IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-350

Filed: 6 September 2016

Alamance County, Nos. 09 CRS 7503, 55361

STATE OF NORTH CAROLINA

v.

ROBERT DENNIS DIXON

Appeal by defendant from judgments entered 21 November 2013 by Judge W. Osmond Smith, III, in Alamance County Superior Court. Heard in the Court of Appeals 10 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

CALABRIA, Judge.

Robert Dennis Dixon ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of first-degree murder with malice, premeditation, and deliberation under a theory of aiding and abetting; first-degree murder pursuant to the felony murder rule, with the underlying felony of first-degree burglary; first-degree burglary under a theory of aiding and abetting; and conspiracy to commit first-degree murder. Defendant's sole argument on appeal is that he is entitled to a new trial because the trial court refused to give an instruction on solicitation to commit

murder as a lesser included offense of first-degree murder pursuant to a theory of aiding and abetting. The trial court did not err in declining to instruct the jury on solicitation to commit murder.

I. Background

In 1987, defendant's father, Cardwell Dixon ("Cardwell") married Sara Dixon ("Sara"), six months after defendant's mother passed away. Cardwell owned a 41-acre piece of property ("the property"), and built a home where he and Sara lived ("2033 McCray Road"). Cardwell also helped defendant purchase a home, and allowed him to place his home on the property.

In 2004, Cardwell suffered a series of strokes, developed dementia, and moved into Alamance Health Care ("AHC"), a nursing facility. In 2005, Cardwell was declared incompetent, and Sara was appointed guardian of the person. Nelson Richardson ("Richardson"), an attorney, handled Cardwell's estate, which included two rental homes, a number of outbuildings, an airplane landing strip, two small hangars, a cabin, a Cessna airplane, a boat, and an old steel Leonard storage building.

Cardwell's monthly expenses at AHC were approximately $6,000, causing a $4,200 deficit each month. Defendant resented this depletion of the estate's assets because Sara placed Cardwell at AHC rather than caring for him at home. Defendant believed that Sara should have paid Cardwell's expenses from her personal funds, not from his inheritance.

Tension intensified between defendant and Sara following the sale of Cardwell's two rental properties, and defendant's inability to secure a loan to purchase a small portion of the property where his home was located. Defendant believed that Cardwell's estate, excluding 2033 McCray Road, was his inheritance, and that he should not have to purchase the land where his home was located. Defendant threatened to file a lawsuit to have Richardson removed as guardian. Defendant told Jamie Blaylock ("Blaylock"), Thomas Friday ("Friday"), and a neighbor, that he would pay someone $5,000 to kill Sara.

Approximately two months before Sara's death, defendant asked Friday to arrange Sara's murder, for $10,000, so that defendant would not know the person who was going to kill Sara. Friday hired Matthew Fields ("Fields") to kill Sara. Defendant also provided Friday with a detailed map of Sara's residence that included the locations of the motion sensor lights, how to evade them, and instructions regarding how to exit the property following the murder.

Following the agreement between defendant and Friday, defendant was contacted by Richardson. Richardson stated that he had to sell the property and the Cessna for Cardwell to be eligible to receive Medicaid, since the funds to pay Cardwell's bills were almost gone. Sara agreed to sell the property and the Cessna. Defendant was still living on the property, and began to worry about where he would live since he would probably be evicted upon the sale of the property. Defendant

responded by indicating his distrust of Sara, and stating that he had "a feeling [that things were] about to get very ugly." Defendant believed that the only assets that should be sold were Sara's vehicle and 2033 McCray Road.

After Sara agreed to sell the property and the Cessna, defendant contacted Friday and instructed him that it was "crunch time." "Crunch time" was the signal to Friday that it was time to carry out Sara's murder. In the days prior to the murder, Friday and Fields exchanged numerous phone calls, and staked out 2033 McCray Road. Friday also exchanged numerous calls with defendant.

On 28 November 2007, Friday and Fields broke into Sara's home at 2033 McCray Road. They eluded the motion sensor lights, and went straight to Sara's bedroom, relying on defendant's map. Fields shot Sara twice with a 9mm Makarov pistol loaded with .380 ammunition, and silenced with shop towels. When Friday and Fields left 2033 McCray Road, they took a wrong turn and drove Friday's truck into a large dip in the road, rendering the truck incapable of being driven. Friday and Fields then ran to defendant's house, where they asked defendant to drive them to Gibsonville to pick up Friday's car-hauler. During the drive to Gibsonville, Friday informed defendant that Sara had been murdered, and that he had witnessed the event. Defendant paid Friday $2,000 cash, and an additional $1,500. Once law enforcement investigated defendant about Sara's death, no further funds were paid to Friday.

Two days later, on 30 November 2007, Sara's neighbors discovered her body. She was lying in her bed, and had suffered two gunshot wounds, one to her left eye and one to her left ear. The .380 caliber bullets found in her head and on her pillow were tested, and were consistent with having been fired from a 9mm Makarov. Defendant was arrested and indicted for first-degree murder with malice, premeditation and deliberation; felony conspiracy to commit first-degree murder; and solicitation to commit first-degree murder. He was later also indicted for first-degree burglary.

At trial in Alamance County Superior Court, defendant requested that the jury be instructed on the charge of solicitation of murder, contending that this constituted a lesser included offense of first-degree murder based upon a theory of aiding and abetting. The trial court denied this request.

The jury returned a verdict finding defendant guilty of first-degree premeditated murder, under a theory of aiding and abetting; first-degree murder pursuant to the felony murder rule, with the underlying felony of first-degree burglary; conspiracy to commit murder; and first-degree burglary under a theory of aiding and abetting. The jury also found aggravating and mitigating circumstances. The trial court sentenced defendant to life imprisonment without parole.

Defendant appeals.

II. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

III. Analysis

In his sole argument on appeal, defendant contends that the trial court erred in denying his request for an instruction on the lesser included offense of solicitation to commit murder. We disagree.

Defendant was found guilty of first-degree murder on the basis of malice, premeditation, and deliberation under a theory of aiding and abetting; first-degree murder pursuant to the felony murder rule, with the underlying felony of first-degree burglary; conspiracy to commit murder; and first-degree burglary under a theory of aiding and abetting. Defendant only challenges the lower court's decision to deny defendant's request for an instruction on solicitation of murder as a lesser included offense of first-degree murder under a theory of aiding and abetting.

"We have previously defined the crime of solicitation as 'counseling, enticing or inducing another to commit a crime.' " *State v. Kemmerlin*, 356 N.C. 446, 475, 573

S.E.2d 870, 890 (2002) (quoting *State v. Furr,* 292 N.C. 711, 720, 235 S.E.2d 193, 199, *cert. denied,* 434 U.S. 924, 54 L.Ed.2d 281 (1977)). "The offense of solicitation is complete with the act of solicitation, even though there never could be acquiescence in the scheme by the one solicited, and even where the solicitation is of no effect." *State v. Tyner*, 50 N.C. App. 206, 207, 272 S.E.2d 626, 627 (1980) (citations omitted).

Our Supreme Court has held that solicitation to commit murder is a lesser included offense of first-degree murder as an accessory before the fact. *State v. Westbrooks*, 345 N.C. 43, 56, 478 S.E.2d 483, 491 (1996). In the instant case, however, the State explicitly did not proceed under a theory of accessory before the fact, but under a theory of aiding and abetting.

"An aider is one who is present at the time and place of the offense and renders aid to the perpetrator, without actually committing the offense. An abettor is one who gives aid and comfort to the perpetrator, or one who commands, advises, instigates or encourages another to commit the offense." *State v. Graham*, 303 N.C. 521, 524, 279 S.E.2d 588, 591 (1981) (citations omitted).

At trial, defendant argued with respect to a solicitation instruction as follows:

> MR. ALFORD: Your Honor, this isn't filed. We're asking for solicitation as a lesser included. It would be a lesser included to aiding and abetting, Your Honor.
>
> THE COURT: Well, aiding and abetting is not an offense. Aiding and abetting is a theory of an offense.
>
> MR. ALFORD: A lesser included of the theory, Your Honor.

THE COURT: So you say solicitation to commit murder is a lesser included offense of murder?

MR. ALFORD: When you're going under aiding and abetting under the idea of recurring, yes, sir.

THE COURT: I'll hear you on your request.

MR. ALFORD: Me, Your Honor?

THE COURT: Yes, sir.

MR. ALFORD: No further evidence. No further argument. We would contend that [solicitation] would be a lesser included offense of the first degree murder.

(Pause in proceedings.)

THE COURT: So if the jury found that the defendant solicited Thomas Friday to commit the murder of Sara Dixon and even though the jury may also find that Thomas Friday did commit the murder of Sara Dixon, that the defendant should be not convicted of anything but the solicitation?

MR. ALFORD: Can you repeat that?

THE COURT: Well, I'm saying, you say it's a lesser included because of a theory of aiding and abetting. That would be like the jury finding he aided and abetted by encouraging, soliciting -- your language soliciting -- Thomas Friday to murder Sara Dixon but leave off that Thomas Friday actually murdered Sara Dixon. Meaning, if the jury -- but there's no evidence to negate that Thomas Friday murdered Sara Dixon or acting with Matthew Fields.

MR. ALFORD: I wouldn't disagree with the Court on that.

The distinction between first-degree murder with premeditation and deliberation on the basis of aiding and abetting, which requires that one "commands, advises, instigates or encourages another to commit the offense[,]"and solicitation, which merely requires "counseling, enticing or inducing another to commit a crime[,]" is that under an aiding and abetting theory of a crime, the State must show that the crime was specifically committed, and under solicitation, the State need only show that the defendant enticed or induced someone to commit a crime, irrespective of whether the crime was ultimately committed.

In order to demonstrate the trial court's error, defendant has the burden of showing that the jury could have returned a verdict finding defendant guilty of the lesser offense, while acquitting him of the greater. *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771. Here, however, that is quite impossible, for the simple reason that the murder was, in fact, committed as a direct result of defendant's solicitation. If the jury found defendant guilty of soliciting a murder *that actually occurred*, he would necessarily be found guilty of aiding and abetting that murder, supporting a conviction for first-degree murder. He could only be acquitted of first-degree murder and convicted of solicitation in the absence of evidence that a murder resulted from his solicitation. In the instant case, the overwhelming evidence at trial showed that defendant enticed Friday to commit the murder, and that Friday in fact did so as a direct result of that enticement.

Defendant's contention on appeal, that he made the serious offer in July of 2007, that the murder was committed in November of 2007, but that no causal link was proven between the two, is absurd. There is no evidence in the record to support any theory of the case other than that defendant offered to pay Friday to murder Sara, Friday murdered Sara, and then defendant paid Friday. There is no evidence in the record that defendant's solicitation of murder was unrelated to Sara's murder. Therefore, there is no evidence that would permit the jury to find defendant guilty of solicitation and acquit him of first-degree murder.

This argument is without merit.

No error.

Judge TYSON concurs.

Judge DAVIS concurs in the result only.

Report per Rule 30(e).