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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-563

Filed: 19 April 2016

Columbus County, No. 11CRS052451, 62

STATE OF NORTH CAROLINA

v.

SHAWN JARMINE MURCHISON, Defendant.

Appeal by defendant from judgments entered 17 December 2014 by Judge Thomas H. Lock in Superior Court, Columbus County. Heard in the Court of Appeals 4 November 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General James D. Concepcion, for the State.

Dunn, Pittman, Skinner, & Cushman, PLLC, by Rudolph A. Ashton, III, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgments convicting him of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon. For the following reasons, we find no error.

I. Background

On 23 July 2011, Dominick Lincoln was driving Mr. James Worley's van; Mr. Worley and defendant were passengers in the van. When Mr. Lincoln approached a

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stop sign he heard shots fired and then saw defendant begin shooting an assault rifle at a black car that pulled up behind the van. During the incident, a girl was shot in the leg.

Defendant was indicted for assault with a deadly weapon inflicting serious injury (“AWDWISI”) and possession of a firearm by a felon. During defendant’s trial one of the charges of discharging a weapon was dismissed. Ultimately, a jury found defendant guilty of AWDWISI and possession of a firearm by a felon. The trial court entered judgment in accordance with the verdicts, and defendant appeals.

II. Telephone Conversation

Defendant first contends that “the trial court erred in allowing the State to introduce the defendant’s recorded jail telephone conversations because they lacked probative value and relevance, and, even if relevant, any probative value was substantially outweighed by prejudice.” (Original in all caps.) “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 (2011) (quotation marks omitted). “Evidence which is not relevant is not admissible.” N.C. Gen. Stat. § 8C-1, Rule 402 (2011). Furthermore, “relevant[] evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2011).

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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. Cowan, 194 N.C. App. 330, 332, 669 S.E.2d 811, 814 (2008) (citation and quotation marks omitted).

As to relevancy, defendant contends the State argued before the trial court that one phone call indicating defendant was in the area of the shooting "amounted to an implied admission that . . . [defendant] was involved in the shooting." Defendant argues "that whether or not he was in the area was not relevant to whether he fired the shot that hit [the girl]. Nor was it relevant to [Mr.] Lincoln's testimony." However, evidence indicating that defendant was in the area of the shooting is relevant to demonstrate whether defendant could possibly have even committed the crimes for which he was charged. The evidence also bolsters Mr. Lincoln's testimony that defendant was the shooter by placing him in the area of the shooting. *See* N.C. Gen. Stat. § 8C-1, Rule 401.

Defendant "further contends that even if relevant, the probative value of the audio jail recordings was substantially outweighed by prejudice" because "the

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‘street talk’ language on the recording was offensive and prejudicially played to the jury.” Defendant does not explain how the jury hearing “street talk” was unfairly prejudicial nor does defendant direct our attention to a specific statement he contends created the prejudice. While we attempt to avoid speculation, we can only logically conclude that defendant is arguing that the jury may have been prejudiced against him from hearing him use offensive language. But we do not believe that the jury’s exposure to “street talk” by defendant resulted in any “unfair prejudice[.]” N.C. Gen. Stat. § 8C-1, Rule 403. The trial court did not err in its relevancy and related determinations; this argument is overruled.¹

III. Motion to Dismiss

Defendant next contends the trial court should have allowed his motion to dismiss the charge of AWDWISI.

The standard of review for a motion to dismiss is well known. A defendant’s motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant’s being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable

¹ Defendant discusses in his reply brief another phone recording that he contends the State interpreted as his attempt to get Mr. Lincoln not to testify, but defendant raised no legal arguments about this conversation in his original brief. Even in his reply brief, defendant contends that Mr. Lincoln’s credibility was crucial; however, defendant’s statements trying to discourage Mr. Lincoln’s testimony do not affect Mr. Lincoln’s credibility. From the record before us, the trial court properly also allowed this recording to be played for the jury.

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inference to be drawn from that evidence. *Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.*

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (emphasis added) (citations and quotation marks omitted).

Defendant does not challenge the substantive elements of the crime but rather asserts

the insufficiency of the evidence goes to the lack of proof that he was the shooter. Of more significance, he contends that even if there was sufficient evidence that he fired a weapon on the evening of July 23, there is no evidence that the weapon . . . he fired caused the injury to

the girl. However, Mr. Lincoln testified that defendant shot a rifle in the area and in the direction of where the girl was; this evidence alone raises a “reasonable inference” that defendant was the shooter who shot the girl, and the trial court properly denied defendant’s motion to dismiss and allowed the jury to decide this issue. *Id.* This argument is overruled.

IV. Jury Instruction

Lastly, defendant contends that “the trial court erred in refusing to instruct the jury on accomplice testimony pursuant to pattern jury instruction § 104.25 as requested by the defendant.” (Original in all caps.)

The standard of review for appeals regarding jury instructions to which a defendant has properly requested at trial is the following:

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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. 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. If a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance.

State v. Cornell, 222 N.C. App. 184, 190-91, 729 S.E.2d 703, 708 (2012) (citations, ellipses, and brackets omitted).

The trial court gave a jury instruction regarding interested witness testimony:

You may find that a witness is interested in the outcome of this trial. You may take the witness' interest into account in deciding whether to believe the witness.

If you believe the testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

Defendant contends the trial court should have provided an instruction on accomplice testimony:

You may find that a witness was an accomplice in this case. An accomplice is a person who joins with another in the commission of a crime. The accomplice may take part in acts necessary to accomplish the crime or may knowingly [help] [encourage] another in the crime, either before or during its commission. The law considers an accomplice to have an interest in the outcome of the case. If you find that

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a witness was an accomplice, you should examine every part of the testimony of the witness with the greatest care and caution. After doing so, if you believe the testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

N.C.P.I -- Crim. 104.25 (footnotes omitted).

However, the evidence does not show that Mr. Lincoln was an accomplice.

[A]n accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged, either as a principal, as an aider and abettor, or as an accessory before the fact. The generally accepted test as to whether a witness is an accomplice is whether he himself could have been convicted for the offense charged, either as a principal, or as an aider and abettor, or as an accessory before the fact, and if so, such a witness is an accomplice within the rules relating to accomplice testimony.

State v. Bailey, 254 N.C. 380, 387, 119 S.E.2d 165, 171 (1961) (quotation marks omitted).

Defendant argues that the evidence shows Mr. Lincoln was an accomplice because he moved away from the black vehicle, knew there were weapons in the van, and that after the shooting Mr. Lincoln “did not stop to see if any harm had been done.” Yet we do not believe that this evidence rises to the level of “accomplice” demonstrating that Mr. Lincoln “knowingly, voluntarily, and with common intent with the principal offender unites with him in the commission of the crime charged[.]” *Id.* And even if there was some evidence which could arguably support an inference that Mr. Lincoln may have been an accomplice, we do not believe that defendant has

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demonstrated that the trial court's refusal to give the instruction on accomplice testimony "was likely, in light of the entire charge, to mislead the jury." *Cornell*, 222 N.C. App. at 191, 729 S.E.2d at 708. The trial court properly denied defendant's request for an accomplice testimony instruction. This argument is overruled.

V. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges STEPHENS and DAVIS concur.

Report per Rule 30(e).