NO. COA10-312
NORTH CAROLINA COURT OF APPEALS

Filed: 17 May 2011

STATE OF NORTH CAROLINA

v.

Buncombe County
File No. 08 CRS 61839
09 CRS 177

KEONTA MONTEECE ARDREY.

Appeal by defendant from judgments entered 21 August 2009 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 29 September 2010.

Attorney General Roy Cooper, by Melissa H. Taylor, Assistant Attorney General, for the State.

James N. Freeman, Jr., for the Defendant.

ERVIN, Judge.

Defendant Keonta Monteece Ardrey appeals from judgments sentencing him to a minimum term of thirty-one months and a maximum term of forty-seven months imprisonment based upon his conviction for discharging a weapon into occupied property and to a consecutive term of a minimum of fourteen months and a maximum of seventeen months imprisonment based upon his conviction for possession of a firearm by a convicted felon, both sentences to be served in the custody of the North Carolina Department of Correction. On appeal, Defendant

challenges the sufficiency of the evidence to support his convictions, the appropriateness of the trial court's decision to allow the admission of certain items of evidence, and the trial court's failure, acting on its own motion, to deliver a limiting instruction relating to the purposes for which the jury was entitled to consider evidence concerning a prior conviction. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that Defendant's challenge to the sufficiency of the evidence to support his convictions has merit and that the trial court's judgments should be reversed.

I. Factual Background

A. Substantive Facts

On 28 August 2008, Glenn McMahan's son, Kyle McMahan, had an altercation with Solobnei Chambers,[1] in the course of which Mr. Chambers threatened to "get" Kyle McMahan and his family. On 29 September 2008, Glenn McMahan was at his home in Black Mountain with his girlfriend and their baby. At around 11:30 p.m., after the motion-activated lights outside his house came on, Glenn McMahan observed two black men, one of whom had braided hair, standing outside

[1] Although the State's evidence tended to portray Mr. Chambers as an important participant in the events that led to the initiation of criminal charges against Defendant, he did not testify at Defendant's trial.

his house near the porch. After making these observations, Glenn McMahan retrieved a firearm and requested his girlfriend to call 911 if anything happened. Although Glenn McMahan heard gunfire two different times after the men banged on his door, he did not see who actually fired the shots. When Glenn McMahan opened the door, he saw a black SUV driving away. Glenn McMahan called Kyle McMahan to tell him about this incident. A short time later, Kyle McMahan called his father and told Glenn McMahan that he had seen the SUV at a gas station located about three miles away from Glenn McMahan's residence and that Mr. Chambers was present at that location.

Joshua Carter worked at Lee's Exxon on the night of 29 September 2008. After midnight, Mr. Carter observed two black males walking from the direction of Black Mountain, one of whom was Defendant. After the individual with Defendant used the telephone and after Defendant asked if Mr. Carter knew anyone that could give the two men a ride to Cherokee, the two men went outside and waited in the parking lot. About five minutes after the two men arrived at the Exxon station, law enforcement officers arrived and took the two men into custody. According to Lieutenant Jeff Blankenship of the Black Mountain Police Department, Lee's Exxon was about three miles from Glenn McMahan's residence, a relatively long distance for someone to travel on foot during the time between the shooting and the time of Defendant's arrival at the service station.

Lieutenant Blankenship was dispatched to Glen McMahan's residence in response to a 911 call. As he neared Glen McMahan's home, Officer Blankenship saw a black SUV with the lights on leaving the neighborhood and two people running away from the vehicle into the woods. He also observed a shotgun and a handgun in the back seat of the SUV. A few minutes later, Deweese Bushyhead emerged from the woods and was taken into custody by Lieutenant Blankenship.

Officer Daniel Denton of the Black Mountain Police Department, who was called to the scene of the shooting at 11:55 p.m., detained Andrew Aguilera,[2] who had been discovered in the back yard of a nearby home, shortly before 12:30 a.m. Officer Denton spoke with Glenn McMahan, who described the men he had seen on his porch, and with Kyle McMahan, who described his previous conflict with Mr. Chambers. Subsequently, Officer Denton drove to Lee's Exxon, found Defendant and Mr. Chambers there, and detained them at about 1:45 a.m. At the time that Officer Denton took him into custody, Mr. Chambers had twigs and foliage in his hair, half of which was braided. Officer Denton noticed that Defendant, who claimed to have been in Asheville, was not nervous, fearful, or out of breath. The stories that Defendant and Mr. Chambers told Officer Denton were inconsistent with each other.

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[2] Mr. Aguilera died of a drug overdose prior to Defendant's trial and could not be called as a witness by either party.

Shotgun pellets were found in the living room and the baby's room of Glenn McMahan's residence, with such pellets having penetrated all of the walls in the building. Detective Lee Ribley of the Black Mountain Police Department observed five gunshot holes in Mr. McMahan's house, two in the vicinity of the door and three in the side of the residence, and collected five spent shotgun shells from locations near the structure. A pump action 12 gauge shotgun and a .45 caliber revolver were found in the back seat of the black SUV. Special Agent Shane Green of the State Bureau of Investigation determined that all five of the shotgun shells had been fired from the shotgun seized from the SUV. On the other hand, the record contains no evidence tending to show that the revolver discovered in the SUV had been fired. No fingerprints were recovered from either weapon. According to Detective Ribley, Defendant denied having been at Glenn McMahan's residence and claimed to have been minding his own business at the time of the shooting.

Although swabbings were taken from the suspects' hands, because more than four hours had elapsed between the shooting and the taking of the samples, the SBI would not perform gunshot residue tests on the samples. About eight months after Mr. Chambers and Defendant were taken into custody, Special Agent Michael Gurdziel of the State Bureau of Investigation analyzed "stubs" taken from the clothing that

the two men were wearing when arrested. According to Special Agent Gurdziel:

> Gunshot residue on the hands we consider to be more - of greater evidentiary value than gunshot residue found on the clothes, and that is specifically due to the limited window of time that gunshot residue can remain on an individual's hands versus on clothing. I cannot say when gunshot residue got on a particular article of clothing. Gunshot residue can retain - can be retained on an individual's clothing for a longer period of time versus gunshot residue that collects on an individual's hands.

Special Agent Gurdziel discussed the possible ways in which gunshot residue could be deposited on someone's hands or clothing:

> [AGENT GURDZIEL]: Gunshot residue is collected on someone's hands. It's possible that they could collect on someone's hands from handling a dirty weapon or ammunition. It could come from possibly firing a weapon. On clothing it could be from firing a weapon or being in the presence of a fired gun. Those would be two possible reasons why someone would have gunshot residue on their clothing.
>
> [PROSECUTOR]: So if they're on the clothing, they either fired the weapon or were near when the weapon was fired?
>
> [AGENT GURDZIEL]: Those would be two possible ways, not necessarily the only way.

Special Agent Gurdziel found no evidence of gunshot residue on Mr. Chambers' clothing. Although he did not find any gunshot residue on Defendant's pants or underwear, Special Agent Gurdziel detected the presence of a single particle of gunshot residue on Defendant's

shirt. Special Agent Gurdziel discussed the significance of this finding in response to questions directed to him by the prosecutor:

> [PROSECUTOR]: Now, Special Agent Gurdziel, based on what you found from your examination of the stubs, what does it tell you that Mr. Ardrey's stub had the presence of a particle? The gunshot residue, what does that tell you?
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> [AGENT GURDZIEL]: With regard to gunshot residue on clothing, we don't - as a laboratory, we do not give an opinion in our result statement regarding how the gunshot residue particle got on an article of clothing. Since time was less of a factor with regard to retention of gunshot residue on that article of clothing, we will just make the statement regarding whether characteristic gunshot residue particles were present or were not present.

Mr. Bushyhead testified that he was with his cousin, Mr. Aguilera, who was driving a black SUV owned by his girlfriend, on 29 September 2008. Mr. Bushyhead and Mr. Aguilera drove around the Cherokee area, drinking moonshine and smoking marijuana, for about forty minutes before picking up Mr. Chambers, whom Mr. Bushyhead had not previously met. After another half-hour had elapsed, the group picked up Defendant, with whom Mr. Bushyhead was already acquainted. Mr. Bushyhead and Mr. Aguilera sat in the front of the car, while Defendant and Mr. Chambers rode in the back. As the group rode around, Mr. Chambers and Mr. Aguilera talked about a man who lived in Black Mountain, giving Mr. Bushyhead the impression that they

wanted to rob this individual. Eventually, Mr. Aguilera drove the SUV to Black Mountain.

Upon arriving at their destination, the group parked near a mobile home. Mr. Chambers, Defendant, and Mr. Bushyhead left the SUV and walked up to the mobile home. After mounting the porch, Mr. Chambers and Defendant knocked on the door. "[A]bout ten minutes" later, as he was returning to the SUV, Mr. Bushyhead heard four or five gunshots. Mr. Bushyhead did not see who fired the shots and had not, until that point, been aware that either Mr. Chambers or Defendant was armed.

After hearing the gunshots, Mr. Bushyhead ran back to the SUV, in which Mr. Aguilera was passed out. Mr. Bushyhead roused Mr. Aguilera, who drove "down the road" with Defendant and Mr. Chambers in the back seat. A short time later, all four men jumped out of the SUV and ran. Investigating officers apprehended Mr. Bushyhead shortly thereafter.

Mr. Bushyhead read to the jury from a handwritten statement that he had provided to law enforcement officers on the night he was arrested. In that statement, Mr. Bushyhead said that:

> [MR. BUSHYHEAD]: It says, "Me and Little Man was settin' around talkin' and drinkin'. He asked-"
>
> . . . .
>
> [PROSECUTOR]: [Is "Little Man"] Mr. Aguilera?

[MR. BUSHYHEAD]: Yes.

[PROSECUTOR]: All right. So start back up now.

[MR. BUSHYHEAD]: Okay. "He asked me to ride with him and these two black guys. We ride around a bit and" -

. . . .

[MR. BUSHYHEAD]: - "and talk. They start talkin' 'bout this guy in Black Mountain that has money and drugs. They asked us to ride over here with them. They roll up a blunt and we have a little white liquor. We start smokin' and sippin'. They start talkin' 'bout how they are going to get this money. I don't know the guy but Dread Man does."

[PROSECUTOR]: Hold on. Who is Dread Man?

[MR. BUSHYHEAD]: That would be Mr. Chambers.

. . . .

[MR. BUSHYHEAD]: Then it says, "He starts talkin' 'bout how we're gonna hit this guy and get this [money]. We ride around then head toward Asheville. He said the guy lives in Black Mountain so we hit the road. They start talkin' 'bout how the guy carries a gun so he said when we hit the door, we better be ready. We smoke a blunt on the way down the road. We're talkin' 'bout all kinds of things."

. . . .

[PROSECUTOR]: Hold on. I think you skipped over a part. Start where it says, "We smoked a blunt on the way down."

[MR. BUSHYHEAD]: "We smoke a blunt on the way down the road. We're talkin' 'bout all kinds of things. They're makin' up plans . . . 'bout someone needs to hit the front and someone needs

> to hit the back they said because he carries heat. . . . So we ride down the road while Dread Man starts givin' directions. We make a few turns. I'm not from here so I don't know where we are. Next thing I know we turn around in front of this trailer park and park on this side - side street. Me and the two black guys get out and walk up to this trailer. They go up to the door and start knocking and ringing the doorbell. I'm standing in the driveway by this motorcycle. This goes on for 'bout five minutes. Then they came off the porch and started shootin' around in the yard. Next thing I know we start runnin'. Then the police showed up and picked us up. The officer set me down and talked to me and asked me to write a statement so I'm telling you my side of the story how the night went 'bout plotting to rob this guy. They're carrying a pump shotgun and some kind of four-barrel pistol. I don't know what kind. End of statement."

Mr. Bushyhead testified that he knew about the presence of the shotgun because "the detective had brought the - the guns up;" that Mr. Aguilera never got out of the SUV; and that he, Mr. Aguilera, Mr. Chambers, and Defendant had all discussed the proposed robbery. On the other hand, Mr. Bushyhead denied "know[ing] who had a gun and who was shooting." On cross-examination, Mr. Bushyhead reiterated his testimony that had not seen Mr. Chambers or Defendant in possession of a firearm, that he did not know who fired the shotgun, that investigating officers had told him that they had found a shotgun and a handgun, and that, since he knew he did not have a weapon, he assumed that Mr. Chambers and Defendant each had one. Although Mr. Bushyhead had entered a plea of guilty to aiding and abetting

discharging a firearm into occupied property, he had not been sentenced as of the date of Defendant's trial.

After the trial court overruled Defendant's objection to the State's attempt to elicit evidence from Detective Ribley concerning his interview with Mr. Bushyhead and instructed the jury that the testimony in question was only being admitted for corroborative purposes, Detective Ribley testified that:

> He told me that after riding from Cherokee in the car with the other three subjects, that he had gotten out of the car and went to the carport area while Mr. Ardrey and Mr. Chambers went to the porch, that gunshots were fired, that he ran back to the car and then ran from police and was apprehended.

On cross-examination, Defendant's trial counsel had a lengthy exchange with Detective Ribley concerning a report prepared by Detective Ribley describing a conversation that he had had with Mr. Bushyhead:

> [DEFENSE COUNSEL]: . . . But when you interviewed him [] shortly after this incident, he told you very clearly that Mr. Ardrey repeatedly fired the shotgun into the dwelling, did he not?
>
> [DETECTIVE RIBLEY]: The means by which he told us that were that he indicated that he was there with them, and while he was there with them shots were fired, and that he did not have a gun and that Mr. Aguilera was in the car. He was making it clear that it was a deductive process, that he realized that they were shooting the guns.

[DEFENSE COUNSEL]: So he was making it clear that it was either Mr. Ardrey or Mr. Chambers?

[DETECTIVE RIBLEY]: Yes, sir.

[DEFENSE COUNSEL]: So he wasn't saying it was Mr. Ardrey?

[DETECTIVE RIBLEY]: He wasn't able to be real clear on that, no, sir.

[DEFENSE COUNSEL]: Now, when you write a narrative report of an interview with a witness, do you try to be as accurate as you can when you're drafting that narrative?

[DETECTIVE RIBLEY]: Yes, sir. His best indication was that Mr. Ardrey had the shotgun.

[DEFENSE COUNSEL]: Is it your testimony now that it was his best indication that he did tell you that?

[DETECTIVE RIBLEY]: In his initial interview on the 30th when he talked to me, he - the questioning went like: "So somebody had the shotgun. Was it you?"

"No."

"Was it them?"

"No."

"Who was it?"

And he was speaking along the lines of, "It must have been Ardrey."

[DEFENSE COUNSEL]: So it must have been Ardrey?

[DETECTIVE RIBLEY]: Along those lines.

[DEFENSE COUNSEL]: But he didn't see the guns. So at that point how did he even know there was a shotgun and a pistol or what kind of weapons they were?

[DETECTIVE RIBLEY]: Again, he was just describing he was right there with them. The

gunshots were fired in his immediate area. It wasn't him or Aguilera.

[DEFENSE COUNSEL]: But he hadn't seen the guns?

[DETECTIVE RIBLEY]: No. He did not ever say that he was watching them when they shot the guns.

[DEFENSE COUNSEL]: He didn't tell you what kind of gun they shot with?

[DETECTIVE RIBLEY]: No, sir.

. . . .

[DEFENSE COUNSEL]: Now, when you drafted this report on that morning, you wrote in your report that "Bushyhead told police that Ardrey repeatedly fired the shotgun into the dwelling." It doesn't say it might have been Chambers. It wasn't no process of deductive logic. This statement is that "Bushyhead told police that Ardrey repeatedly fired the shotgun into the dwelling." He never told you that, though, did he, Mr. Ribley?

[DETECTIVE RIBLEY]: He told us that in the same way that I just told you.

[DEFENSE COUNSEL]: So he never mentioned -

[DETECTIVE RIBLEY]: He didn't say that he saw him shoot it; he said that he knew they were shooting it. He did indicate that Ardrey had the shotgun and that Chambers had the pistol.

[DEFENSE COUNSEL]: So he did indicate that Ardrey had the shotgun?

[DETECTIVE RIBLEY]: Yes, sir.

[DEFENSE COUNSEL]: Now, didn't you just testify that he indicated that he never saw the guns, didn't know what kind of guns were used?

[DETECTIVE RIBLEY]: No, sir. His process of answering my questions that night I recorded -

. . . .

[DEFENSE COUNSEL]: [D]id he tell you that night that he knew there was a shotgun and he knew [there] was a pistol?

[DETECTIVE RIBLEY]: Well, we told him that much, sir.

[DEFENSE COUNSEL]: Okay. You told him. But he turned and told you, or at least you put in your report, that he told you that Ardrey fired the shotgun repeatedly?

[DETECTIVE RIBLEY]: When we asked him who had which gun, he did make that indication at one point.

[DEFENSE COUNSEL]: Okay. So he told you who had which gun, but he had never seen the guns and, furthermore, he had already told you that he didn't know who did the shooting; yet in your report you put down very emphatically that Bushyhead told you that Mr. Ardrey shot the gun. And that's just not correct, is it, Mr. Ribley?

[DETECTIVE RIBLEY]: It's what he indicated to us.

. . . .

[DEFENSE COUNSEL]: And it's not in his written statement?

[DETECTIVE RIBLEY]: No.

[DEFENSE COUNSEL]: And he told you that he didn't see the guns?

[DETECTIVE RIBLEY]: He told me what, sir?

[DEFENSE COUNSEL]: He told you he did not see the guns. You testified you told him it was a shotgun and [a] pistol.

[DETECTIVE RIBLEY]: Yes.

[DEFENSE COUNSEL]: Yet you also write in your report that he told you then, well, Mr. Ardrey had the shotgun.

[DETECTIVE RIBLEY]: At one point when we interviewed him, he indicated that Mr. Ardrey had the shotgun.

[DEFENSE COUNSEL]: Is that because you told him that Mr. Ardrey had the shotgun?

[DETECTIVE RIBLEY]: No, sir, of course not.

[DEFENSE COUNSEL]: So how did he know that Mr. Ardrey had the shotgun if he didn't know there was a shotgun?

[DETECTIVE RIBLEY]: It was a line of questioning as to who had the shotgun and who had the pistol.

[DEFENSE COUNSEL]: Okay. And I'm asking, Mr. Ribley, how did you make that - how did he reach that conclusion if he did not know until you told him that there was a shotgun used. If you told him there was a shotgun used and prior to that time he didn't know there was a shotgun, then how did he tell you that Mr. Ardrey had the shotgun?

[DETECTIVE RIBLEY]: Sir, that was what he told me. I'm not sure.

. . . .

[DEFENSE COUNSEL]: And Mr. Bushyhead didn't tell you that Mr. Ardrey had the shotgun?

[DETECTIVE RIBLEY]: Mr. Bushyhead did indicate at one point during his interview that he believed that Mr. Ardrey must have had the shotgun and that Mr. Chambers must have had the pistol.

[DEFENSE COUNSEL]: Again, Mr. Ribley, I'm having a hard time understanding. How could he possibly tell you that if he did not know that there was a shotgun used?

[DETECTIVE RIBLEY]: Well, we didn't know what he knew and didn't know at the time. We were trying to uncover the truth.

[DEFENSE COUNSEL]: Well, you told him that there was a shotgun used. And Mr. Bushyhead testified that he didn't know until the officers told him. That was his testimony, and you heard that this morning. That's in his statement, and that's also what you testified to. So that's three times that we've heard that he didn't know what kind of gun was used; yet in your statement, Officer Ribley, you put in here that Mr. Ardrey had the shotgun. How did you reach that conclusion?

. . . .

[DETECTIVE RIBLEY]: I wrote down what the suspect indicated at the time. We walked through the process of we know there was a shotgun and we know there was a pistol, who had which? And at one point in his interview he said, to the best of his recollection, that it must have been Ardrey that had the shotgun. I recorded that.

[DEFENSE COUNSEL]: To the best of his recollection it must have been. That's not what you put in your report, though?

[DETECTIVE RIBLEY]: I didn't quote him directly.

> [DEFENSE COUNSEL]: You put in there that he said, "Ardrey repeatedly fired the shotgun into the dwelling." That's the words you used. How did you reach such a sound conclusion, Officer Ribley? How did you reach such a sound conclusion based on what you have just told that jury?
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> [DETECTIVE RIBLEY]: I was just trying to record what he indicated to us.
>
> [DEFENSE COUNSEL]: You were recording what that meant to you. You were making an inference there, were you not? Because even if he already said he didn't see the guns, he already said he didn't - he even testified he never saw any guns in anybody's hands. He said he didn't see the guns until you showed them to him; yet you've got in your report that he told you that Mr. Ardrey repeatedly fired the shotgun into the dwelling. Now, why is that the only place that comes up and how come it hasn't come up before now?
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> [DETECTIVE RIBLEY]: That is the recording of that particular interview. He did make that statement in that interview, so I recorded it. I understand that the other statements he's made subsequently. I just recorded what he indicated to us at the time.

After the conclusion of the State's case, Defendant elected not to present evidence on his own behalf.

B. Procedural History

On 30 September 2008, a Warrant for Arrest was issued charging Defendant with discharging a firearm into an occupied building. On 4 March 2009, the Buncombe County grand jury returned bills of indictment charging Defendant with discharging a firearm into

occupied property and possession of a firearm by a convicted felon. The charges against Defendant came on for trial before the trial court and a jury at the 17 August 2009 Criminal Session of the Buncombe County Superior Court. At the time that it instructed the jury concerning the legal principles applicable to the issue of Defendant's guilt of the crimes with which he had been charged, the trial court did not instruct the jury concerning the doctrine of acting in concert; however, the trial court did discuss the doctrine of constructive possession in the course of its instructions concerning the possession of a firearm by a convicted felon charge. On 21 August 2009, the jury returned verdicts finding Defendant guilty of discharging a firearm into occupied property and possession of a firearm by a convicted felon. At the ensuing sentencing hearing, the trial court found that Defendant had accumulated six prior record points and should be sentenced as a Level III offender. Based upon these determinations, the trial court sentenced Defendant to a minimum term of thirty-one months and a maximum term of forty-seven months imprisonment based on his conviction of discharging a firearm into occupied property and to a consecutive term of a minimum of fourteen months and a maximum of seventeen months imprisonment for possession of a firearm by a convicted felon, both sentences to be served in the custody of the North Carolina Department

of Correction. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the charges against him because the evidence was insufficient to support a verdict finding him guilty of those offenses. We believe that Defendant's argument has merit.

A. Standard of Review

> The standard for ruling on a motion to dismiss "is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In determining the sufficiency of the evidence, "the trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom."

State v. Harris, 145 N.C. App. 570, 578, 551 S.E.2d 499, 504 (2001) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990), *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982), and *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994)), *disc. review denied,* 355 N.C. 218, 560 S.E.2d 146 (2002).

B. Applicable Substantive Legal Principles

Defendant was convicted of discharging a firearm into occupied property in violation of N.C. Gen. Stat. § 14-34.1(a), which

provides, in pertinent part, that "[a]ny person who willfully or wantonly discharges or attempts to discharge any firearm . . . into any building . . . while it is occupied is guilty of a Class E felony." "The elements of this offense are (1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied." *State v. Rambert*, 341 N.C. 173, 175, 459 S.E.2d 510, 512 (1995) (citing *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991)). Defendant was also convicted of possession of a firearm by a convicted felon in violation of N.C. Gen. Stat. § 14-415.1(a), which provides, in pertinent part, that:

> It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.] . . . Every person violating the provisions of this section shall be punished as a Class G felon.

"Thus, the State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007).

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed." *State v.*

Roberts, 176 N.C. App. 159, 162-63, 625 S.E.2d 846, 849 (2006) (citing *Presnell v. Georgia*, 439 U.S. 14, 16, 58 L. Ed. 2d 207, 211, 99 S. Ct. 235, 236 (1978)). In this case, "the trial court did not instruct the jury that they may find defendant guilty of [the charged offense] under either the theory of acting in concert or aiding and abetting. In the absence of an instruction permitting the jury to convict defendant on any theory of vicarious liability, the State was required to prove defendant personally committed each element of [the charged offense]." *Roberts,* 176 N.C. App. at 163-64, 625 S.E.2d at 850 (citing *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510-11 (1996) (stating that, "[i]n the absence of an acting in concert instruction, the State must prove that the defendant committed each element of the offense" so that, "even where the evidence is sufficient to support a conviction . . . on a theory of . . . acting in concert, the conviction cannot be upheld absent a jury charge to that effect") and *State v. Cunningham*, 140 N.C. App. 315, 321, 536 S.E.2d 341, 346 (2000), *disc. review denied,* 353 N.C. 385; 547 S.E.2d 23 (2001)). As a result, Defendant's convictions for discharging a weapon into an occupied dwelling and possession of a firearm by a convicted felon can only be sustained on appeal if the State elicited sufficient evidence tending to show that Defendant personally engaged in conduct that constituted each element of the

offenses in question, including personally firing the shotgun into Glenn McMahan's residence and personally possessing a firearm.[3]

C. Sufficiency of the Evidence to Support Defendant's Convictions

As a result of the fact that the undisputed evidence indicated that several shotgun blasts were fired into Glenn McMahan's residence at a time when it was occupied and that Defendant had been previously convicted of a felony, the only issue about which there is any dispute on appeal is the extent to which the record contains sufficient evidence to support a jury finding that Defendant personally fired the shotgun from which the pellets that entered Glenn McMahan's residence came and that Defendant actually or constructively possessed either the shotgun or the revolver found in the rear of the black SUV discovered in the vicinity of Glenn McMahan's residence. As a result, we will focus our analysis on these specific issues.

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[3] Although Defendant did not argue at trial or in his brief on appeal that the State was required to prove that he personally discharged the shotgun into Glenn McMahan's home or that he personally possessed a firearm, we do not believe that this omission justifies a decision on our part to ignore the fundamental legal principle enunciated in ***Wilson***, ***Cunningham***, and ***Roberts*** given that Defendant moved to dismiss both charges for insufficiency of the evidence at trial and has brought that claim forward on appeal. *State v. Person*, 187 N.C. App.512, 518-19, 653 S.E.2d 560, 564-65 (2007), *rev'd in part on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008) (holding that a defendant adequately preserved his challenge to the sufficiency of the evidence by moving to dismiss at the appropriate times in the trial court).

1. Discharging a Firearm into an Occupied Dwelling

The record adequately establishes that the shotgun was fired into Glenn McMahan's residence and that the shotgun and the revolver were found in the rear seat of the SUV in which Defendant had been riding. In addition, the testimony of Mr. Bushyhead clearly tended to show that both Defendant and Mr. Chambers were outside Glenn McMahan's residence when the shotgun was fired. However, Mr. Bushyhead testified that he never saw either firearm and was not aware of the types of weapons found in the SUV until after investigating officers told him of their existence and that he was unable to identify the individual who actually fired the shotgun. As a result, the record does not contain any direct evidence tending to show that Defendant fired the shotgun into Glenn McMahon's residence. For that reason, the only basis upon which one could find that Defendant actually fired the shotgun would be by inferring that fact from the presence of the shotgun in the same area of the vehicle in which Defendant had been riding, the presence of both Defendant and Mr. Chambers in the immediate vicinity of Glenn McMahan's residence at the time that the shotgun was fired, and the presence of a single particle of gunshot residue on the front of Defendant's shirt.[4]

[4] Although the record contains evidence of prior bad blood between Mr. Chambers and Kyle McMahan, there is no evidence tending to show either the existence of a similar relationship between Defendant and any member of Glenn McMahan's family or that Defendant

Based upon our examination of the record, we are unable to find that these factors, taken individually or collectively, suffice to support a finding that Defendant personally fired the shotgun into Glenn McMahan's residence. Although the record clearly supports a finding that Defendant was in the vicinity of Glenn McMahan's residence at the time the shots were fired, that fact, standing alone, does not make it more likely that he actually fired the shotgun rather than Mr. Chambers, who had a grudge against Kyle McMahan. The same is true of the fact that the shotgun was found in the rear of the SUV, since Mr. Chambers was riding in that portion of the vehicle as well. Finally, the fact that a single particle of gunshot residue was found on Defendant's shirt indicates nothing more than that he was in the vicinity of a fired weapon. Nothing in the testimony of Special Agent Gurdziel in any way tends to suggest that the presence of this particle made it more likely that Defendant, as compared to Mr. Chambers, actually discharged the shotgun. Consideration of all three of these pieces of evidence in combination does not increase the likelihood that Defendant, rather than Mr. Chambers, actually shot into Glenn McMahan's residence, since they are equally consistent with the notion that Mr. Chambers, rather than Defendant, fired the shotgun. As a result, we conclude that the record evidence simply does not provide an adequate basis for a jury finding that

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had met Mr. Chambers before the night that the incident occurred.

Defendant, as compared to Mr. Chambers, discharged the shotgun into Glenn McMahan's home.

In its brief, the State asserts that, when Detective Ribley interviewed Mr. Bushyhead, his "best indication was that the defendant must have had the gun" and that, "[a]lthough [Mr.] Bushyhead stated at trial that he did not know who had the gun, Detective Ribley recorded in a written statement what [Mr.] Bushyhead had indicated at the time which was that the defendant had the shotgun." We do not find this argument persuasive for a number of reasons. First, the evidence in question was admitted after the trial court gave a limiting instruction informing the jury that it should not "consider such earlier statement as evidence of the truth of what was said at an earlier time" and that it should, instead, "consider this together with all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve the witness's testimony at this trial." As a result, the portion of Detective Ribley's testimony upon which the State relies was not admitted for substantive purposes. Secondly, the portions of the record upon which the State relies in making this assertion relate to the testimony that Detective Ribley gave on cross-examination. As we have already noted, the upshot of Detective Ribley's testimony concerning the information that Mr. Bushyhead provided when giving this particular statement was that

"[w]e walked through the process of we know there was a shotgun and we know there was a pistol, who had which?" and that, "at one point in his interview [Mr. Bushyhead] said that, to the best of his recollection, that it must have been Ardrey that had the shotgun." Simply put, the evidence upon which the State relies in support of this assertion is nothing more than an inference that Mr. Bushyhead drew during the course of his discussion with Detective Ribley rather than an assertion of factual information in Mr. Bushyhead's possession. Thus, we do not believe that this particular portion of the record will bear the weight placed upon it in the State's brief.

As a result, given the requirement that "the State [must] prove defendant personally committed each element" of the offense of firing into occupied property, *Roberts*, 176 N.C. App. at 163-64, 625 S.E.2d at 850, the record, taken in the light most favorable to the State, simply does not permit a reasonable juror to conclude that Defendant, as compared to Mr. Chambers, personally fired the shotgun into Glenn McMahan's residence. Our conclusion is supported by the results reached in a number of prior reported decisions, reinforcing our determination "that, by comparison with the totality of the evidence found insufficient in other reported cases, . . . the sum of the evidence before us does not suffice to raise more than a suspicion or conjecture of defendant's identity as the perpetrator." *State v. Stallings*, 77 N.C. App. 189, 191, 334 S.E.2d 485, 486-87 (1985),

disc. review denied, 315 N.C. 596, 341 S.E.2d 36 (1986). For example, in *State v. Hewitt*, 34 N.C. App. 109, 111-12, 237 S.E.2d 311, 312-13 (1977), *aff'd*, 294 N.C. 316, 239 S.E.2d 833 (1978), this Court held that the trial court erred by denying the defendant's motion to dismiss a firing into occupied property charge. As was noted by the dissenting judge:

> The evidence and reasonable inferences therefrom, considered in the light most favorable to the State, tend to show: Eight to ten shots were fired at the trailer home from a motor vehicle on the road where the eight or nine .22 caliber shell casings were found, and at least two bullets struck and were imbedded in the home. Two hours after the shooting the .22 caliber weapon which fired these shots was found in defendant's home behind the sofa where defendant was sitting. The weapon was fully loaded with .22 caliber cartridges, and some .22 caliber cartridges were found in defendant's pocket.

Hewitt, 34 N.C. App. at 111-12, 237 S.E.2d at 312-13 (Clark, J., dissenting). On appeal from a divided decision of this Court, the Supreme Court reviewed the evidence connecting Defendant to the weapon that fired the shots into the victim's house, including ballistics evidence that the shots were fired from the gun found behind the defendant's sofa. However, noting that the victims "did not know defendant and knew of no reason he would have to harm them" and that there was no evidence tending to show when the shots were fired, the Court affirmed our earlier decision:

> [T]he evidence here . . . raises no more than a suspicion or conjecture as to the identity of defendant as the perpetrator. The only evidence that might connect defendant with any shots fired into the mobile home is [the victim's] statement, "To my knowledge the holes were not in my trailer before I heard the eight to ten shots." This somewhat ambiguous declaration, without any further showing that the holes in the trailer wall resulted from shots fired the evening of 1 November 1976, falls short of substantial evidence that defendant fired into the mobile home, especially as the surrounding area was commonly used for hunting.

State v. Hewitt, 294 N.C. 316, 319, 239 S.E.2d 833, 835 (1978).

Similarly, in *State v. Heaton*, 39 N.C. App. 233, 249 S.E.2d 856 (1978), the evidence tended to show that

> shortly after a confrontation on a nearby road, a bullet was fired through the victim's kitchen door and struck the chimney in the living room. The police visited the defendant's home and found ammunition of the type fired into the victim's home. The defendant's hand was bloody and there was a blood trail in the direction of the defendant's car and the victim's home. However, no weapon was recovered and no one saw the defendant shoot into the victim's home. This Court determined the State "failed to produce evidence sufficient to indicate [the] defendant fired the shot" into the victim's mobile home. "The State's evidence [was] entirely circumstantial" and "one [could] do no more than speculate that [the] defendant fired the gunshot and that he injured himself fleeing the scene of the crime."

State v. Silas, 168 N.C. App. 627, 631, 609 S.E.2d 400, 403 (2005) (citing *Heaton*, 39 N.C. App. at 235-36, 249 S.E.2d at 857, and quoting

Heaton at 235-36, 249 S.E.2d at 858) (distinguishing *Hewitt* and *Heaton* on the basis that, "in this case the victim testified that he saw defendant shooting at him and that defendant continued to shoot after the victim entered his apartment"), *aff'd and modified in part on other grounds*, 360 N.C. 377, 627 S.E.2d 604 (2006). As a result, both *Hewitt* and *Heaton* support our conclusion that the State's evidence raised no more than a suspicion that Defendant fired the shotgun into Mr. McMahan's house, so that we are unable to uphold Defendant's conviction for shooting into an occupied dwelling on the basis of the present record given the absence of an acting in concert instruction.

2. Possession of a Firearm by a Convicted Felon

In addition, we conclude that the record does not adequately support Defendant's conviction for possession of a firearm by a convicted felon. As we have already noted, the State did not present sufficient evidence to support an inference that Defendant fired the shotgun. Similarly, the record does not permit an inference that the revolver was ever removed from the SUV, given that Mr. Bushyhead's discussion of which suspect had which firearm stemmed from a process of deductive reasoning rather than from personal observation. The record does not establish that Defendant owned either firearm, and no fingerprints were found on either weapon. At best, the record would permit an inference that Defendant was in close proximity to

the two weapons based upon the fact that both weapons were found in the same part of the SUV in which Defendant and Mr. Chambers had been riding. Although the trial court did instruct the jury on the doctrine of constructive possession, "[a]s a general rule, '"mere proximity to persons or locations with [the item allegedly possessed] is usually insufficient, in the absence of other incriminating circumstances, to convict for possession."'" *State v. Ferguson*, __ N.C. App. __, __, 694 S.E.2d 470, 477 (2010) (quoting *State v. Weems*, 31 N.C. App. 569, 570, 230 S.E.2d 193, 194 (1976)). As a result of the fact that the record contains no evidence, other than physical proximity to the weapons in question, that Defendant "ha[d] the intent and capability to maintain control and dominion over" either firearm, *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citing *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983)), and the fact that the record contains no evidence that Defendant actually possessed either firearm, we conclude that the record does not support Defendant's conviction for possession of a firearm by a convicted felon given the absence of an acting in concert instruction. This conclusion renders it unnecessary to reach Defendant's remaining appellate arguments.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court erred by denying Defendant's motions to dismiss the charges

against him on the grounds that the evidence, when taken in the light most favorable to the State, was not sufficient to support a conviction. As a result, the trial court's judgments should be, and hereby are, reversed.

REVERSED.

Judges BRYANT and STEELMAN concur.

Report per Rule 30(e).