NO. COA01-525

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Pitt County
No. 99 CRS 64973

DANNY RAY CARMON

Appeal by defendant from judgment entered 1 September 2000 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 15 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General, Diane A. Reeves, for the State.

Jonathan E. Jones, for defendant-appellant.

EAGLES, Chief Judge.

Danny Ray Carmon ("defendant") appeals from judgment entered on a jury verdict finding him guilty of first degree burglary. After careful consideration of the briefs and record, we find no error.

At trial, the State's evidence tended to show that on the evening of 7 September 1999, Thomas Coghill ("Coghill"), a 76 year old man, placed his pants which contained approximately $220.00 on a kitchen chair in his home. Coghill went to bed between 10:00 p.m. and 10:30 p.m. and the next morning, he could not locate his pants or his money. On the evening of 10 September 1999, Coghill

again placed his pants which contained approximately $7.00 on a chair in the kitchen. At approximately 11:30 p.m., Coghill heard the storm door, which leads from the garage to the kitchen, open. Coghill got up and went outside but did not hear anything. Coghill observed that a tire on his truck had been punctured and that his cellular phone from his truck was missing.

Coghill told Charlie Lee Ward ("Ward"), one of his employees, about the burglaries. On 11 September 1999, Ward brought Dexter Cannon ("Cannon") to see Coghill. Cannon told Coghill that defendant was the person who had broken into Coghill's home on 7 and 10 September 1999. On 12 September 1999, Cannon told Coghill that defendant was planning another attempt for that night. Later that day, Coghill learned that defendant would have a knife. Coghill and Jimmy Galloway ("Galloway") waited in Coghill's home on the evening of 12 September 1999. Coghill and Galloway sat in the office which was located next to the kitchen. At approximately 10:00 p.m., Coghill heard defendant open the kitchen door and then open the office door. Defendant fled when he saw Galloway fire his shotgun.

Defendant was charged with three counts of first degree burglary for 7, 10, and 12 September 1999. The matter came to trial at the 28 August 2000 Criminal Session of Pitt County Superior Court before Judge W. Russell Duke, Jr. The jury returned a verdict of guilty for first degree burglary in 99 CRS 64973, the 12 September 1999 incident, and verdicts of not guilty for the remaining two first degree burglary charges. Defendant was

sentenced in the aggravated range to a minimum term of imprisonment of 146 months to a maximum term of 185 months. Defendant appeals.

On appeal, defendant contends that the trial court erred by alleging an aggravating factor on its own accord and using the aggravating factor as a basis for sentencing defendant in the aggravated range. After careful consideration, we discern no error.

Defendant contends that the trial court swore Coghill in and questioned him about his physical abilities without any request from the State. Defendant argues that the trial court made no inquiry as to whether Coghill was targeted due to his age or condition and that no evidence was presented at trial to show that Coghill was chosen due to his age or physical condition. Defendant contends that the State did not meet their burden of establishing the existence of the aggravating factor by a preponderance of the evidence. Defendant further argues that the trial court made no findings of fact that Coghill was targeted because of his age or physical infirmity. Defendant also argues that he was denied the opportunity to offer rebuttal evidence. We are not persuaded.

"'When a defendant assigns error to the sentence imposed by the trial court, our standard of review is "whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing."'" *State v. Choppy*, 141 N.C. App. 32, 42, 539 S.E.2d 44, 51 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001) (citations omitted).

We begin by noting that at a sentencing hearing, the trial court may call a witness on its own initiative. *State v. Rollins*, 131 N.C. App. 601, 608, 508 S.E.2d 554, 558 (1998); G.S. § 15A-1334(b). G.S. § 15A-1334(b) "remains in effect notwithstanding enactment of the [Structured Sentencing Act]." *Rollins*, 131 N.C. App. at 608, 508 S.E.2d at 558.

Next, this Court has previously held "that in sentencing proceedings under the [Structured Sentencing Act], the trial court may properly find non-statutory aggravating factors not specifically requested by the State whether the circumstances supporting such factors are presented at trial, if the defendant pleads not guilty, or at the sentencing hearing." *Id.* at 607, 508 S.E.2d at 558.

> First, at sentencing under the FSA, the trial court was obligated to "consider all circumstances that are both transactionally related to the offense and reasonably related to the purposes of sentencing . . . ." This requirement was held to be mandatory under the FSA regardless of whether the factors were expressly listed under G.S. § 15A-1340.4(a)(1) and "regardless of whether the State specifically request[ed] a finding in this regard."
>
> Under the FSA, moreover, the trial court properly relied upon circumstances brought out at trial in determining the presence of aggravating factors, even though the State did not present evidence of such circumstances at the sentencing hearing. Finally, the trial court was "not required to ignore the facts and evidence of the case," but rather was to consider uncontradicted and credible evidence of aggravating factors.
>
> The foregoing general principles enunciated in cases involving sentencing under

> the FSA are equally applicable to sentencing proceedings under the SSA.

Id. at 606, 508 S.E.2d at 557 (citations omitted).

Here, the aggravating factor found by the trial court was a statutory factor. G.S. § 15A-1340.16(d)(11) allows the trial court to find as an aggravating factor that "[t]he victim was very young, or very old, or mentally or physically infirm, or handicapped." G.S. § 15A-1340.16(d)(11). Here, the trial court found that "[t]he victim was: d. physically infirm."

"The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." G.S. § 15A-1340.16(a). The State has the burden of proving the existence of aggravating factors by a preponderance of the evidence. *Id.*; *State v. Easter*, 101 N.C. App. 36, 41, 398 S.E.2d 619, 622 (1990). However, we see no reason why the trial court should ignore or disregard credible evidence which becomes apparent to it in the course of the trial or is properly before it during a sentencing hearing.

Defendant further contends that the evidence does not support the existence of the aggravating factor. Defendant alleges that the evidence is insufficient to show that defendant targeted Coghill due to his age or physical condition. We are not convinced.

At the sentencing hearing, the trial court found as an aggravating factor that the 76 year old Coghill was "physically

infirm." "The policy underlying this aggravating factor is to deter wrongdoers from taking advantage of a victim because of his age or mental or physical infirmity." *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997).

> A victim's age does not make a defendant more blameworthy unless *the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her*, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized.

State v. Hartman, 344 N.C. 445, 477, 476 S.E.2d 328, 346 (1996) (quoting *State v. Hines*, 314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985)), *cert. denied*, 520 U.S. 1201, 137 L. Ed. 2d 708 (1997) (emphasis added). "Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person." *Hines*, 314 N.C. at 525, 335 S.E.2d at 8.

The rationale applied to age can properly be applied to physical infirmity. Here, the evidence showed that defendant worked for Coghill two years before the burglary, that defendant lived three miles from Coghill, and that Coghill "had been knowing [defendant] for years." At the sentencing hearing, the trial court stated that "[b]ecause it takes so long for you to get up here in an infirm condition, I am going to have the bailiff take a Bible back to you . . . ." The trial court then asked Coghill the following questions:

THE COURT: You walk with a cane?

MR. COGHILL: Yes, sir.

THE COURT: You have to be assisted?

MR. COGHILL: Yes, sir. Well, I mean, yeah, at times, yes.

THE COURT: Well, you've had to be assisted in here every time I've seen you?

MR. COGHILL: Yeah, yeah.

During the trial, Coghill testified that he has had hip replacements, "trouble with [his] feet," and that he "move[s] slow, because of [his] operation."

Coghill's physical condition made him more vulnerable to the burglary. His physical condition made it more likely that he could not prevent or resist the crime, flee, or chase defendant. Coghill's physical condition "made him vulnerable and an inviting target . . . ." *Hartman*, 344 N.C. at 478, 476 S.E.2d at 346.

Also, "[t]here is no requirement that the trial court set out particularized findings in support of those factors which it finds in aggravation. Each factor must be supported by a preponderance of the evidence." *State v. West*, 103 N.C. App. 1, 12, 404 S.E.2d 191, 199 (1991) (citations omitted). The trial court made written findings of the aggravating factors that were present in the offense. The aggravating factors were supported by a preponderance of the evidence.

Further, counsel for defendant was asked twice if he had any questions for Coghill at the sentencing hearing. Defendant's counsel was asked after Coghill was sworn but before Coghill was questioned and defendant's counsel was asked again if he had any questions after the trial court finished examining Coghill. On

both occasions, defendant's counsel stated that he did not have any questions.

The trial court did not commit error in swearing in Coghill, asking Coghill questions, and finding the aggravating factor of physical infirmity on its own initiative based on the evidence presented at trial and at the sentencing hearing. Accordingly, we discern no error.

No error.

Judges HUDSON and BRYANT concur.

Report per Rule 30(e).