, 391 S.E.2d at 179. The indecent liberties statute, N.C. Gen. Stat. § 14-202, prohibited "any immoral, improper, or indecent liberties," the jurors did not have to unanimously find a certain sexual act. *Id*. at 565, 391 S.E.2d at 179. Rather, each juror could find the defendant committed some proscribed act under section 14-202, and the jury would unanimously find the defendant violated the statue. *Id*. ("Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of 'any immoral, improper, or indecent liberties.' Such a finding would be sufficient to establish the first element of the crime charged."). Consequently, our Supreme Court held the instruction did not violate the constitutional right to a unanimous jury verdict.

In *State v. Surrett*, our Court expanded *Hartness* to allow disjunctive instructions for multiple theories of guilt. *State v. Surrett*, 217 N.C. App. 89, 719 S.E.2d 120 (2011). In *Surrett*, the trial court's disjunctive instruction allowed the jury to convict the defendant of second-degree burglary through three theories: accessory before the fact, aiding and abetting, and acting in concert. *Id*. at 93, 719 S.E.2d at 123. This Court held disjunctive theories of guilt were permissible, like the disjunctive elements in *Hartness*, because the theories were not separate crimes that

the defendant could be convicted of and punished for. *Id.* at 96, 719 S.E.2d at 125. Therefore, disjunctive theories of guilt that are supported by the evidence and properly delivered to the jury do not violate N.C. Const. art. I, § 24.

Defendant argues that the trial court's instructions presented two theories of guilt for armed robbery: (1) Defendant "personally satisfied the traditional armed robbery elements," and (2) Defendant acted in concert with Holt to commit armed robbery. Without deciding if the court's instructions actually posed two distinct theories, we review Defendant's contention.

Armed robbery is a statutory crime composed of three elements: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened. *State v. Calderon*, ___ N.C. App. ___, ___, 774 S.E.2d 398, 406 (2015) (citations and quotation marks omitted); *see also* N.C. Gen. Stat. § 14-87(a). Generally, a defendant may be found guilty of armed robbery if the State proves seven things beyond a reasonable doubt: (1) the defendant took property from the person of another or in his presence; (2) the defendant carried away the property; (3) the person did not voluntarily consent to the taking and carrying away of the property; (4) the defendant knew he was not entitled to take the property; (5) at the time of taking the defendant intended to deprive that person of its use permanently; (6) the defendant had a firearm in his

possession at the time he obtained the property, or it reasonably appeared to the victim that a firearm was being used; and (7) the defendant obtained the property by endangering or threatening the life of that person, or another, with the firearm. N.C.P.I.—Crim. 217.20; *see also Calderon*, ___ N.C. App. at ___, 774 S.E.2d at 403. However, the State does not need to prove a defendant individually satisfied each element if guilt is premised on an acting in concert theory.

Our Supreme Court defined the acting in concert doctrine as follows:

> If two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal of the crime if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose or as a natural or probable consequence thereof.

State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (citations and quotation marks omitted). This doctrine "need not be overlaid with technicalities. It is based on the common meaning of the phrase 'concerted action' or 'acting in concert.' To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979) (citing Webster's Third New International Dictionary 470 (1971)). "These terms mean the same in the law of crimes as they do in ordinary parlance." *Id.*

The State must prove two elements for an acting in concert theory: (1) the defendant was present at the scene of the crime; and (2) the defendant acted together

with another person who committed the necessary acts to constitute the crime, pursuant to a common plan or purpose. *State v. Jackson*, 215 N.C. App. 339, 345, 716 S.E.2d 61, 66 (2011) (citation omitted). Acting in concert is not a separate offense since a defendant cannot be convicted and punished separately for it. *See Surrett*, 217 N.C. App. at 98, 719 S.E.2d at 127; *Cf. Diaz*, 317 N.C. 545, 346 S.E.2d 488. Rather, acting in concert is theory of guilt, and it is not necessary for the defendant "to do any particular act constituting at least part of a crime in order to be convicted of that crime . . . ." *Joyner*, 297 N.C. at 357, 255 S.E.2d at 395.

The evidence in the record sufficiently shows Defendant was present at the scene of the armed robbery, Johnson's house. Johnson and Holt testified to Defendant's actions inside the home, which the State substantiated with evidence of Johnson's injuries and the broken revolver hammer. Additional evidence illustrated Defendant's and Holt's actions following the robbery, collectively stashing the revolver and stolen property, and fleeing to Clara Williams's house. Therefore, we disagree with Defendant's contention that the acting in concert instruction is only based on evidence of a common plan or purpose.

Our Supreme Court held a common plan or purpose may "be shown by circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto." *State v. Westbrook*, 279 N.C. 18, 42, 181 S.E.2d 572, 586 (1971), *death penalty vacated sub nom*, *Westbrook v. North Carolina*, 408 U.S. 939 (1972).

"The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *State v. Sanders*, 288 N.C. 285, 290–91, 218 S.E.2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976) (citation omitted).

In the case *sub judice*, testimony at trial established Defendant discussed, if not planned, the armed robbery with Holt and Gaines before driving to Johnson's home. Uncontroverted evidence demonstrates Defendant and Holt entered Johnson's home, Defendant pistol whipped and held Johnson at gunpoint, and Holt took Johnson's belongings without authorization. Defendant and Holt returned to Clara Williams's car, stashed the revolver and stolen property in the trunk, fled on foot to Clara Williams's house, and later made incriminating statements about their joint participation in the armed robbery. Therefore, sufficient evidence supports the second element of acting in concert, showing a common plan or purpose between Defendant and Holt to commit armed robbery.

The trial court's jury charge properly presented the elements of armed robbery and acting in concert, not separate criminal acts. Therefore, the instruction could not cause a fatally ambiguous jury verdict. As juror polling revealed, each juror found Defendant guilty of armed robbery under an appropriate theory of guilt. Thus,

Defendant's N.C. Const. art. I, § 24, right was not violated, and the trial court did not commit error, much less plain error.

IV. Conclusion

For the foregoing reasons we hold there is

NO ERROR.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).