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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-74

Filed: 16 October 2018

Forsyth County, Nos. 15 CRS 59260-61

STATE OF NORTH CAROLINA

v.

LINDSEY LEE ROBINSON, JR.

Appeal by defendant from judgments entered 20 April 2017 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 22 August 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryn J. Thomas, for the State.

North Carolina Prisoner Legal Services, Inc., by Lauren E. Miller, for defendant-appellant.

DAVIS, Judge.

Lindsey Lee Robinson, Jr. ("Defendant") appeals from his convictions for first-degree burglary, discharging a weapon into an occupied dwelling inflicting serious bodily injury, discharging a firearm within an enclosure with the intent to incite fear, robbery with a dangerous weapon, and assault with a deadly weapon inflicting

serious injury. After a thorough review of the record and applicable law, we vacate Defendant's conviction for discharging a firearm within an enclosure with the intent to incite fear but affirm his remaining convictions.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: On 7 October 2015, Reginald Jones was watching a movie with his girlfriend, Angeliek Brunt, in the den of her trailer in Walkertown, North Carolina. Brunt's three children were asleep in their bedrooms. Jones had been in a romantic relationship with Brunt for five years and is the father of her two younger children.

Shortly after midnight, Jones and Brunt heard a recurring "very loud thud" at the front door of the trailer. Upon realizing that intruders were attempting to kick down the door, Jones told Brunt to call the police and positioned his body against the door in an effort to keep it closed. As he did so, Brunt ran to one of the children's bedrooms and called the police.

As Jones attempted to keep the door from opening, he saw three armed men wearing masks standing outside his doorway. Two of the men were carrying rifles, and the third was armed with a handgun. The intruders began firing gunshots at the window and door of the trailer. One of the bullets went through the door and struck Jones in his kneecap.

Soon after Jones was shot, "the door caved in," and a man wearing a white shirt with a black leather jacket and carrying a rifle entered the residence. Upon doing so, the intruder in the leather jacket shot Jones in the same leg that had been wounded previously. The intruder then struck Jones with the rifle after which Jones "couldn't really see too much."

After calling the police, Brunt "ran back to the front door to try to help [Jones]." At that point, the intruder with the black leather jacket pointed his rifle at her chest and backed Brunt into a bedroom, repeating the phrase "Just give me what you got." One of the other intruders entered the bedroom and repeatedly urged the man in the black leather jacket to shoot Brunt.

The man in the black leather jacket eventually located two hundred dollars in cash that Jones kept in a dresser drawer and the two men then exited the bedroom. In addition to leaving the trailer with the money, the intruders also took several old cell phones, a bag of marijuana, a marijuana pipe, and a backpack belonging to Brunt's son.

Forsyth County Sheriff's Deputy Jordan Lemons was dispatched to Brunt's residence shortly after midnight on 7 October 2015. A dispatcher advised Deputy Lemons that the suspects were traveling in a white vehicle. As he approached the trailer park where Brunt's home was located, Deputy Lemons saw a vehicle matching that description and "immediately turned [his] blue lights and siren on."

The white vehicle turned out of the trailer park and accelerated rapidly. A chase ensued during which Deputy Lemons pursued the vehicle at speeds approaching 95 miles per hour. The vehicle eventually entered an apartment complex and drove into a grassy area behind the apartments. As the vehicle made a U-turn in the grass, Deputy Lemons observed that there were four people in the car, including a female driver. In attempting to turn his own vehicle around, Deputy Lemons' patrol vehicle became stuck in the mud.

At that point, a male passenger exited the white vehicle and ran into some nearby woods. Deputy Lemons jumped out and pursued him on foot but neither he nor other officers arriving on the scene were able to catch him. The passenger who fled from the white vehicle was never located.

Officers maintained pursuit of the white vehicle until it eventually collided with a truck at an intersection. Following the crash, Corporal Brian Mullins of the Forsyth County Sheriff's Office assisted other officers in detaining and arresting the occupants of the white vehicle — Christina Bowens, James Washington, and Defendant. The three suspects were subsequently transported to Wake Forest Baptist Medical Center (the "Hospital") to be treated for injuries they suffered in the collision.

At approximately 5:00 a.m. that same morning, Corporal Douglas Fay of the Sheriff's Office went to the Hospital to collect evidence from the car accident involving

Defendant. When Corporal Fay arrived, Defendant, Washington, and Bowens were being treated in three different rooms within the emergency wing of the Hospital. Corporal Fay met with two other deputies outside Bowens' room. The deputies were standing next to bags of evidence containing clothes that had been collected from the suspects prior to Corporal Fay's arrival. One of the bags contained a black leather jacket and was labeled "Justice," which was Defendant's nickname. The State presented no evidence at trial with regard to who collected, bagged, or labeled the evidence bags prior to Corporal Fay's arrival at the Hospital.

Upon reviewing videos obtained from the dashboard cameras of police vehicles involved in the pursuit of the white vehicle, officers determined that multiple items had been thrown out of the vehicle's window during the chase. Officers subsequently discovered the backpack belonging to Brunt's son as well as a .22 caliber revolver on the side of the road along the route of the chase. On 10 October 2015, law enforcement officers discovered a bag containing marijuana and two rifles on the side of the road in separate locations along the route where the pursuit had occurred.

On 29 February 2016, Defendant was indicted by a grand jury for first-degree burglary, discharging a weapon into an occupied dwelling inflicting serious bodily injury, discharging a firearm within an enclosure with the intent to incite fear, robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury. A jury trial was held in Forsyth County Superior Court

beginning on 17 April 2017 before the Honorable L. Todd Burke. At trial, Defendant stipulated that a palm print found on the trunk of the white car was his.

On 20 April 2017, the jury convicted Defendant of assault with a deadly weapon inflicting serious bodily injury — a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious bodily injury — as well as on the remaining charges. The trial court consolidated the two offenses involving the discharge of a firearm and sentenced Defendant to a term of 96 to 128 months imprisonment. The trial court then imposed two consecutive sentences of 72 to 99 months imprisonment for the remaining offenses. Defendant gave oral notice of appeal in open court.

Analysis

On appeal, Defendant argues that the trial court erred by (1) instructing the jury that it could convict him of first-degree burglary based on an intent to commit assault where the indictment only alleged an intent to commit larceny; (2) subjecting him to double jeopardy by sentencing him for two crimes — discharging a firearm within an enclosure with the intent to incite fear and assault with a deadly weapon inflicting serious injury — arising out of the same conduct; (3) improperly instructing the jury on the offense of discharging a firearm within an enclosure with the intent to incite fear; and (4) admitting into evidence a photograph of a clothing bag

containing a leather jacket and labeled with Defendant's nickname. We address each argument in turn.

I. Jury Instruction on First-Degree Burglary

Defendant first contends that the trial court erred by instructing the jury that it could convict him of first-degree burglary if it found that he broke or entered with the intent to commit robbery or assault rather than with the intent to commit larceny as alleged in the indictment. Specifically, he asserts that this instruction permitted the jury to convict him based upon a theory of the crime that was not charged in the indictment.

Because Defendant failed to object to the trial court's instructions, our review is limited to plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted). In determining "whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Sergakis*, 223 N.C. App. 510, 513, 735 S.E.2d 224, 227 (2012) (citation and quotation marks omitted), *disc. review denied*, 366 N.C. 438, 736 S.E.2d (2013).

Our Supreme Court has held that "it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980) (citation omitted); *see also State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986) ("[A] defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." (citation omitted)). "[W]hen the indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged." *State v. Silas*, 360 N.C. 377, 383, 627 S.E.2d 604, 608 (2006) (citation omitted). Furthermore, where the trial court instructs a jury on alternative theories, "one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for

which it received a proper instruction." *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987).

The essential elements of first-degree burglary are: "(1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) of another (6) which is actually occupied at the time of the offense (7) *with the intent to commit a felony therein*." *State v. Clagon*, 207 N.C. App. 346, 350, 700 S.E.2d 89, 92 (2010) (emphasis added and citation and quotation marks omitted). Intent "must ordinarily be proven by circumstances from which it can be inferred." *State v. Jackson*, 145 N.C. App. 86, 90, 550 S.E.2d 225, 229 (2001). "Evidence of what a defendant does after he breaks and enters a house is evidence of his intent at the time of the breaking and entering." *Clagon*, 207 N.C. App. at 350, 700 S.E.2d at 92 (citation, quotation marks, and brackets omitted).

Our appellate courts have recently addressed in the plain error context the issue of disjunctive jury instructions permitting the conviction of a defendant for a crime not charged in the indictment. In *Sergakis*, the defendant was charged in his indictment with conspiracy to commit felony breaking or entering. *Sergakis*, 223 N.C. App. at 513, 735 S.E.2d at 227. The trial court instructed the jury that it could convict the defendant of conspiracy if it found that he had conspired to commit *either* felony larceny or felony breaking or entering. *Id.* at 512, 735 S.E.2d at 227. The jury returned verdicts of guilty as to the felony larceny and conspiracy charges but was

unable to return a unanimous verdict on the charge of felony breaking or entering. *Id.* at 515, 735 S.E.2d at 228. This Court determined that the trial court's disjunctive instructions "erroneously allowed the jury the option of convicting [the defendant] of a crime not charged in the indictment" and that this error constituted plain error. *Id.*

In explaining our reasoning as to why the improper instructions amounted to plain error, we emphasized the ambiguous nature of the verdicts returned by the jury.

> Moreover, because the verdict sheet lists the conspiracy charge only as "Felonious Conspiracy," it is impossible to determine whether the jury found that Defendant committed the charged offense of conspiracy to commit felony breaking and entering, or whether the jury found that he committed the uncharged offense of conspiracy to commit felony larceny. Indeed, the jury was unable to return a unanimous verdict on the felonious breaking and entering charge, but did return a guilty verdict on felony larceny.

Id.

In *State v. Farrar*, 361 N.C. 675, 651 S.E.2d 865 (2007), the indictment alleged that the defendant committed first-degree burglary by breaking and entering with the intent to commit larceny. *Id.* at 676, 651 S.E.2d at 865. The trial court, however, instructed the jury that in order to convict the defendant of first-degree burglary the State was required to prove that "at the time of the breaking and entering, the defendant intended to commit robbery with a firearm[.]" *Id.* After noting that larceny is a lesser-included offense of armed robbery, our Supreme Court concluded that "the trial court's charge to the jury in this case benefitted defendant, because the

instructions required the State to prove more elements than those alleged in the indictment." *Id.* at 678-79, 651 S.E.2d at 867.

In the present case, Defendant's first-degree burglary indictment stated that he broke and entered Brunt's home "with the intent to commit a felony therein, to wit: LARCENY." The trial court instructed the jury, in relevant part, as follows:

> [Defendant] has been charged with first degree burglary, which is breaking and entering in the nighttime of another person's occupied dwelling house without that person's consent and with the intent to commit a felony therein, in this case robbery.
>
> For you to find [Defendant] guilt[y] of this offense, the State must prove five things beyond a reasonable doubt:
>
> First, that [Defendant] broke and entered a dwelling house.
>
> Second, that the breaking and entering was during the nighttime.
>
> Third, that at the time of the breaking and entering, the dwelling was occupied.
>
> Fourth, that the owner or tenant did not consent to the breaking and entering.
>
> And fifth, that at the time of the breaking and entering, [Defendant] intended to commit a felony within that dwelling. And I will give you the elements of robbery with a dangerous weapon -- *or assault is another felony you could consider* -- momentarily.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date [Defendant] broke

> into and entered an occupied dwelling without the owner's consent during the nighttime, and at that time intended to commit a felony, *whether it be robbery or assault therein*, it would be your duty to return a verdict of guilty of first degree burglary.

(Emphasis added.) As noted above, the jury convicted Defendant of both robbery with a dangerous weapon and assault with a deadly weapon inflicting serious bodily injury.

Defendant contends that the trial court's instructions permitting the jury to convict him of first-degree burglary based upon an intent to commit assault — rather than larceny, as alleged in the indictment — constituted plain error because "it is impossible to know from the verdict sheet whether the jury based its guilty verdict upon finding an intent to commit robbery or assault." We disagree.

Here, the jury convicted Defendant of both robbery with a dangerous weapon and assault with a deadly weapon inflicting serious bodily injury. As noted above, larceny is a lesser-included offense of armed robbery. *Farrar*, 361 N.C. at 678, 651 S.E.2d at 867. Thus, unlike *Sergakis* in which the jury was unable to reach a unanimous verdict on one of the underlying crimes that the defendant was charged with conspiring to commit, the verdict sheet in the present case does not render it impossible for this Court to determine whether the jury found that Defendant possessed the intent to commit larceny as charged in his indictment. Rather, because the jury convicted Defendant of both robbery and assault, it logically follows that had

it been properly instructed with regard to larceny as the felony that Defendant intended to commit when he broke into Brunt's home, then it would still have found Defendant guilty of first-degree burglary given that it also convicted him of robbery. Therefore, because the erroneous jury instructions did not have "a probable impact on the jury's finding that the defendant was guilty" of first-degree burglary, we hold that the trial court's instructions did not constitute plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

II. Double Jeopardy

Defendant next contends that the trial court subjected him to double jeopardy by entering judgment against him for both assault with a deadly weapon inflicting serious injury and discharging a firearm within an enclosure with the intent to incite fear. He asserts that specific language in the statute criminalizing the act of discharging a firearm within an enclosure to incite fear demonstrates an intent on the part of our legislature to prohibit the punishment of individuals under both this statute and another statute carrying a greater punishment for the same conduct. We agree.

As an initial matter, Defendant concedes that he failed to raise this issue in the trial court. However, he requests that we review this argument pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, which allows this Court to suspend the Appellate Rules when it is necessary "[t]o prevent manifest injustice to

a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2. While not controlling, we note that this Court has previously invoked Rule 2 in order to review defendants' arguments with respect to double jeopardy. *See, e.g., State v. Baldwin*, 240 N.C. App. 413, 423, 770 S.E.2d 167, 174-75 (2015); *State v. Williams*, 201 N.C. App. 161, 173, 689 S.E.2d 412, 418 (2009).

After careful review of the parties' arguments and the record in this case, we elect to exercise our discretion under Rule 2 to reach the merits of Defendant's argument on this issue. *See State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017) ("[W]hether an appellant has demonstrated that his matter is the rare case meriting the suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." (citation omitted)).

The Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. Double jeopardy is likewise prohibited by both the North Carolina Constitution as well as our state's common law. *See State v. Ezell*, 159 N.C. App. 103, 106, 582 S.E.2d 679, 682 (2003) (citation omitted). "The double jeopardy clause prohibits (1) a second prosecution for the same offenses after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense." *Id.*

In North Carolina, "the intent of the legislature controls whether an individual may be punished for the same conduct under more than one criminal statute." *State v. Hines*, 166 N.C. App. 202, 208, 600 S.E.2d 891, 896 (2004) (citation omitted). This Court reviews double jeopardy issues *de novo*. *Baldwin*, 240 N.C. App. at 424, 770 S.E.2d at 175 (citation omitted).

N.C. Gen. Stat. § 14-34.10 provides as follows:

> *Unless covered under some other provision of law providing greater punishment*, any person who willfully or wantonly discharges or attempts to discharge a firearm within any occupied building, structure, motor vehicle, or other conveyance, erection, or enclosure with the intent to incite fear in another shall be punished as a Class F felon.

N.C. Gen. Stat. § 14-34.10 (2017) (emphasis added).

Our appellate courts have repeatedly held that a defendant's constitutional protection against double jeopardy is violated where the defendant is convicted under separate assault statutes carrying different penalties for the same conduct and one of the statutes contains the language "unless covered under some other provision of law providing greater punishment." In *Ezell*, this Court found a double jeopardy violation where the defendant was convicted of both assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b) and assault inflicting serious bodily injury under N.C. Gen. Stat. § 14-32.4 based upon the same conduct. *Ezell*, 159 N.C. App. at 111, 582 S.E.2d at 685. We noted that N.C. Gen. Stat. § 14-32.4 criminalized assault inflicting serious bodily injury "unless the conduct is covered

under some other provision of law providing greater punishment." *Id.* at 110, 582 S.E.2d at 684 (citation omitted). This Court concluded as follows:

> Defendant was indicted and convicted under G.S. § 14-32, a Class E felony. A Class E felony carries a more severe punishment than the Class F felony in G.S. § 14-32.4. Thus, because defendant's conduct is "covered under some other provision of law providing greater punishment," we conclude that the court cannot convict and sentence him for both §§ 14-32 and 14-32.4 for the same conduct without violating the double jeopardy provisions of the United States and North Carolina constitutions.

Id. at 111, 582 S.E.2d at 685; *see also Hines*, 166 N.C. App. at 208-09, 600 S.E.2d at 895-96 (holding that statute criminalizing assault on a handicapped person "bars punishment under both this provision and another provision of an assault statute" based upon language stating that statute applies "unless defendant's conduct is covered under some other provision of law providing greater punishment") (citation, quotation marks, and brackets omitted).

In the present case, Defendant was convicted of both discharging a firearm within an enclosure with the intent to incite fear — a class F felony — and assault with a deadly weapon inflicting serious injury — a class E felony. As noted above, N.C. Gen. Stat. § 14-34.10 contains specific language indicating that our legislature did not intend the statute to apply to situations where a defendant's conduct was "covered under some other provision of law providing greater punishment." N.C. Gen. Stat. § 14-34.10.

Thus, Defendant was convicted of discharging a firearm within an enclosure with the intent to incite fear and another assault offense providing greater punishment in contravention of both the statutory language of N.C. Gen. Stat. § 14-34.10 and the above-cited decisions of this Court. Therefore, we hold that the trial court improperly subjected Defendant to double jeopardy by allowing him to be convicted of both offenses. Accordingly, we must vacate his conviction for discharging a firearm within an enclosure with the intent to incite fear and remand for resentencing. *See Baldwin*, 240 N.C. App. at 427, 770 S.E.2d at 177 (vacating assault conviction carrying lesser penalty and remanding for resentencing on conviction carrying greater penalty).[1]

III. Hearsay

In his final argument, Defendant contends that the trial court erred by admitting into evidence a photograph of a bag labeled with his nickname and containing a leather jacket connected with the crime. Defendant asserts that admission of the photograph of the clothing bag labeled "Justice" along with Corporal Fay's testimony that the jacket belonged to Defendant constituted inadmissible hearsay because both were "offered as substantive evidence for the truth of the matter to prove that the jacket was [Defendant's] and that [Defendant] was the shooter and

[1] In light of our holding on this issue, we need not address Defendant's alternative argument with regard to why his conviction for discharging a weapon within an enclosure with the intent to incite fear should be vacated.

entered the home." He concedes, however, that although he objected to the introduction of the photograph he failed to object each time Corporal Fay testified that the jacket belonged to Defendant. Thus, he seeks plain error review on this issue.

Even assuming — without deciding — that the evidence he challenges constituted inadmissible hearsay, we hold that its admission did not rise to the level of plain error because it did not have a probable impact upon the jury's finding that Defendant was guilty. This Court has stated the following with regard to the theory of acting in concert:

> [I]f 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 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. Williams, 185 N.C. App. 318, 330, 648 S.E.2d 896, 905 (2007) (citation, quotation marks, and ellipsis omitted), *appeal dismissed and disc. review denied*, 362 N.C. 372, 664 S.E.2d 559 (2008). However, a defendant "may not be criminally responsible as an accomplice under the theory of acting in concert for a crime which requires a specific intent, unless he, himself, is shown to have the requisite specific intent." *State v. Abraham*, 338 N.C. 315, 346, 451 S.E.2d 131, 148 (1994) (citation omitted). A defendant's specific intent "may be proved by evidence tending to show that the specific intent crime was a part of the common plan." *Id.* (citation omitted).

"As a practical matter . . . the difference between acting in concert and aiding and abetting is of little significance, both being equally guilty and equally punishable." *State v. Owens*, 75 N.C. App. 513, 520, 331 S.E.2d 311, 316 (citation and quotation marks omitted), *disc. review denied*, 314 N.C. 546, 335 S.E.2d 318 (1985).

Following the close of the evidence, the trial court instructed the jury as follows with regard to the legal doctrines of acting in concert and aiding and abetting:

> Acting in concert. 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. If two or more persons join in a common purpose to commit a crime, each of them, if actually constructive -- actually or constructively present, is guilty of the crime and also guilty of any other crimes committed by the other person or the other in pursuance of the common purpose to commit a crime, or as a natural and probable consequence thereof.
>
> A defendant is not guilty of a crime merely because the defendant is present at the scene, even though the defendant may silently approve of the crime or secretly intend to assist in its commission. To be guilty, the defendant must aid or actively encourage the person committing the crime or in some way communicate to another person the defendant's intention to assist in its commission.
>
> Aiding and abetting. A person may be guilty of a crime although the defendant personally does not do any of the acts necessary to constitute that crime. A person who aids and abets another to commit a crime is guilty of that crime. You must clearly understand that the defendant does not aid and abet the defendant -- excuse me. You must clearly understand that if the defendant does aid and abet, the defendant is guilty of the crime just as if the defendant had personally done all the acts necessary to constitute

> that crime.
>
> For you to find defendant guilty of a specific crime because of aiding and abetting, the State has to prove three things beyond a reasonable doubt:
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> First, that the crime was committed by some other person.
>
> Second, that the defendant knowingly advised, instigated, encouraged, procured, or aided another person to commit the crime.
>
> A person is not guilty of a crime merely because the defendant is present at the scene, even though the defendant may silently approve of the crime or secretly intend to assist in its commission. To be guilty, the defendant must aid or actively encourage the person committing the crime or in some way communicate to this person the defendant's intention to assist in the commission.
>
> And third, that the defendant's actions or statements caused or contributed to the commission of the crime by that other person.

Here, Defendant was arrested following a high-speed pursuit of the vehicle he was riding in during which rifles matching the description of the weapons used by the intruders who broke into Brunt's home were thrown from the window of the car. Multiple items stolen from Brunt's residence during the break-in were also recovered by law enforcement officers on the side of the road along the route of the vehicle chase. Furthermore, Defendant stipulated at trial that a palm print found on the trunk of the car involved in the police chase belonged to him. Thus, the State presented

overwhelming evidence that Defendant was, in fact, one of the intruders involved in the break-in at Brunt's residence on 7 October 2015.

As noted above, the trial court instructed the jury on the doctrine of acting in concert. Per the court's instructions with regard to this doctrine, if Defendant "join[ed] in a common purpose to commit a crime" with others then he would be "guilty of the crime and also guilty of any other crimes committed by the other person[s] . . . in pursuance of the common purpose to commit a crime, or as a natural and probable consequence thereof."

The State's evidence clearly established that the three men who broke into Brunt's residence possessed a common purpose to assault and rob the occupants of the home. Thus, the actions of the intruder in the leather jacket were ultimately attributable to all three intruders based upon a theory of acting in concert. Therefore, we are satisfied that any alleged error with regard to the admission of the evidence characterized by Defendant as hearsay did not rise to the level of plain error. *See Abraham*, 338 N.C. at 347, 451 S.E.2d at 148 (holding no plain error existed in trial court's jury instructions where it was "inconceivable that the jury would not have found that [the co-defendant] shared with [defendant] a common purpose to assault [the victim]"). Accordingly, this argument is overruled.

Conclusion

For the reasons stated above, we vacate Defendant's conviction for discharging a firearm within an enclosure with the intent to incite fear but affirm his remaining convictions. We remand for resentencing.

NO PREJUDICIAL ERROR IN PART; VACATED IN PART; REMANDED.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).