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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-25

Filed: 19 December 2017

Mecklenburg County, Nos. 12 CRS 249810–11

STATE OF NORTH CAROLINA

v.

JUSTIN SAVON DIXON

Appeal by defendant from judgments entered 1 April 2015 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert M. Curran, for the State.

Gilda C. Rodriguez for defendant-appellant.

BRYANT, Judge.

Where the trial court instructed the jury on acting in concert with regard to an individual who was not on trial and denied defendant's requests to withdraw the instruction after the jury's questions revealed they misunderstood the instruction and to whom it applied, we vacate defendant's convictions for assault with a deadly weapon and discharging a firearm into occupied property and remand for a new trial.

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On 15 November 2012, defendant Justin Savon Dixon and two of his friends, Cedrick Mobley and Phillip Henderson, went to visit defendant's two-year-old son at the home of the child's grandmother in Charlotte, North Carolina. The child's mother, Whitney Stitt, Stitt's friend, Nicole Rivera, and several others were present at the home.

Defendant arrived at the house drunk and stumbling. As Henderson and Mobley were about to enter the home, Henderson was told he could not come into the house with the gun he had tucked in his waistband. Henderson handed the gun to Mobley who took it outside.

After about an hour, as Stitt and Rivera were getting ready to go out to a club, defendant and Rivera began arguing. Rivera told defendant that she was "going to get her daddy to 'f' him up." Henderson took defendant back to the van where defendant got in the front passenger seat, Mobley got in the driver's seat, and Henderson got in the back, and they drove away.

When Stitt and Rivera arrived at the club, Stitt received a call from defendant's sister. They left the club, and once they got near the house, they discovered an ambulance, a car in a ditch, and another vehicle in someone's yard.

Meanwhile, Dion Ruff had been visiting his friend, Michael Crawley in Charlotte. Crawley was to drive Ruff home that evening in Crawley's white Nissan Maxima. Shortly after pulling out of Crawley's driveway, the white Nissan

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approached a stop sign, and Ruff noticed a van and someone standing behind it with a gun. Ruff pointed the man out to Crawley, and Crawley put on his high beams. Ruff looked down at his phone to call 911 and heard gunshots. When Ruff looked up again, the man he had seen standing behind the van was no longer there, and the van had pulled up beside the white Nissan and the shooter was leaning over the hood firing his weapon.

Ruff opened his door and asked why the shooter was shooting at them. The shooter cursed and fired more shots. The van took off, and the white Nissan rolled across the street. Both Ruff and Crawley had been shot. Crawley died within minutes from a gunshot wound to the chest. Ruff underwent emergency surgery for a gunshot wound to the abdomen, was hospitalized for six weeks, and required extensive care and further surgeries for his wounds after his release. While in the emergency room, Ruff told police the passenger in the van shot them. In court, Ruff identified defendant as the person who leaned out of the passenger side of the van and shot him and Crawley.

Defendant was indicted for first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and discharging a firearm into occupied property. The case was tried at the 16 March 2015 Criminal Session of Superior Court of Mecklenburg County, Superior Court Judge Gregory R. Hayes presiding.

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At trial, defendant called Mobley as a witness. Mobley testified that he had pled guilty to two counts of discharging a firearm into an occupied vehicle in relation to the events of 15 November 2012. Mobley also testified that he had lied to police when he told them defendant had been driving the van. Prior to Mobley's testimony, the State requested that a limiting instruction be given to inform the jury that evidence of Mobley's guilty plea could be used only to weigh the witness's credibility, and not to support an argument that Mobley's plea exonerated defendant. Defendant objected, and the trial court determined that the jury should be allowed to consider Mobley's guilty plea for purposes other than credibility, and did not give the requested limiting instruction, suggesting the matter be revisited during the charge conference.

Defendant testified at trial that it was Henderson who got out of the van holding a gun and started walking, at which point Mobley told Henderson to get back in the van and hand him the gun. Defendant testified that a white car then flashed its lights at the van, and as Mobley pulled the van alongside the white car, Mobley fired several shots out of the window toward the car and sped away, hitting the curb. Defendant, Mobley, and Henderson ran from the van to a main street, then caught a bus to Henderson's home. Defendant testified that he believed Mobley had been shooting into the air and did not know that anyone in the car had been shot. At trial, defendant denied having possession of a firearm at any point on the evening of 15

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November 2012. When defendant was arrested, he told police that he had spent the entire night at his girlfriend's house and knew nothing about a shooting.

At the charge conference, the State requested that the trial court give an instruction on acting in concert solely as to Mobley, who had pled guilty to two counts of discharging a firearm into an occupied vehicle. Defendant objected, arguing that if an acting in concert instruction were to be given, it be given without limiting it to Mobley. However, the trial court gave an acting in concert instruction only as to Mobley and did not give an acting in concert instruction as to defendant.

During their deliberations, the jury had several questions about whether the acting in concert instruction applied to defendant as well as to Mobley, and whether it applied to the assault with a deadly weapon charge as well as the discharging a firearm charge. In its discretion and over defendant's objection, the trial court declined to give the jury further instructions and referred the jury to the instructions previously given, which included a written copy of the instructions.

The jury found defendant not guilty of murder but guilty of assault with a deadly weapon inflicting serious injury and discharging a firearm into occupied property. The trial court entered judgment and sentenced defendant to two consecutive terms of twenty-five months to forty-two months imprisonment. Defendant gave notice of appeal in open court.

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On appeal, defendant contends the trial court committed reversible error when it instructed the jury on acting in concert, which instruction was only applicable to a co-defendant who was not on trial, and where the trial court repeatedly denied defendant's requests to withdraw the instruction after the jury's questions revealed they were confused and misunderstood whether the instruction applied to defendant. We agree.

“The question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*.” *State v. McGee*, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014) (citing *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)).

This Court reviews jury instructions contextually and in its entirety. The charge will be held 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.

Id. (alterations in original) (quoting *State v. Blizzard*, 169 N.C. App. 285, 296–97, 610 S.E.2d 245, 253 (2005)).

In the instant case, the State alleged that defendant was the shooter and therefore did not prosecute the charges against defendant under an acting in concert theory. At the State's request, the trial court instructed the jury on acting in concert

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applicable only to Mobley, amending the standard pattern jury instruction, 202.10, which is applicable only to trial defendants, to read as follows:

Evidence has been received concerning criminal convictions of Cedrick Mobley related to the November 15, 2012 incident. For a *person* to be guilty of a crime, it is not necessary that the *person* do all of the acts necessary to constitute the crime.

If two or more persons join in a common purpose to commit discharging a firearm into occupied property; each of them, if actually or constructively present, is guilty of the crime and also guilty of any other crime committed by the other in pursuance of the common purpose to commit discharging a firearm into occupied property, or as a natural or probable consequence thereof.[¹]

(Emphasis added).

Because the State did not prosecute defendant on a theory of acting in concert, the jury's conviction of defendant can rest only on the theory that defendant himself "actually committed every element of th[e] offense[s]" *State v. Helton*, 79 N.C. App. 566, 568, 339 S.E.2d 814, 815 (1986); see *State v. Jordan*, 186 N.C. App. 576, 582, 651 S.E.2d 917, 921 (2007) ("The trial court's jury instructions on possible theories of conviction must be supported by the evidence." (quoting *State v. Osborne*, 149 N.C. App. 235, 238, 562 S.E.2d 528, 531 (2002))).

"The elements of assault with a deadly weapon inflicting serious injury are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in

¹ The original, unedited pattern instruction reads in pertinent part, as follows: "For a *defendant* to be guilty of a crime, it is not necessary that the *defendant* do all of the acts necessary to constitute the crime." N.C.P.I. 202.10 (emphasis added).

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death.” *State v. Uvalle*, 151 N.C. App. 446, 453, 565 S.E.2d 727, 731 (2002) (citation omitted) (quoting *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990)). “The elements of the offense [of discharging a firearm into occupied property] are (1) the willful or wanton discharging (2) of a firearm (3) into any building [or vehicle] (4) while it is occupied.” *State v. Canady*, 191 N.C. App. 680, 685, 664 S.E.2d 380, 383 (2008) (quoting *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991)).

With regard to the assault charge, the evidence at trial tended to show as follows: (1) an assault was committed on Ruff; (2) with a firearm, which was fired into the white Nissan (an occupied vehicle); (3) and which inflicted serious injury, as evidenced by his emergency surgery to treat his gunshot wounds and his extended hospital stay; (4) and Ruff did not die as a result of the gunshot wounds. *See Uvalle*, 151 N.C. App. at 453, 565 S.E.2d at 731 (citations omitted). With regard to *who* committed the assault, the evidence at trial was less clear.

Based on the State’s theory that defendant and only defendant was the shooter, the State explained that it wanted to convey to the jury that both defendant and Mobley could be responsible for the same offenses—shooting into occupied property—but that Mobley’s guilty pleas were based on the theory that *Mobley* was acting in concert with *defendant*, and not the other way around. By submitting the acting in concert instruction as to Mobley—a witness and individual not on trial—and not as to defendant, the trial court’s instruction was misleading and erroneous. This Court

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is unaware of any case in which such an instruction was (or could be) altered in a manner to fit the State's theory of a case, but such instruction would nevertheless be deemed acceptable as a matter of law. On these facts, we hold the alteration of the trial court's instruction on acting in concert was error.

Certainly, the evidence at trial was conflicting. Again, the State's theory was that defendant did not act in concert with anyone, that he actually committed every element of the charged offenses, i.e., first-degree murder, assault with a deadly weapon inflicting serious injury, and discharging a weapon into occupied property. *Helton*, 79 N.C. App. at 568, 339 S.E.2d at 815. Ruff's testimony at trial was that defendant was the shooter, that he was leaning over the hood of the vehicle. However, Ruff acknowledged that at an interview he identified Mobley as the driver and said during the interview that Mobley could have been the shooter. Meanwhile, defendant presented the testimony of William Hensley, an expert in the field of forensic crime scene analysis and projectile trajectory, which conflicted with the State's theories.

Hensley examined three out of the five projectiles in the case and gave his opinion that all the shots fired came from the driver's side of the vehicle. Further, defendant himself testified that after leaving the visit with his son, Henderson jumped out of the van with a gun, but Mobley told him to get back in the van. Defendant testified that Mobley took the gun, drove close to the car that blinked its lights, and fired shots while driving the van.

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As stated previously, Mobley testified that he pled to two counts of discharging a firearm into an occupied vehicle. Mobley, who was called as a witness by defendant, nevertheless testified at trial that defendant had a gun, was a passenger in the van, and was halfway out the open passenger door when defendant began shooting at the white Nissan.

In light of this conflicting evidence, it was error for the trial court to alter the PJI for acting in concert. Further, it was error to fail to withdraw the erroneous instruction (per N.C. Gen. Stat. § 15A-1234(a)(2)) after it was requested by defendant, and after it was clear the jury was confused by the instruction. And no wonder—it concerned a theory of culpability applicable to a witness not on trial but to be used to deflect a theory of defendant, who was on trial.

After being instructed that the acting in concert instruction applied only to Mobley, the jury requested that the trial court “clarify” the instruction. When told to be more specific, the jury returned and asked for “clarification” on the sentence that stated “[f]or a person to be guilty of a crime it is not necessary that the person do all of the acts necessary to constitute the crime.” The jury asked whether “it [was] possible to have reasonable doubt about whether the defendant was the shooter and return a guilty verdict based on [the] acting in concert section of the judges [sic] instructions.” Defendant requested that the trial court respond “no” to the question,

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but the trial court declined to answer and instructed them that they were to go back and apply the law they had already been given to the evidence.

The jury returned again with more questions. The jury asked, “[c]an you explain the in concert law without using Cedric Mosley [sic] as an example as a matter of law?”; “[i]s it generalized as a rule for all criminal charges?”; “[d]oes the acting in concert clause apply to the charge assault with a deadly weapon inflicting serious injury?”; and whether the word “a” in the “for a person to be guilty of a crime it is not necessary that the person do all of the acts necessary to constitute the crime” statement “refer[red] to both charges or only discharging a firearm into occupied property.” Defendant made a motion for a mistrial, which the trial court denied. The trial court again instructed the jury to apply the law they had already been instructed on to the evidence.

Prejudice

Even if there was evidence (however contradictory) presented at trial that defendant was indeed the shooter (per Mobley and Ruff’s testimony), defendant was prejudiced by the acting in concert instruction as reflected in the questions the jury asked and the verdicts it returned. “On appeal, a defendant is required not only to show that a challenged jury instruction was erroneous, but also that such error prejudiced the defendant.” *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citations omitted).

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“[A]n error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.’ ” It is the defendant’s burden to establish the existence of such prejudice on appeal.

State v. Tatum-Wade, 229 N.C. App. 83, 94, 747 S.E.2d 382, 390 (2013) (internal citations omitted) (quoting *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009)).

In the instant case, prejudice is particularly evident in the jurors’ question about whether they could have “reasonable doubt” that defendant was the shooter and at the same time return a guilty verdict based on the acting in concert instruction, which was supposed to apply only to Mobley. This question clearly reflected the jurors’ incorrect interpretation of the acting in concert instruction and their misunderstanding as to whom the instruction applied. It is therefore probable that the erroneous instruction misled jurors to apply the acting in concert instruction to defendant and impacted the jury’s verdict. As a result, defendant’s convictions must be vacated and the cases remanded for a new trial.

VACATED AND REMANDED FOR NEW TRIAL.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).