Rel: September 11, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-0605

Supreme Born

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-18-358; CC-18-359; CC-18-360; CC-18-361)

On Return to Remand

COLE, Judge.

Supreme Born appeals his convictions for one count of attempted murder, a violation of §§ 13A-6-2 and 13A-4-2, Ala. Code 1975, two counts of discharging a firearm into an occupied vehicle, a violation of § 13A-11-61, Ala. Code 1975,

and one count of discharging a firearm into an unoccupied vehicle, a violation of § 13A-11-61, Ala. Code 1975, and his resulting sentences.

Procedural History

In February 2018, Born was indicted for two counts of discharging a firearm into an occupied vehicle, one count of discharging a firearm into an unoccupied vehicle, and one count of attempted murder. The charges were joined for a single trial, without objection. The charges arose out of a gun battle in the parking lot of a Birmingham retail meat market.

In June 2018, Born filed a motion seeking immunity from prosecution on the ground that he acted in self-defense. After conducting an evidentiary hearing, the circuit court denied the motion. Born did not file a petition for a writ of mandamus challenging that decision.

In September 2018, Born was tried before a jury. The jury returned guilty verdicts on all four charges. The trial court entered judgments in accordance with the jury's verdicts. On December 11, 2018, the trial court held a sentencing hearing and sentenced Born to "a term of life [in

prison] with the possibility of parole," with the sentence to "run concurrently with all cases." (C. 36, 70, 104, 139; R. 471-72.)

On January 10, 2019, Born filed a motion for a judgment of acquittal or, in the alternative, for a new trial. The trial court denied the motion on January 17, 2019. Born appealed.

On October 15, 2019, this Court issued an order holding that Born's life sentences exceeded the maximum authorized by law with respect to the convictions for discharging a firearm into an occupied vehicle and the conviction for discharging a firearm into an unoccupied vehicle, and remanding the case to the trial court for it to resentence Born with respect to those convictions.

On November 12, 2019, on remand, the trial court held a sentencing hearing and resentenced Born to 20 years' imprisonment on each of the convictions for discharging a firearm into an occupied vehicle, and to 10 years' imprisonment on the conviction for discharging a firearm into an unoccupied vehicle, all to run concurrently. On January 6, 2020, the case was resubmitted on return to remand.

Facts

At trial, Edward Brown testified that he was a licensed contractor. Brown had hired Born to work for him on several jobs, but Born was not a regular employee. During Easter weekend of 2017, Brown was in Sumter County visiting relatives when Born telephoned him several times demanding that Brown pay him money that he said Brown owed him.

On the following Monday, a man named Alphonzo, who owned a vegetable and fruit stand located in the parking lot of Discount Meat Market, called Brown and told him that Born was saying that Brown owed him money. Brown did not think he owed Born anything, but decided he would take some money to Born to avoid problems. Brown testified that he and his friend, Taurus Hawkins, drove to the meat market in Brown's truck to meet with Born.

According to Brown, when he arrived at the meat market, he saw Born and Alphonzo standing at the vegetable and fruit stand. Brown stopped his truck so that Born was standing near the passenger side of Brown's truck. Brown testified that, as he got out of the truck, he saw Born reaching for a pistol in his waistband. Brown asked Born if he needed a pistol to talk

to him about money. Born immediately began firing shots at Brown, initially striking the windshield of Brown's truck. Born then fired shots that struck the passenger door, the rear window, and the tool box of Brown's truck. When Born stumbled and fell behind the truck, Brown reached inside his truck and grabbed his shotgun from the backseat.[1] He never fired the shotgun because he realized that it had no shells in it.

Brown ran across the street, and when he got to the walkway in the middle of the street he noticed that he had been shot in the leg. Once he was on the other side of the street, he looked back and saw that Born had two pistols and was shooting with both hands. Brown testified that at some point he saw that another man wearing an apron was also shooting at him.

Brown's friend, Taurus Hawkins, drove Brown to the University of Alabama at Birmingham Hospital in Brown's truck. At the hospital, Brown learned that he had been shot in the leg, in his wrist, and in the stomach area. He testified that

[1]Brown testified that he kept a shotgun in his truck for safety because he often worked in "rough" neighborhoods. (R. 242, 251.)

doctors did not perform surgery to remove the bullet in his leg because it would not be safe to do so.

The State presented evidence indicating that two vehicles, in addition to Brown's truck, had been shot into and damaged. An evidence technician from the Birmingham Police Department also noted a bullet strike on the vegetable and fruit stand where an elderly woman had been sitting. At the scene, evidence technicians collected fourteen .40 caliber shell casings and fourteen 9 mm casings. All of the .40 caliber shells had been fired from the same gun; 12 of the 9 mm shells had been fired from one gun, and 2 had been fired from a different gun.

Detective Joylyn Craig, of the Birmingham Police Department, testified that, a few days after the shooting, she viewed a surveillance video from the meat market, but stated that the video could not be located for trial. She testified that the quality was enough to see people, but not to recognize faces. She saw two people shooting, one who came out of the meat market, and one who was standing at the passenger side of Brown's truck.

The defense presented testimony of Marvin Nickerson, who testified that Brown was the initial aggressor. Nickerson, who was employed at the meat market, testified that he walked out of the store to the parking lot to take a break and saw Born, whom he knew, standing in the parking lot talking to the vegetable and fruit vendor. Within minutes, a green truck drove up, circled the parking lot, and stopped near Born. Nickerson testified that the driver of the truck (Brown) got out, looked over the top of the truck, pulled out a short black shotgun that did not have a handle, and began shooting at Born. Thereafter, Born reached underneath his shirt and pulled out a gun and started firing back. The man from the truck walked backward away from the truck onto Jefferson Avenue, and began running while still firing his gun. Born was also firing his gun in the man's direction as the man was running behind the trees across the street. The shooting back and forth continued for several minutes. Nickerson testified that Born's son came out of the meat market and fired a shot.

Standard of Review

> "'In determining the sufficiency of the evidence to sustain the conviction, this Court must accept as true the evidence introduced by the State, accord the State all legitimate inferences therefrom, and

consider the evidence in the light most favorable to the prosecution.' Faircloth v. State, 471 So. 2d 485, 489 (Ala. Cr. App. 1984), affirmed, Ex parte Faircloth, [471] So. 2d 493 (Ala. 1985).

"'....

"'"The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision to the jury." Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978). An appellate court may interfere with the jury's verdict only where it reaches "a clear conclusion that the finding and judgment are wrong." Kelly v. State, 273 Ala. 240, 244, 139 So. 2d 326 (1962). ... A verdict on conflicting evidence is conclusive on appeal. Roberson v. State, 162 Ala. 30, 50 So. 345 (1909). "[W]here there is ample evidence offered by the state to support a verdict, it should not be overturned even though the evidence offered by the defendant is in sharp conflict therewith and presents a substantial defense." Fuller v. State, 269 Ala. 312, 333, 113 So. 2d 153 (1959), cert. denied, Fuller v. Alabama, 361 U.S. 936, 80 S. Ct. 380, 4 L. Ed. 2d 358 (1960).' Granger [v. State], 473 So. 2d [1137,] 1139 [(Ala. Crim. App. 1985)].

"... 'Circumstantial evidence alone is enough to support a guilty verdict of the most heinous crime, provided the jury believes beyond a reasonable doubt that the accused is guilty.' White v. State, 294 Ala. 265, 272, 314 So. 2d 857, cert. denied, 423 U.S. 951, 96 S. Ct. 373, 46 L. Ed. 2d 288 (1975). 'Circumstantial evidence is in nowise considered inferior evidence and is entitled to the same weight as direct evidence provided it points to the guilt of the accused.' Cochran v. State, 500 So. 2d 1161, 1177 (Ala. Cr. App. 1984), affirmed in pertinent part, reversed in part on other grounds, Ex parte Cochran, 500 So. 2d 1179 (Ala. 1985)."

White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989).

Discussion

On appeal, Born argues (1) that the evidence was insufficient to prove that he shot into an occupied vehicle owned by Zerry Robinson; (2) that the evidence was insufficient to prove that he shot into an unoccupied vehicle owned by Ashlai Parker; (3) that the evidence was insufficient to prove that he shot into an occupied vehicle owned by Edward Brown; (4) that the evidence was insufficient to prove the offense of attempted murder of Edward Brown; (5) that his sentence of life imprisonment violates the Eighth Amendment to the United States Constitution; and (6) that the trial court erred in denying his pretrial motion for immunity and that this Court should overrule its prior precedent holding that an immunity claim becomes moot after a trial and conviction.

I. Sufficiency of the Evidence

Insufficient Evidence: Case No. CC-18-358 Shooting into An Occupied Vehicle (Zerry Robinson)

Born was convicted of shooting into an occupied vehicle owned by Zerry Robinson, a violation of § 13A-11-61(a), Ala. Code 1975, which provides:

> "(a) No person shall shoot or discharge a firearm, explosive or other weapon which discharges a dangerous projectile into any occupied or unoccupied dwelling or building or railroad locomotive or railroad car, aircraft, automobile, truck or watercraft in this state."

(Emphasis added.)

A violation of this statute is a Class B felony if the vehicle is occupied, see § 13A-11-61(b), and a Class C felony if the vehicle is unoccupied, see § 13A-11-61(c). This statute has been held to include any of the states of mental culpability set forth in § 13A-2-2, Ala. Code 1975--i.e., intentionally, knowingly, recklessly, or with criminal negligence. Sullens v. State, 878 So. 2d 1216, 1222 (Ala. Crim. App. 2003). Furthermore, § 13A-11-61 applies to the frame and tires of an automobile, and "seeks to punish all individuals who shoot into an occupied or unoccupied vehicle, whether the projectile enters the passenger compartment or not." Hawkins v. State, 621 So. 2d 400, 401 (Ala. Crim. App. 1993).

Born argues that the evidence as to the shooting into Robinson's automobile was insufficient because, he says, the State did not show that Born fired the shots that hit Robinson's automobile and did not show that the automobile was

occupied. As to whether Born fired the shot, Brown testified that Born was shooting at him with two pistols, and there was evidence of 28 shell casings found in the parking lot. Although there was evidence indicating that another individual also fired shots during the incident, the jury could reasonably have inferred that Born fired at least one of the shots that struck Robinson's automobile. "We have repeatedly held that it is not the province of this court to reweigh the evidence presented at trial." Johnson v. State, 555 So. 2d 818, 820 (Ala. Crim. App. 1989). Furthermore, "'[t]his Court must view the evidence in the light most favorable to the State, and "draw all reasonable inference and resolve all credibility choices in favor of the trier of fact."'" D.L. v. State, 625 So. 2d 1201, 1204 (Ala. Crim. App. 1993) (quoting Woodberry v. State, 497 So. 587, 590 (Ala. Crim. App. 1986)). Under the facts presented, and viewing the evidence in a light most favorable to the State, the jury could have reasonably determined that Born fired the shots that hit Robinson's vehicle.

As to whether Robinson's automobile was occupied at the time of the shooting, the State argues that Born did not

preserve this issue for appellate review because he did not raise this particular argument in the trial court. In making the motion for a judgment of acquittal at the close of the State's case, Born's counsel stated:

> "[DEFENSE COUNSEL]: Judge, we would like to make a motion for acquittal as to the discharging a firearm into a vehicle. The State has produced no evidence that this person had anything to do with that. I expect him to take the witness stand and testify.
>
> "THE COURT: All right.
>
> "[DEFENSE COUNSEL]: But the State has not met its burden."

(R. 324.) Although this motion did not address whether the automobile was occupied, Born's "motion for post-verdict judgment of acquittal or in the alternative new trial" did preserve this argument for appellate review. That motion asserted that

> "[t]he State of Alabama failed to produc[e] sufficient evidence to support a finding of guilt beyond a reasonable doubt and to a moral certainty of each and every element of the separate offenses charged in the counts of the Indictment."

(C. 252.)

This Court has held that a "motion for a new trial is sufficient to preserve an issue of sufficiency of the

evidence, even if no specific objection is made at trial." Washburn v. Town of Blountsville, 739 So. 2d 1146, 1147 (Ala. Crim. App. 1999). We have also held that a motion for a judgment of acquittal on the ground "'"that the state has failed to prove a prima facie case"' was sufficient to preserve the appellant's specific argument that the State had failed to prove a necessary element of the charged offense." Cole v. City of Bessemer, 26 So. 3d 488, 489 (Ala. Crim. App. 2009) (quoting Ex parte Johnson, 620 So. 2d 665, 668 (Ala. 1993)). Since "[t]o prove a prima facie case in a criminal prosecution, the State must 'fulfill its duty of proving the elements of the offense," Gamble v. State, 699 So. 2d 978, 979 (Ala. Crim. App. 1997) (quoting Eldridge v. State, 415 So. 2d 1190, 1194 (Ala. Crim. App. 1982)), Born's assertion that the State failed to prove all elements of the offense was the equivalent of asserting a failure to prove a prima facie case and was sufficient to preserve this issue of appellate review.

Clearly, one of the elements of discharging a firearm into an occupied vehicle is that the vehicle must be "occupied." § 13A-11-61(b), Ala. Code 1975. Zerry Robinson, the owner of the vehicle that is the subject of this

indictment, did not testify at trial. Officer Roger Eady testified that shots had been fired into Robinson's vehicle, but he did not testify that the vehicle was occupied at the time of the shooting. The closest the State came to proving this element was through the testimony of Detective Joylyn Craig, who testified as follows:

> "Q. Were either of them [Ashlai Parker and Robinson] in the vehicle at the time of the shooting? Do you recall?
>
> "A. I know Ashlai was not in the vehicle. Mr. Parker may have been--I mean, Mr. Robinson may have been in his car."

(R. 298.) As Born argues on appeal, testimony by an individual who did not witness the shooting that Robinson "may have been in his car" was insufficient to establish beyond a reasonable doubt that Robinson's vehicle was occupied at the time of the shooting.

Because the State did not prove that Robinson's vehicle was occupied at the time of the shooting, the trial court erred in not granting Born's motion for a judgment of acquittal as to that offense. Although the State did prove beyond a reasonable doubt that Born fired a shot into Robinson's unoccupied vehicle, and thus presented sufficient

evidence to sustain a conviction for the lesser-included offense of discharging a firearm into an unoccupied vehicle, in violation of § 13A-11-61(a), Ala. Code 1975, the circuit court did not instruct the jury on the lesser-included offense of discharging a firearm into Robinson's unoccupied vehicle.

Because the jury was not instructed on the lesser-included offense, this Court cannot adjudge Born guilty of that offense; instead, we must reverse Born's conviction in case no. CC-18-358 and render a judgment in his favor in that case. See, e.g., Campbell v. State, 90 So. 3d 789, 793 (Ala. Crim. App. 2012) ("Although the State urges this Court to adopt the view of the [United States v.] Hunt[, 129 F.3d 739 (5th Cir. 1997),] court, the Alabama Supreme Court has already addressed this issue and has made a decision to the contrary. The Alabama Supreme Court has held [in Ex parte Roberts, 662 So. 2d 229 (Ala. 1995),] that when the State fails to present sufficient proof of all the elements of a crime, a conviction must be reversed, judgment must be rendered for the defendant, and an appellate court may not enter judgment on a lesser-included offense unless the jury was charged as to the lesser-included offense.").

Insufficient Evidence: Case No. CC-18-359
Shooting into An Unoccupied Vehicle (Ashlai Parker)

Born was convicted of shooting into an unoccupied vehicle owned by Ashlai Parker. Born argues that the evidence was insufficient as to this charge because, he says, the State did not show that Born fired the shots that hit Parker's automobile. Specifically, Born argues that his son, Dan Davidson, was also charged with shooting into Parker's automobile, but the case against Davidson was dismissed because a witness was unavailable or uncooperative.

Born does not make an adequate argument that the evidence, when viewed in the light most favorable to the State, did not support the verdict. As discussed above, there was evidence indicating that Born fired many shots in the parking lot, and the jury could reasonably have inferred that he fired at least one of the shots that hit Parker's automobile. Evidence that someone else might have fired some of the shots during the shootout goes to the weight of the evidence, and not to its sufficiency.

Insufficient Evidence: Case No. CC-18-361
Shooting into An Occupied Vehicle
(Edward Brown's Truck)

Born was convicted of shooting into an occupied vehicle owned by Edward Brown. Born argues that the evidence was insufficient as to this offense because there was no evidence indicating that Brown was occupying the truck when it was struck by gunfire. This argument is without merit. Although there was evidence indicating that Brown had exited his truck before the shooting started, there was also evidence indicating that Hawkins was still inside the truck when it was hit by gunfire. Although Born's motion for new trial preserved the issue whether the truck was occupied at the time of the shooting, he did not preserve the issue whether the truck was occupied by Brown at the time of the shooting. There was also direct testimony from Brown to the effect that Born shot his truck, and physical evidence indicating that Born had shot into the truck. Accordingly, the evidence is sufficient to support this conviction.

Insufficient Evidence: Case No. CC-18-360
Attempted Murder

Born was also convicted of the attempted murder of Brown. Born argues that he was entitled to a judgment of acquittal because he "presented sufficient evidence that he was acting in self-defense, so much so that it was not reasonable for the

jury to exclude the possibility of self-defense beyond a reasonable doubt." (Born's brief, p. 25.)

Born's self-defense claim is governed by § 13A-3-23(a), Ala. Code 1975, which provides:

> "(a) A person is justified in using physical force upon another person in order to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he or she may use a degree of force which he or she reasonably believes to be necessary for the purpose. A person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense or the defense of another person pursuant to subdivision (5), if the person reasonably believes that another person is:
>
> > "(1) Using or about to use unlawful deadly physical force."

Section 13A-3-23(d)(4) provides:

> "(4) If the defendant does not meet his or her burden of proving immunity at the pre-trial hearing, he or she may continue to pursue the defense of self-defense or defense of another person at trial. Once the issue of self-defense or defense of another person has been raised by the defendant, the state continues to bear the burden of proving beyond a reasonable doubt all of the elements of the charged conduct."

This Court has repeatedly held that a claim of self-defense is an issue to be decided by the jury. See Chestang

v. State, 837 So. 2d 867, 871 (Ala. Crim. App. 2001) ("'"Where ... the [shooting] was admitted, the question of whether or not it was justified under the theory of self-defense was a question for the jury."'") (quoting Quinlivan v. State, 627 So. 2d 1082, 1087 (Ala. Crim. App. 1992), quoting in turn Townsend v. State, 402 So. 2d 1097, 1098 (Ala. Crim. App. 1981)); Worthington v. State, 652 So. 2d 790, 794 (Ala. Crim. App. 1994) ("'"'The issue of self-defense invariably presents a question for the jury whose verdict will not be disturbed on appeal.'"'") (quoting Brooks v. State, 630 So. 2d 160, 162 (Ala. Crim. App. 1993), quoting in turn Mack v. State, 348 So. 2d 524, 529 (Ala. Crim. App. 1977)).

Born argues that Nickerson's testimony and the consistent portions of Brown's testimony establish that Born acted in self-defense. That argument is without merit because it does not view the evidence in the light most favorable to the State. As discussed above, the jury was entitled to believe Brown's testimony that Born shot first and to disbelieve Nickerson's testimony that Brown was the initial aggressor. Conflicting evidence presents a jury question not subject to review on appeal, provided the State's evidence establishes a

prima facie case. Gunn v. State, 387 So. 2d 280 (Ala. Crim. App. 1980).

Therefore, the jury's verdict finding Born guilty of attempted murder is supported by the evidence, and the trial court did not err in denying Born's motion for a judgment of acquittal.

II. Excessive Sentence Violates the Eighth Amendment

Born argues that his four sentences of life imprisonment are so excessive and disproportionate that they violate the Eighth Amendment of the United States Constitution. After remand, the trial court reduced three of the sentences to 20 years' imprisonment or 10 years' imprisonment, and ordered that those sentences were to run concurrently with the sentence of life imprisonment imposed with respect to the attempted-murder conviction. Born did not file a supplemental brief after return to remand, but we will consider whether the sentence of life imprisonment for attempted murder violates the Eighth Amendment.

The State argues that Born did not preserve this claim for appellate review because he did not object on this basis at the sentencing hearing. We agree that this claim was not

preserved. See Boldin v. State, 585 So. 2d 218, 220 (Ala. Crim App. 1991) ("The appellant contends that his sentence violates both the Fifth and Eighth Amendments of the United States Constitution. The appellant failed to preserve these issues for review because he did not raise them in the trial court. This requirement also applies to Constitutional issues.").

Further, this claim is without merit. Born's sole basis for arguing that the sentences are excessive is that they are severe. "The mere fact that punishment may be severe does not make it cruel and usual punishment. Rummell v. Estelle, 445 U.S. 263 (1980)." Riley v. State, 480 So. 2d 32, 33 (Ala. Crim. App. 1985).

Born acknowledges that "this Court does not review a trial court's sentence where the sentence is within the limits defined by the Legislature." (Born's brief, p. 43.) He argues, however, that this sentence was so disproportionate to the offense that it constitutes an Eighth Amendment violation. Born cites Solem v. Helm, 463 U.S. 277 (1983), which held that a life-imprisonment-without-parole sentence for a defendant who had been convicted of his seventh bad-check offense was so

disproportionate as to violate the Eighth Amendment. He does not, however, explain how Solem warrants a reversal in this case, which involved a public gun battle, serious physical injury, and endangerment to the public.

Born argues that he did not have any prior felony convictions, that no one was seriously hurt, and that the trial court commented at the sentencing hearing that "'the community is tired of all this gun violence.' R-455." (Born's brief, p. 47.) Born does not make an adequate argument that the sentence here is too severe for the nature of the crime, the actual harm caused, and potential harm threatened. We first note that the legislature has adopted various firearms-enhancement statutes, including § 13A-5-6(a)(5), Ala. Code 1975, to impose more serious penalties on crimes in which firearms are used. We also note that Brown suffered an apparently permanent injury to his leg and that Born's gun battle seriously endangered multiple people present in a public parking lot in the middle of the day. Therefore, Born's sentence of life in prison for attempted murder was an appropriate sentence within the statutory range allowed for that offense and did not

constitute cruel and unusual punishment. See, e.g., Ware v. State, 949 So. 2d 169, 183 (Ala. Crim. App. 2006) ("'It is well settled that "[w]here a trial judge imposes a sentence within the statutory range, this Court will not disturb that sentence on appeal absent a showing of an abuse of the trial judge's discretion." Alderman v. State, 615 So. 2d 640, 649 (Ala. Crim. App. 1992).'").

III. Denial of Motion For Immunity

Born argues that the trial court erred in denying his motion for immunity based on self-defense and he asks this Court to overrule Smith v. State, 279 So. 3d 1199, 1203 (Ala. Crim. App. 2018). Smith held that, after an immunity hearing is held and immunity denied, the immunity claim is moot unless the defendant files a petition for a writ of mandamus. Born argues that mandamus relief provides only extraordinary relief and that it is unfair to limit a defendant to mandamus relief as his or her sole remedy for the denial of an immunity claim. Born cites Judge Kellum's observation in her special concurrence in Smith that, "[b]ecause a writ of mandamus is an extraordinary remedy that places on a petitioner a particularly heavy burden, I question whether a petitioner

would ever be successful in challenging a circuit court's pretrial immunity ruling by mandamus." Smith, 279 So. 3d at 1207 (Kellum, J., concurring specially).

In Smith, this Court considered its decision in Harrison v. State, 203 So. 3d 126 (Ala. Crim. App. 2015), which construed § 13A-3-23(d), Ala. Code 1975, other Alabama cases involving immunity from liability in other contexts, and similar self-defense immunity statutes from other states and concluded:

> "We agree with the State that once a pretrial hearing on the issue of immunity has been conducted and the circuit court has ruled on that issue, but the defendant elects to proceed to trial instead of challenging that ruling by a petition for a writ of mandamus, any claim of immunity from prosecution is moot."

Smith, 279 So. 3d at 1203.

Born does not make an adequate argument as to how Smith was incorrectly decided or why it should be overruled, and we decline to do so. Most of his argument goes to whether the trial court erred in denying immunity in the pretrial hearing. Those arguments are moot under Smith.

IV. Born's 10-year Sentence for Shooting into an Unoccupied Vehicle

We note, however, that Born's 10-year sentence for his shooting-into-an-unoccupied-vehicle conviction for shooting into Ashlai Parker's vehicle is illegal. Although neither party on appeal addresses the propriety of Born's 10-year sentence, it is well settled that "[m]atters concerning unauthorized sentences are jurisdictional," Hunt v. State, 659 So. 2d 998, 999 (Ala. Crim. App. 1994), and that this Court may take notice of an illegal sentence at any time. See, e.g., Pender v. State, 740 So. 2d 482 (Ala. Crim. App. 1999).

Born was convicted of shooting into an unoccupied vehicle, a Class C felony. See § 13A-11-61(c), Ala. Code 1975. The punishment for committing a Class C felony is a sentence of not "more than 10 years or less than 1 year and 1 day and must be in accordance with subsection (b) of Section 15-18-8[, Ala. Code 1975,] unless sentencing is pursuant to Section 13A-5-9[, Ala. Code 1975]." § 13A-5-6(a)(3), Ala. Code 1975.[2]

[2]Because Born used a firearm, his 10-year sentence is both the minimum and maximum sentence he can receive for his discharging-a-firearm conviction. See Myers v. State, 715 So. 2d 928, 929 (Ala. Crim. App. 1998) ("[T]he sentence for a Class C felony in the commission of which the defendant used a firearm is 'exactly ten years--no more or no less.' Robinson v. State, 434 So. 2d 292, 293 (Ala. Cr. App. 1983).").

To put it differently, unless a defendant is sentenced as a habitual felony offender, a sentence for a Class C felony must fall within the range of time set out in § 13A-5-6(a)(3), Ala. Code 1975, and must comply with subsection (b) of the Split Sentence Act. As this Court recently held in Jackson v. State, [Ms. CR-18-0454, Feb. 7, 2020] ___ So. 3d ___ (Ala. Crim. App. 2020), §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975, do not allow a trial court to impose a "straight" sentence for a Class C felony when the Habitual Felony Offender Act does not apply. Instead, under § 13A-5-6(a)(3) and 15-18-8(b), once the trial court imposes on a defendant a sentence length between 1 year and 1 day and 10 years, the trial court must either:

> (1) Sentence the defendant to probation, drug court, or a pretrial diversion program; or
>
> (2) "Split" the confinement portion of the defendant's sentence to a period not exceeding two years, suspend the remainder of the defendant's sentence, and impose a term of probation on the defendant that does not exceed three years.

Here, Born is not a habitual felony offender and was not sentenced under § 13A-5-9, Ala. Code 1975. (R. 468.) Yet the trial court sentenced Born to a "straight" 10-year sentence in the Alabama Department of Corrections, which, as explained

above, is impermissible under § 13A-5-6(a)(3), Ala. Code 1975.[3] Thus, we must remand this case to the trial court to impose a sentence on Born for his conviction for discharging a firearm into an unoccupied vehicle that complies with §§ 13A-5-6(a)(3) and 15-18-8(b).

In so doing, however, we note that Born's 10-year sentence is valid; thus, the trial court cannot change the underlying sentence. See generally Moore v. State, 871 So. 2d 106, 110 (Ala. Crim. App. 2003) (recognizing that, when the base sentence imposed by the trial court is valid, the trial court cannot alter it on remand).

Conclusion

Based on the foregoing, Born's convictions for attempted murder and discharging a firearm into an unoccupied vehicle and his conviction for discharging a firearm in an occupied vehicle in case no. CC-18-361 are affirmed. Born's conviction

[3]The trial court's straight 10-year sentence in this case makes sense given the fact that Born's sentencing event also included a sentence of life imprisonment for attempted murder, and two concurrent straight 20-year sentences for the discharging-a-firearm-into-an-occupied-vehicle convictions. However, neither § 13A-5-6(a)(3), nor § 15-18-8(b) includes any exception that would allow "straight" time for a Class C felony where a trial court imposes a sentence for a Class A or B felony along with that Class C felony.

for discharging a firearm into an occupied vehicle in case no. CC-18-358 is reversed and we render judgment in Born's favor in that case. Finally, we remand this case to the trial court for that court to resentence Born in accordance with this opinion for his discharging-a-firearm-into-an-unoccupied-vehicle conviction in case no. CC-18-359. On remand, the trial court shall take all necessary action to ensure that return be made to this Court within 42 days from the date of this opinion.

AFFIRMED IN PART; REVERSED IN PART AND JUDGMENT RENDERED; AND REMANDED WITH INSTRUCTIONS.

Windom, P.J., and McCool and Minor, JJ., concur. Kellum, J., concurs specially, with opinion.

KELLUM, Judge, concurring specially.

I concur with the main opinion. I write specially only to invite the legislature to consider amending § 13A-3-23(d), Ala. Code 1975, to include a right to appeal a trial court's pretrial ruling on an immunity defense. See Smith v. State, 279 So.3d 1199 (Ala. Crim. App. 2018) (Kellum, J., concurring specially).