

16-262 An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-262

Filed: 15 November 2016

Durham County, No. 13 CRS 59100

STATE OF NORTH CAROLINA

v.

BRADLEY DAVIS BAGLEY, Defendant.

Appeal by defendant from judgment entered 19 June 2015 by Judge James K. Roberson in Durham County Superior Court. Heard in the Court of Appeals 19 October 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Kristin J. Uicker, for the State.*

*Guy J. Loranger for defendant-appellant.*

ENOCHS, Judge.

Defendant Bradley Davis Bagley (“Defendant”) appeals from a judgment entered on his conviction of assault with a deadly weapon inflicting serious injury. Defendant argues that the trial court erred in denying his motions to dismiss because the State introduced insufficient evidence that he was either acting in concert with or aiding and abetting his co-defendant, who actually committed the assault. We conclude, however, that the State presented sufficient evidence to sustain a conviction

for this charge, whether based on an acting in concert theory or an aiding and abetting theory. Therefore, we find no error in the trial court's judgment.

Factual Background

On 13 September 2013, Christopher Fuller ("Fuller") was working for a food distribution company as a delivery driver. He was driving home after his shift at approximately 8:00 p.m. when Kenisha Daye ("Kenisha"), with whom he had a child but was not currently in a relationship, called asking Fuller to take her and their son to get dinner. Fuller drove to Kenisha's mother's house on Monmouth Avenue in Durham, North Carolina, picked up Kenisha and their son and took them to a nearby Wendy's restaurant.

While they were at Wendy's, Kenisha received a phone call from her sister, Sheerah Daye ("Sheerah"), who told her that Sheerah's boyfriend, Nathan Harris ("Harris"), had hit her. Kenisha heard Harris in the background of the call say, "Yeah, I did it. I'd do it again." Kenisha told Fuller that Harris had hit Sheerah, and they returned to Kenisha's mother's house. When they arrived at the house, Harris and Sheerah were standing outside yelling and arguing.

Harris' car was parked in front of the house along the curb, with the driver's side door closest to the house. Defendant, who was Harris' cousin and close friend, was sitting in the passenger seat of the vehicle. After Fuller parked his car in the driveway, Kenisha got out and went down the driveway to where Harris and Sheerah

were, near Harris' car. Kenisha told Harris "Do you want to hit on a girl, hit on me[.]" Kenisha then tried to hit Harris, but he grabbed her arms.

After Harris, Sheerah, and Kenisha had argued for several more minutes, Fuller saw Harris grab Kenisha and hit her. Fuller went and tried to break up the fight. When Fuller reached Harris' car, Defendant got out of Harris' car with a pistol in his hand. Harris then punched Fuller in the jaw and the two began to scuffle, moving into the street.

At the outset of the altercation, neither Harris nor Fuller had any weapon. After circling each other and trying to throw punches, Fuller and Harris grabbed each other and fell into the yard across the street from Kenisha's mother's house. Fuller grabbed Harris around the arms to prevent Harris from hitting him. At this point, Defendant was waving the pistol around and standing near the two men fighting. Harris said that he couldn't breathe and told Defendant, "Get him off me; shoot him, Cuz[.]" Defendant then hit Fuller in the back of the head with the gun. Fuller stood up with his head bleeding, and Harris also stood up. When Fuller stood up, he saw that Defendant had a gun and froze like a "deer in the headlights." Fuller did not re-engage in the fight.

Harris then asked Defendant to "[g]ive me the gun, give me the gun." Defendant extended his arm presenting the pistol to Harris, and Harris took it. Then, with Defendant standing right next to him, Harris shot Fuller in the groin, causing

him to fall to the ground. Defendant and Harris then walked over to their vehicle together and left the scene with Sheerah also in the car.

Kenisha's version of events differed from Fuller's. She saw Defendant get out of Harris' car with a gun while Harris and Fuller were fighting, but before Fuller was holding Harris in such a way as to restrict his breathing. After that, Fuller got on top of Harris and Harris said that he could not breathe. Harris then told Defendant "[s]hoot him, Cuz; shoot him." Defendant then hit Fuller in the head with the hammer of the gun. Fuller released Harris and they both stood up. Kenisha did not see how the gun was transferred from Defendant to Harris. Harris pointed the gun "right between [Fuller's] eyes," just four or five inches from his face. Defendant got back into Harris' car. Harris then walked to his car and bent inside the driver's side door. When he stood back up, he had his hands tucked up under his t-shirt and walked up very close to Fuller. Harris then shot Fuller. Fuller fell to the ground, and Harris kicked him and called him a "bitch." Harris then pointed the gun at Fuller's head and pulled the trigger. However, the gun did not fire; all that was heard was a "click." Harris dragged Fuller over to the rear of his car, and then got in the car and left the scene.

On 2 December 2013, a Durham County grand jury indicted Defendant for assault with a deadly weapon inflicting serious injury. A superseding indictment was returned by the grand jury on 17 March 2014 indicting Defendant for assault with a

deadly weapon with intent to kill inflicting serious injury. Defendant's charges were joined for trial with identical charges filed against Harris. Both Harris and Defendant were tried before a jury. On 19 June 2015, the jury found Defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant timely appealed.

Analysis

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “ ‘Upon defendant’s motion for dismissal, 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) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

“In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

STATE V. BAGLEY

*Opinion of the Court*

“Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant’s guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.”

*Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (internal citation omitted) (quoting *Barnes*, 334 N.C. at 75-76, 430 S.E.2d at 919).

“[C]ontradictions and discrepancies do not warrant dismissal of the case – they are for the jury to resolve.” *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). “[S]o long as the evidence supports a reasonable inference of the defendant’s guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant’s innocence.” *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (internal quotation marks omitted).

To survive a motion to dismiss, the State must have presented substantial evidence that the defendant committed each essential element of assault with a deadly weapon inflicting serious injury. Those elements, pursuant to N.C. Gen. Stat. § 14-32(b) (2015), are: “ ‘(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death.’ ” *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d

255, 261 (1997) (quoting *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990)).

The State prosecuted Defendant under the common law doctrines of acting in concert or, alternatively, aiding and abetting. These two doctrines require different elements of proof, but “[t]he distinction between aiding and abetting and acting in concert . . . is of little significance. Both are equally guilty, and are equally punishable.” *State v. Williams*, 299 N.C. 652, 656, 263 S.E.2d 774, 777 (1980) (internal citations omitted).

“Under the doctrine of acting in concert, ‘[i]f two [or more] persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal 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. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 306-07 (2003) (quoting *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (2002)). The defendant needs neither to do any specific act constituting a part of the crime charged, *State v. Taylor*, 337 N.C. 597, 608, 447 S.E.2d 360, 367 (1994), nor “expressly vocalize [his] assent to the criminal conduct,” *State v. Marion*, 233 N.C. App. 195, 204, 756 S.E.2d 61, 68, *disc. review denied*, 367 N.C. 520, 762 S.E.2d 444 (2014). An express agreement between the parties is not required,

only an implied mutual understanding or agreement to do the crimes is required. *State v. Hill*, 182 N.C. App. 88, 93, 641 S.E.2d 380, 385 (2007).

Defendant argues that the State presented insufficient evidence to show that Defendant and Harris acted with a common purpose or that Harris shooting Fuller was a natural or probable consequence of the common purpose. We disagree.

This Court has previously held that when a defendant “joined together to forcibly confront the victim with a weapon” there was sufficient evidence to survive a motion to dismiss charges based on an acting in concert theory. *State v. Sloan*, 180 N.C. App. 527, 535, 638 S.E.2d 36, 42 (2006), *aff’d per curiam*, 361 N.C. 584, 650 S.E.2d 594 (2007); *see also State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (“[B]efore the jury could apply the law of acting in concert to convict the defendant of the crime . . . , it had to find that the defendant and [co-defendant] had a common purpose to commit a crime; it is not strictly necessary, however, that the defendant share the intent or purpose to commit the particular crime actually committed.”), *overruling abrogated by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997).

In *Sloan*, the defendant had been charged with first degree murder when she acted in concert with a co-defendant who had actually pulled the trigger that killed the victim. 180 N.C. App. at 535-36, 638 S.E.2d at 42. The defendant not only knew her co-defendant had a weapon when they decided to pursue the victim, but she also



likely heard her co-defendant say that he was “‘going to kill this mother-f---.’” *Id.* at 536, 638 S.E.2d at 42. Furthermore, immediately after the victim had been shot, the defendant left the scene without calling for medical or police assistance. *Id.* This Court held that when it considered this evidence in the light most favorable to the State, there was a “substantial” showing that the defendant acted in concert. *Id.*

The evidence in this case, when viewed in the light most favorable to the State, supported an acting in concert theory of assault. Defendant and Harris had a close familial relationship. Harris had not brought the pistol with him to the scene of the fight, and Defendant had never seen him with a gun before that night. Defendant got out of Harris’s car with the pistol and waved it at Kenisha and Sheerah when they got close to the two men fighting. Defendant clearly heard Harris say “Get him off me; shoot him, Cuz.” When Fuller was holding Harris on the ground, Defendant hit Fuller on the head with the weapon hard enough to stun him and end the fight. After both Fuller and Harris had stood up, Harris asked Defendant for the pistol, Defendant handed it to him; and Harris shot Fuller. Then, Harris gave the pistol back to Defendant, and they fled the scene without calling for any assistance for Fuller.

As in *Sloan*, Defendant was an indispensable actor who set a series of events in motion, the result of which was Fuller being shot. Defendant produced the pistol and, by hearing his co-defendant request that Defendant “shoot him, Cuz[,]” he knew

that Harris' intent was to assault Fuller with that weapon. Furthermore, viewing the evidence in the light most favorable to the State, Defendant fled the scene with Harris without offering any assistance to Fuller or calling for medical or police assistance. This is substantial evidence that Defendant acted in concert with Harris in assaulting Fuller with a deadly weapon inflicting serious injury.

Defendant also argues that there was insufficient evidence that he aided and abetted Harris in assaulting Fuller. Under the doctrine of aiding and abetting, the State must prove three elements regarding the assault: "(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. Francis*, 341 N.C. 156, 161, 459 S.E.2d 269, 272 (1995). Similar to an acting in concert theory, "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, 291, 218 S.E.2d 352, 357 (1975).

Defendant does not argue that there was insufficient evidence that Harris committed the assault on Fuller of which both he and Defendant were convicted. Defendant knowingly aided Harris by giving him the pistol when Harris asked for it. Harris used Defendant's pistol to shoot Fuller in Defendant's presence. Harris would

STATE V. BAGLEY

*Opinion of the Court*

not have had the weapon were it not for Defendant giving it to him. Because of this, Defendant directly contributed to the assault committed by Harris. There was substantial evidence that Defendant aided and abetted the assault on Fuller.

Conclusion

Whether by the acting in concert theory or the aiding and abetting theory, when viewing the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences and resolving all contradictions in favor of the State, substantial evidence was introduced at trial showing that the Defendant was guilty of assault with a deadly weapon inflicting serious injury. Therefore, the trial court did not err in denying Defendant's motions to dismiss for insufficiency of the evidence, and the judgment of the trial court is affirmed.

NO ERROR.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).