NO. COA01-1116

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 00 CRS 8825, 8826

ZACHARY HOWZE

Appeal by defendant from judgment entered 15 March 2001 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 May 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

WALKER, Judge.

Defendant appeals his conviction on two counts of discharging a weapon into occupied property. The State's evidence tends to show that defendant is the owner of the Plaza Car Care Center (Car Care Center) in Charlotte. At approximately 6:50 p.m. on 18 September 1999, Melvin Hoskins (Hoskins), an employee of defendant, drove into the Car Care Center in order to collect his pay for the week.

After he arrived, Hoskins exited his vehicle and entered defendant's office. Defendant gave Hoskins a check along with a

statement which showed that taxes had been withheld from his pay. Thereafter, an argument ensued over whether the two had previously agreed that defendant would not withhold taxes from Hoskins' pay. Defendant ordered Hoskins out of his office and the two continued to exchange words as Hoskins returned to his vehicle. Defendant followed, reached inside of Hoskins' vehicle and punched him. Hoskins then began to back up his vehicle while defendant ran into his office. According to Hoskins, defendant returned with a silver handgun and proceeded to fire a number of rounds in the direction of Hoskins' vehicle as he was leaving. Hoskins testified that bullets struck his vehicle in the right rear tire and the trunk area.

In his first assignment of error, defendant contends the trial court erred by admitting into evidence a statement made by a State's witness to police. The record shows that Antrice Mitchell (Mitchell) testified as to what she observed at the Car Care Center on 18 September 1999. Mitchell stated that while she was waiting in the lobby the "manager" came inside and went into the garage area. He quickly returned carrying a silver handgun in his right hand. Mitchell stated that a few moments later she heard "two or three shots" but acknowledged that she did not actually see the "manager" fire the silver handgun.

After Mitchell's testimony, Officer Theodore Castano (Officer Castano) of the Charlotte-Mecklenburg Police Department testified that following the incident, Mitchell "indicated [to him] that she saw the Defendant fire one shot . . . ." Defendant's objection was

overruled by the trial court; however, at defendant's request, the trial court excused the jury. Defendant then argued that his objection was based on Officer Castano's testimony that Mitchell had previously indicated to him that she had seen "the Defendant fire one shot." The prosecutor next conducted a *voir dire* and agreed to limit his questioning of Officer Castano to how Mitchell had described the handgun. After the jury returned, Officer Castano continued his testimony stating, over defendant's objection, "She indicated that during the shooting incident she observed the owner with the silver handgun."

Defendant maintains the trial court erred in admitting this portion of Officer Castano's testimony for the reason that Mitchell's prior statement to him contradicts her in-court testimony in which she stated that she did not actually see defendant fire the silver handgun. It is well settled that "[p]rior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached. However, the prior statement must in fact corroborate the witness' testimony. Slight variations between the corroborating statement and the witness' testimony will not render the statement inadmissible." *State v. Riddle*, 316 N.C. 152, 157, 340 S.E.2d 75, 78 (1986)(citations omitted). Nevertheless, a witness' prior statement which tends to add "new" information to his in-court testimony is inadmissible as corroborative evidence. *See State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573-74 (1986). Additionally, a new trial is warranted only in cases where

the erroneous introduction of the prior statement has prejudiced the defendant. *See generally, State v. Burton*, 322 N.C. 447, 368 S.E.2d 630 (1988); and *State v. Reynolds*, 91 N.C. App. 103, 370 S.E.2d 600 (1988); *see also* N.C. Gen. Stat. § 15A-1443(a)(2001).

Here, assuming *arguendo,* that Officer Castano's testimony regarding Mitchell's prior statement was inadmissible to the extent that it did not corroborate her in-court testimony, defendant has failed to show how he was sufficiently prejudiced by its admission to warrant a new trial. Indeed, the victim testified that, as he was leaving the Car Care Center, he observed defendant fire several shots towards his vehicle with a silver handgun. Mitchell's in-court testimony that she had witnessed the manager of the Car Care Center carrying a silver handgun and moments later heard shots being fired corroborates this testimony. Therefore, we conclude any error in the admission of testimony that did not corroborate Mitchell's testimony did not prejudice defendant as to warrant a new trial. Defendant's assignment of error is overruled.

Next, defendant contends his conviction on two counts of discharging a weapon into occupied property violates his constitutional right to protection against double jeopardy. However, our Supreme Court has previously held that an indictment for multiple counts of discharging a firearm into occupied property does not violate the constitutional guarantees against double jeopardy provided that each count relates to a "separate and distinct" act. *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995).

In *Rambert*, the State's evidence showed the defendant was riding in an automobile which pulled into a parking space next to a space where the victim was sitting in his automobile. After words were exchanged, the defendant pulled out a handgun and fired a bullet which hit the front windshield of the victim's automobile. The victim drove forward and a second bullet struck the passenger door. Finally, the defendant fired a third shot which hit the rear bumper. In upholding the defendant's indictment for three counts of discharging a firearm into occupied property, the Court noted: "Each shot . . . required that defendant employ his thought processes each time he fired the weapon. Each act was distinct in time, and each bullet hit the vehicle in a different place." *Id.* at 176-77, 459 S.E.2d at 512-13.

Here, the State's evidence showed defendant had fired at least two shots into Hoskins' vehicle as Hoskins drove out of defendant's parking lot--one striking a tire and the other striking the trunk. As in *Rambert*, each shot was distinct in time, hit a separate area of the victim's vehicle, and required defendant to employ his thought processes each time he fired the handgun. Accordingly, we conclude defendant's conviction for two counts of discharging a firearm into occupied property did not violate his constitutional right to protection against double jeopardy.

Lastly, defendant contends the trial court committed plain error in the calculation of his sentence by finding, as an aggravating factor, that he "knowingly created a great risk of death to more than one person . . . ." He maintains this finding

does not comport with this Court's prior holdings that non-automatic rifles and handguns are not normally dangerous to the lives of more than one person. *See State v. Bethea*, 71 N.C. App. 125, 129-30, 321 S.E.2d 520, 523 (1984); and *State v. Jones*, 83 N.C. App. 593, 605, 351 S.E.2d 122, 129 (1986), *disc. rev. denied*, 319 N.C. 461, 356 S.E.2d 9 (1987). However, the record also shows the trial court found, as mitigating factors, that defendant "supports his family" and has "a positive employment history." The trial court then determined that the mitigating factors outweighed any aggravating factors and defendant received concurrent mitigated sentences of 30 to 45 months in prison.

The State contends this issue is not properly before this Court, arguing that defendant is not entitled to a direct appeal of a sentence imposed within the mitigated range. We agree.

Pursuant to N.C. Gen. Stat. § 15A-1444(a1):

> A defendant who has been found guilty . . . is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

N.C. Gen. Stat. § 15A-1444(a1).

This Court has recently noted that a defendant sentenced within the presumptive range is not entitled as a matter of right to appeal his sentence. *See State v. Brown*, 146 N.C. App. 590,

593, 553 S.E.2d 428, 430 (2001). Although defendant's sentence falls below the presumptive range, we do not interpret N.C. Gen. Stat. § 15A-1444(a1) as entitling a defendant sentenced in the mitigated range to a direct appeal. "[T]he decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a). Thus, a trial court is not required to sentence a defendant in the mitigated range, even in situations where mitigating factors may be present. As defendant has not petitioned for a writ of certiorari, we conclude the issue of whether the trial court committed plain error in finding an aggravating factor is not properly before this Court.

We conclude defendant received a trial free from prejudicial error.

No error.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).