NO. COA01-554

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v. Cumberland County
No. 97 CRS 57684

KEVIN DEWAYNE LEWIS

On review by writ of certiorari from judgment entered 8 May 2000 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 24 June 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Rogers Firm, P.A., by Sherry Miller, for defendant appellant.

TIMMONS-GOODSON, Judge.

Defendant entered a plea of guilty to second-degree murder and conspiracy to discharge a firearm into occupied property under an agreement that provided for "a minimum of 250 months to a maximum of 309 months active sentence." In a judgment entered 8 May 2000, Judge E. Lynn Johnson found as a non-statutory aggravating factor that defendant's "conduct was hazardou[s] to more than one person" and sentenced him in the aggravated range to a single term of 250 to 309 months' imprisonment. We issued a writ of certiorari to allow defendant a belated appeal "limited to those [issues] to

which he originally had an appeal of right" under N.C. Gen. Stat. § 15A-1444(a1), (a2), and (e) (2001).

The State's proffer of evidence tended to show that defendant sought revenge on two men, Elliott and Surles, following a failed drug deal. Unable to locate the men, defendant telephoned Elliott's residence and threatened to "come over and shoot up the house and kill" the occupants. An associate of defendant misidentified a trailer at 1312 Cheddington Drive in Fayetteville as belonging to Elliott. Defendant enlisted the assistance of Anthony Hemmingway ("Hemmingway"), who drove with defendant to the Cheddington Drive address. Defendant possessed a .45 caliber handgun. Hemmingway possessed a .38 caliber pistol. Several shots were fired into the residence, one of which killed William Bradford ("Bradford"). Inside the residence with Bradford were Cynthia Winston and their eight-year-old son.

Police found eleven shell casings outside the trailer, six from Hemmingway's gun and five from defendant's gun. Inside the trailer were six bullet holes. Five bullets from Hemmingway's gun were recovered from the interior walls; one bullet was lodged in the victim's head. In a statement to police, defendant admitted that he and Hemmingway had agreed "to go shoot the trailer up." He claimed, however, that he had fired his weapon into the air while Hemmingway shot into the residence. Hemmingway told police that defendant fired both weapons into the residence simultaneously while he ran to the car. After hearing the evidence, the trial court noted, "[N]o matter whose version you buy, it's still acting

in concert." Defendant appeals.

On appeal, defendant contends the trial court erred in finding the aggravating factor that his conduct endangered the lives of more than one person. He argues that the evidence supporting this finding was also used to establish the element of malice required to establish second-degree murder. This claim is without merit.

We accept defendant's premise that the act of intentionally discharging a firearm into the dwelling demonstrated the requisite malice for defendant's murder conviction. *See State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). However, a trial court may aggravate a sentence, on the basis of conduct, "not used to prove an element of the offense for which the defendant is convicted if that conduct is proved by a preponderance of the evidence, increases the defendant's culpability, and is related to the purpose of sentencing." *State v. Jones*, 104 N.C. App. 251, 259, 409 S.E.2d 322, 327 (1991). In the instant case, the act of firing the weapon into the dwelling multiple times, thereby "increas[ing] the risk of the harm to the people within[,]" may be separately considered as a non-statutory factor in aggravation of his offense under N.C. Gen. Stat. § 15A-1340.16(d)(8)(2001). *See Jones*, 104 N.C. App. at 259, 409 S.E.2d at 327 (1991); *see also State v. Bruton*, 344 N.C. 381, 393-94, 474 S.E.2d 336, 345 (1996). On this basis, we uphold the trial court's finding of the above-stated aggravating factor.

Although it is not separately listed as a question for review

in his appellant's brief, *see* N.C.R. App. P. 28(b)(2)(2002), defendant raises the additional claim that the trial court committed plain error in convicting him for conspiracy, given that the district attorney dismissed the conspiracy charges against his alleged co-conspirators. This issue lies outside the scope of defendant's appeal of right. Moreover, defendant has failed to list this claim as an assignment of error in the record on appeal. *See* N.C.R. App. P. 10(a) (2002). The record submitted by defendant contains no evidence to support the claim. *See* N.C.R. App. P. 9(a)(3)(e)(2002). Finally, the prosecutor's dismissal of conspiracy charges against his alleged co-conspirators does not preclude defendant's conviction for the conspiracy. *See State v. Saunders*, 126 N.C. App. 524, 527-28, 485 S.E.2d 853, 855 (1997). Only where all other co-conspirators are acquitted may a defendant complain of his conspiracy conviction. *Id.*

Accordingly, we find no error.

No error.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).