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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-378

No. COA20-388

Filed 20 July 2021

Durham County, No. 17CRS57995

STATE OF NORTH CAROLINA

v.

AIRY KEMONDIE BLUEFORD, Defendant.

Appeal by defendant from judgments entered on or about 30 August 2019 and on 4 October 2019 by Judge James E. Hardin Jr. in Superior Court, Durham County. Heard in the Court of Appeals 9 March 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for the State.

Mary McCullers Reece, for defendant-appellant.

STROUD, Chief Judge.

¶ 1

Defendant appeals from judgments convicting him of assault inflicting serious bodily injury and conspiracy to commit assault inflicting serious bodily injury. After full review of the record, we determine defendant has failed to demonstrate plain error based upon one sentence of the additional jury instructions provided by the trial court in response to the jury's question.

I. Background

¶ 2 The State’s evidence tended to show that on 30 September 2017, Demarcus Williams was at a club with his now-fiancé, Geneiya Hodge. Mr. Williams saw defendant, Ms. Hodge’s ex-boyfriend, and “a whole bunch of other[s]” wearing matching shirts with the word “Savage” on them. Mr. Williams left the club and was sitting on the hood of a car when defendant and some other individuals, including Tyriq Cofield, approached Mr. Williams; defendant struck Mr. Williams in the face. Mr. Williams fell to the ground and “basically blacks out from the impact of his head hitting the concrete of the road.” Defendant and Mr. Cofield began stomping on Mr. Williams’s head; another individual with them, Frank, was kicking Mr. Williams. Mr. Williams awoke in the hospital with his mouth wired shut because his jawbone had been broken in two places; he had two surgeries and was on a liquid diet for approximately ten weeks.

¶ 3 After a trial by jury, defendant was found guilty of assault inflicting serious bodily injury and conspiracy to commit assault inflicting serious bodily injury (“conspiracy”). The trial court entered judgments. Defendant appealed.

II. Jury Inquiry

¶ 4 Defendant was tried by a jury. The trial court instructed the jury on conspiracy in part as follows,

¶ 4 Now, ladies and gentlemen, in this case, the

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defendant has been charged with conspiring to commit assault inflicting serious bodily injury. A criminal conspiracy is defined as an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice. This evidence may be circumstantial or inferred from the defendant's behavior. The crime of conspiracy does not require an overt act for its completion. The agreement itself is the crime. For you to find the defendant guilty of this offense, the State of North Carolina must prove three things to you beyond a reasonable doubt:

First, that the defendant and Tyriq Cofield entered into an agreement.

Second, that the agreement was to commit assault inflicting serious bodily injury. Assault inflicting serious bodily injury, as you have previously been instructed, is that the defendant, acting either by himself or together with other persons, intentionally assaulted Demarcus Williams inflicting serious bodily injury.

And third, that the defendant and Tyriq Cofield intended that the agreement be carried out at the time it was made.

Now, ladies and gentlemen, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant agreed with Tyriq Cofield to commit assault inflicting serious bodily injury, and that the defendant and that person, Tyriq Cofield, intended at that time the agreement was made that it would be carried out, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of conspiracy to commit assault inflicting serious bodily injury[.]

During deliberations, the jury submitted two notes to the trial court. One note asked, "If one person takes an action and then a second person takes an action for the

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same purpose, can that be the point that mutual, implied understanding is established or does it need to happen prior to the action?” The trial court discussed the question and potential responses with counsel. The trial court responded to the question by adding an instruction roughly based upon *State v. Sanders*, 208 N.C. App. 142, 701 S.E.2d 380 (2010). In *Sanders*, this Court discussed the law regarding conspiracy:

Criminal conspiracy is complete upon a meeting of the minds, *State v. Christopher*, 307 N.C. 645, 649, 300 S.E.2d 381, 383 (1983), when the parties to the conspiracy

(1) give sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate the object of the conspiracy, the objective to be achieved or the act to be committed, and (2) whether informed by words or by gesture, understand that another person also achieves that conceptualization and agrees to cooperate in the achievement of that objective or the commission of the act.

Ordinarily, the existence of a conspiracy is a jury question, and where reasonable minds could conclude that a meeting of the minds exists, the trial court does not err in denying a motion to dismiss for insufficiency of the evidence.

We find unpersuasive defendant’s effort to imply the absence of a meeting of the minds by contrasting his well-orchestrated attempt to assault Joseph Salter with the abrupt nature of his assault of Mark Buffaloe. *The spontaneity of the plan does not belie the conspiracy. Similarly, in the context of a unilateral contract, a meeting of the minds can exist when a party thereto accepts an offer by action not by words.*

Id. at 146, 701 S.E.2d at 383 (emphasis added) (citation and quotation marks

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omitted).

¶ 6 Without objection from defendant, the trial court repeated the initial instruction on conspiracy to the jury, but this time added, “You are further instructed that words and actions of the defendant and others provide sufficient evidence of an implied agreement to assault the victim, Demarcus Williams. The spontaneity of the plan does not defeat the conspiracy. A meeting of the minds can occur when a party accepts an offer by action.” Thereafter, defendant did not object or propose any correction to the instruction as given.

¶ 7 Defendant’s only argument on appeal is that

the trial court plainly erred by answering the jury’s inquiry regarding the ‘agreement’ element of conspiracy by instructing them that ‘words and actions of the defendant and others provide sufficient evidence of an implied agreement to assault the victim, Demarcus Williams’ where the existence of an agreement was a question for the jury[.]

¶ 8 Because defendant did not object to the trial court’s instructions to the jury, we review for plain error. *See State v. Robinson*, 255 N.C. App. 397, 400, 805 S.E.2d 309, 312–13 (2017).

As defendant did not object to this instruction at trial, we review only for plain error. Under this standard, the 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.

Id. (citation and quotation marks omitted).

¶ 9

Even if we assume the trial court erred in the one statement defendant contests, defendant has failed to demonstrate prejudice. The trial court added a few sentences to an otherwise proper instruction which informed the jury of the elements of conspiracy. Defendant objects to one sentence of this additional instruction. Although the contested sentence could have been more carefully worded, it basically restates the instruction already provided in that the evidence of the agreement may be “circumstantial or inferred from the defendant’s behavior.” Other jury instructions noted the State’s burden to prove each element of the crimes beyond a reasonable doubt and the jury’s duty to determine whether the evidence established defendant was guilty beyond a reasonable doubt. Considering the one contested sentence of the additional instruction in the context of the jury instructions as a whole, we cannot determine “that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty[,]” particularly given the eye witness testimony regarding defendant’s and Mr. Cofield’s unprovoked and coordinated attack on Mr. Williams. *Id.* at 400, 805 S.E.2d at 313. This argument is overruled.

III. Conclusion

¶ 10

We conclude there was no plain error.

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NO ERROR.

Judges DIETZ and CARPENTER concur.

Report per Rule 30(e).