NO. COA12-601
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

STATE OF NORTH CAROLINA

v. Wake County
Nos. 10 CRS 18846-47

DAVID RUBEN GREEN, III

Appeal by defendant from judgments entered 2 September 2011 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 25 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.*

*Kimberly P. Hoppin for defendant appellant.*

McCULLOUGH, Judge.

On 2 September 2011, David Ruben Green, III ("defendant") was convicted, pursuant to a guilty plea, of second-degree murder and conspiracy to commit first-degree murder. For the second-degree murder conviction, defendant was sentenced to an active term in the presumptive range of 140 to 177 months' imprisonment, followed by a consecutive term in the mitigated range of 109 to 140 months' imprisonment for the conspiracy to

commit first-degree murder conviction. On appeal, defendant argues the trial court abused its discretion at sentencing by refusing to find factors of extraordinary mitigation to support the imposition of an intermediate punishment for his two felony convictions and that he is therefore entitled to a new sentencing hearing. We dismiss in part and affirm in part.

## I. Background

On 25 August 2011, defendant pled guilty to second-degree murder and conspiracy to commit first-degree murder pursuant to a plea arrangement with the State. The events leading to defendant's charges are as follows: In January 2009, defendant was living with his father, David Green, Jr. ("Father"); his mother, Wendy Green ("Mother"); and his fifteen-year-old sister, Alexis Green ("Sister") at a house on Ray Road in Raleigh, North Carolina. Defendant was thirteen years old at the time.

On the night of 18 January 2009, an argument occurred between the Father and the Mother about the possibility that the Sister was pregnant. During the argument, the Father threatened the Mother, stating that he would kill her and bury her in the backyard if he found out that the Sister was pregnant. The Father demanded that the Mother take the Sister to see a doctor the following morning to determine if the Sister was pregnant.

After the Father went to bed that evening, a conversation occurred between the Mother, the Sister, and defendant. During this conversation, defendant learned that the Sister was, in fact, pregnant. The Mother then told defendant that she believed the Father would kill her and asked defendant to kill the Father. The Mother had made similar statements that the Father needed to be killed on prior occasions when she was angry with the Father. On this occasion, the Mother suggested defendant kill the Father with a sword while the Father was asleep and then place his body in the basement freezer. The Mother removed the sword from the Father's closet and gave defendant the sword to put in his bedroom. Defendant felt that his Mother and Sister were pressuring him to kill the Father, and he believed his Father would carry through with his threat. The three then went to bed with the understanding that defendant would kill the Father.

The following morning, on 19 January 2009, the Mother woke up defendant around 8:30 a.m. and asked him if he was ready. Defendant told the Mother he did not want to kill his Father. Defendant then had a conversation with his Mother, during which the Mother cried, asked defendant if he loved her, offered defendant money to kill the Father, and implored him to carry

out the act. At this time, the Father was still asleep in his bed. At the prompting of the Mother, defendant went into his Father's bedroom with the sword, but he decided he could not kill his Father with the sword and left the bedroom. Defendant then obtained a "grudge hammer" and returned to his Father's bedroom. Defendant again left the bedroom, replacing the first hammer with a nail hammer he retrieved from the kitchen.

Defendant then returned to his Father's bedroom for the third time, where defendant struck his Father in the head with the hammer. The Mother stood in the bedroom doorway watching defendant as he struck the Father. The first blow did not incapacitate the Father, so defendant struck his Father again with the hammer, thereby incapacitating the Father. Defendant stated the second blow cracked open his Father's skull, causing blood to splatter on defendant's face. Defendant then took the hammer and went into the bathroom where he washed his face and the hammer.

The Father did not immediately die as a result of defendant's blows. The Father was able to eventually get up out of bed, and he walked around the house for approximately four to six hours, in a confused state, falling down, and asking for help. During this time the family did not offer the Father any

assistance. Defendant stated his Father's head was bleeding "a lot" and his brain was "falling out." Defendant checked his Father's pulse every thirty minutes to see if the Father was still alive. The Mother asked defendant to strike the Father again, but defendant refused to do so. Later in the afternoon, around 3:00 or 4:00 p.m., the Father passed away.

The Mother then decided to place the Father's body in the basement freezer. At the instruction of his Mother, defendant wrapped the Father's body in a sheet, placed a trash bag over his Father's head because it was leaking fluid, taped the Father's body, and brought the Father's body downstairs to the basement area. Defendant came up with a plan of how to place the Father's body inside the freezer, and the three then placed the Father's body there. The three then went to spend the night in a hotel, and on the following morning, the three purchased cleaning supplies, cleaned the house, and shampooed the carpet. The family then continued to live in the house for a year until the following January, when the Mother abandoned defendant and the Sister to live in the house alone.

In February 2010, defendant decided to cut up his Father's body to dispose of it, and he asked a friend to help. Defendant first tried to cut his Father's legs off with an axe,

but he was unable to do so because the body was so frozen. Defendant's friend then used the axe to cut off the Father's head. After the Father's head was removed, defendant removed a necklace from the Father's body and later had a friend pawn it for money. At some point, defendant also mutilated the body with motorized hedge trimmers. Defendant did not call the police at any point because he did not want to see his Mother go to jail.

Eventually, the Father's brother began questioning where the Father was and called the Wake County Sheriff's Office. The power was cut off to the Ray Road residence in August 2010, at which time investigators went into the home and discovered the Father's mutilated body in the basement freezer. The Sister informed the officers who the responsible parties were, and defendant was located in Minnesota and brought back to North Carolina. Defendant cooperated with the investigation and gave a statement to law enforcement officers. On 25 October 2010, defendant was charged by juvenile petitions with first-degree murder and conspiracy to commit first-degree murder. After finding probable cause to believe that defendant had committed a Class A felony, the trial court transferred both cases to superior court, where defendant was indicted on both offenses.

As part of defendant's plea arrangement, the State agreed to reduce the charge of first-degree murder to second-degree murder. Defendant was also required to testify truthfully in the trials of his Mother and Sister. Defendant admitted the existence of statutory aggravating factor number fifteen, that defendant "took advantage of a position of trust or confidence to commit the offense[s,]" N.C. Gen. Stat. § 15A-1340.16(d)(15) (2011). The State also stipulated to two statutory mitigating factors: number one, that defendant "committed the offense[s] under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability[,]" and number fifteen, that defendant "has accepted responsibility for [his] criminal conduct." N.C. Gen. Stat. § 15A-1340.16(e)(1), (15) (2011). Following the trial court's acceptance of defendant's plea, sentencing was continued.

On 31 August 2011, defendant filed a motion seeking dispositional deviation for extraordinary mitigation. In the motion, defendant argued that he was thirteen years old at the time of the offenses; he had been "turned into a weapon by his biological mother" who directed him to kill his Father; he acted under the belief that he was defending his mother's life; and

that "this behavior is explained by Dr. Moira Artigues as 'emotional incest' in which an adult uses their child in ways inappropriate to the parent/child relationship[.]" Accordingly, defendant asked the trial court to find statutory mitigating factor numbers one, four, seven, eleven, thirteen, and fifteen under N.C. Gen. Stat. § 15A-1340.16(e), and the non-statutory mitigating factor that defendant had thrived in the regular routine of life at the juvenile detention facility. Defendant further requested the trial court to find the existence of extraordinary mitigating factors, that those factors outweigh any factors in aggravation, and that it would be a manifest injustice to impose an active punishment in this case.

On 2 September 2011, defendant's case came on for sentencing before the trial court. At sentencing, the State submitted to the trial court a compact disk containing defendant's interview with a police investigator and the prosecutor wherein defendant gave a statement regarding his involvement in his Father's murder. Based on defendant's statement, the State argued against the trial court mitigating defendant's sentences, contending that defendant was capable of making decisions at the time of the offenses. The State asked the trial court to find that the aggravating factor outweighed

any mitigating factors, in light of the fact that the Father was lying helplessly in his bed when defendant struck him. The State requested the trial court to sentence defendant in the bottom of the aggravated range for each offense.

Defendant presented no evidence at the sentencing hearing. Rather, defendant argued his mind and will were overtaken by his Mother, who used him inappropriately to kill the Father. Defense counsel also informed the trial court that defendant had thrived in the Juvenile Detention Center and that he needed to be in school. Accordingly, defense counsel asked the trial court to find extraordinary mitigation for both offenses.

Following the hearing, the trial court found the existence of statutory aggravating factor number fifteen, to which defendant had stipulated in his plea agreement. The trial court also found the existence of statutory mitigating factor numbers one and fifteen, to which the State had stipulated. The trial court further found the existence of statutory mitigating factor number four, that defendant's age or immaturity at the time of the commission of the offenses significantly reduced his culpability.

For the second-degree murder conviction, the trial court found the mitigating factors and the aggravating factor balanced

each other out and sentenced defendant in the presumptive range to 140 to 177 months' imprisonment. For the conspiracy to commit first-degree murder conviction, the trial court found that the factors in mitigation outweighed the factor in aggravation and sentenced defendant in the mitigated range to 109 to 140 months' imprisonment, to run consecutively following his first sentence. The trial court denied defendant's motion for extraordinary mitigation. Defendant gave oral notice of appeal following his sentencing.

## II. Right to Appeal

Pursuant to N.C. Gen. Stat. § 15A-1444(a1) (2011):

> A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing *only if* the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

*Id.* (emphasis added). Here, because defendant was sentenced in the presumptive range for his second-degree murder conviction, he has no appeal of right from that conviction.

Nonetheless, recognizing this fact in his appellate brief, defendant asks this Court to invoke Rule 2 of our Rules of Appellate Procedure and review the merits of his appeal as it pertains to his conviction for second-degree murder "to prevent manifest injustice and to promote judicial economy." Rule 2 provides: "To prevent manifest injustice to a party, . . . either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party . . . ." N.C. R. App. P. 2 (2012). Our Supreme Court has stated that Rule 2 "must be applied cautiously" and invoked only "in exceptional circumstances" to consider "significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court[.]" *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (internal quotation marks and citation omitted). Here, defendant has failed to show exceptional circumstances or manifest injustice requiring our invocation of Rule 2 in this case. Further, defendant has not petitioned this Court for a writ of certiorari to review the imposition of the presumptive sentence for his second-degree murder conviction. Thus, we dismiss defendant's appeal as it

pertains to his second-degree murder conviction in case No. 10 CRS 18846.

However, "a defendant may, pursuant to N.C. Gen. Stat. § 15A-1444(a1), appeal the issue of the sufficiency of the evidence to support his or her sentence even though he or she was sentenced in the mitigated range." *State v. Mabry*, ___ N.C. App. ___, ___, 720 S.E.2d 697, 702 (2011). Therefore, we review defendant's argument as it pertains to his conviction for conspiracy to commit first-degree murder in case No. 10 CRS 18847.

III. Extraordinary Mitigation

In his sole argument on appeal, defendant contends that the trial court abused its discretion by refusing to find factors of extraordinary mitigation to support the imposition of an intermediate punishment for his two serious felony charges and that he is entitled to a new sentencing hearing. We disagree.

In *State v. Riley*, 202 N.C. App. 299, 688 S.E.2d 477, *cert. denied*, 364 N.C. 246, 699 S.E.2d 644 (2010), this Court explained the role of extraordinary mitigation in structured sentencing:

> The felony sentencing grid contained in N.C. Gen. Stat. § 15A-1340.17 provides for three possible sentencing dispositions: (a) "C" being community punishment as defined in

> N.C. Gen. Stat. § 15A-1340.11(2); (b) "I" being intermediate punishment as defined in N.C. Gen. Stat. § 15A-1340.11(6); and (c) "A" being active imprisonment in the Department of Correction[] as defined in N.C. Gen. Stat. § 15A-1340.11(1). Where a cell in the sentencing grid contains only an "A" as the sentencing disposition, the trial court is required to impose an active prison sentence. The only exception to the imposition of an active sentence is where the trial court finds the existence of a factor in extraordinary mitigation as provided in N.C. Gen. Stat. § 15A-1340.13(g).

*Id.* at 307-08, 688 S.E.2d at 483; *see also State v. Melvin*, 188 N.C. App. 827, 829-30, 656 S.E.2d 701, 702 (2008). This statute "allows the sentencing judge to impose an intermediate punishment upon a finding that an extraordinary mitigating factor exists in the case." *Melvin*, 188 N.C. App. at 830, 656 S.E.2d at 702; *see also* N.C. Gen. Stat. § 15A-1340.13(g) (2011).

In the present case, both of defendant's convictions were for Class B2 felonies, for which the only allowable disposition is an active sentence. *See* N.C. Gen. Stat. § 14-17 (2011); N.C. Gen. Stat. § 14-2.4 (2011); N.C. Gen. Stat. § 15A-1340.17 (2011). However, defendant moved the trial court to find extraordinary mitigating factors in this case pursuant to N.C. Gen. Stat. § 15A-1340.13(g).

Pursuant to N.C. Gen. Stat. § 15A-1340.13(g)(1), an extraordinary mitigating factor is defined as being "of a kind significantly greater than in the normal case[.]" *Id.* "The decision to find an extraordinary mitigating factor rests in the discretion of the presiding judge." *Melvin*, 188 N.C. App. at 830, 656 S.E.2d at 702. If the trial judge finds a factor of extraordinary mitigation, the trial judge must then make two additional findings before an intermediate punishment may be imposed in lieu of an active sentence: The extraordinary mitigating factors "substantially outweigh any factors in aggravation[,]" and "[i]t would be a manifest injustice to impose an active punishment in the case." N.C. Gen. Stat. § 15A-1340.13(g)(2), (3). "The decision to find these additional factors rests in the discretion of the presiding judge." *Melvin*, 188 N.C. App. at 830, 656 S.E.2d at 703. Furthermore, "the ultimate decision of whether to impose an intermediate punishment rests in the discretion of the presiding judge." *Id.*; *see also* N.C. Gen. Stat. § 15A-1340.13(g) ("The court shall consider evidence of extraordinary mitigating factors, but the decision to find any such factors, or to impose an intermediate punishment is in the discretion of the court."). Finally, the trial judge is prohibited from imposing an intermediate

punishment based upon a finding of extraordinary mitigation where (1) the offense is a Class A or Class B1 felony; (2) the offense is a drug trafficking offense; or (3) the defendant has five or more record points. N.C. Gen. Stat. § 15A-1340.13(h). The exceptions enumerated under subsection (h) do not apply to defendant in the present case.

> On appeal, the decisions made by the trial court under N.C. Gen. Stat. § 15A-1340.13(g) are reviewed under an abuse of discretion standard. An abuse of discretion occurs only when the trial court's ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision."

*Melvin*, 188 N.C. App. at 830-31, 656 S.E.2d at 703 (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)).

In *Melvin*, this Court held:

> The statutory mitigating factors set forth in N.C. Gen. Stat. § 15A-1340.16(e) are mitigating factors found in a normal case. While the trial court is not precluded from making a finding of extraordinary mitigation based upon the same facts as would support one of the mitigating factors listed in the statute, in order to be extraordinary mitigation there must be additional facts present, over and above the facts required to support a normal statutory mitigation factor.

*Id.* at 831, 656 S.E.2d at 703. In *Riley*, 202 N.C. App. 299, 688 S.E.2d 477, this Court again held that "the normal mitigating factors set forth in N.C. Gen. Stat. § 15A-1340.16(e) are not in and of themselves sufficient to support a finding of extraordinary mitigation." *Id.* at 308, 688 S.E.2d at 483. Rather, "[t]he trial court must look to the quality and nature of the factor to determine whether it is an extraordinary factor in mitigation." *Melvin*, 188 N.C. App. at 831, 656 S.E.2d at 703. "Unless the factor is 'significantly greater' it cannot be a factor of extraordinary mitigation." *Id.*

In the present case, defendant contends that two of the statutory mitigating factors found by the trial court in this case are of a kind significantly greater than in the normal case and therefore constitute extraordinary mitigating factors warranting an intermediate punishment. In particular, defendant argues that statutory mitigating factor number one, that defendant "committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability," N.C. Gen. Stat. § 15A-1340.16(e)(1), was significantly greater here than in the normal case because such duress, coercion, and threats

came from defendant's Mother, including her admonitions that defendant's Father would kill her if defendant did not act.

Defendant further argues that because his Mother is the one who directed, encouraged, and coerced him to kill his Father, this evidence shows that defendant was an "abused juvenile," thereby elevating the duress and coercion experienced by defendant over that found in a normal case. Defendant points to the definition of an abused juvenile under Chapter 7B of our General Statutes in support of his argument. However, the provisions of Chapter 7B and the definitions applied thereunder are inapposite in a criminal proceeding in superior court against a juvenile defendant.

Here, the record shows the trial court considered the circumstance that defendant's Mother's statements and actions coerced him into committing the murder. Indeed, the record reveals that these facts — that defendant was coerced into killing his Father by the statements and actions of his Mother — are the very facts that support the trial court's finding that the statutory mitigating factor existed in this case. While the facts of this case are disturbing, defendant has failed to show how the quality and nature of the factor here - that the coercion and duress came from defendant's Mother - was

significantly greater than in the normal case such that the trial court's decision not to find the factor in extraordinary mitigation was manifestly unsupported by reason.

Defendant further contends that the facts supporting statutory mitigating factor number four, that defendant's age or immaturity at the time of the offense significantly reduced his culpability, were significantly greater here than in the normal case and therefore support the finding of an extraordinary mitigating factor warranting an intermediate punishment. Specifically, defendant asserts that he "was not just young and immature," he was "extraordinarily young – a juvenile, appearing in Superior Court through a mandatory transfer statute." However, the fact that defendant was thirteen years old at the time he committed the murder is the very fact supporting the statutory mitigating factor found by the trial court. The record in no way indicates the trial court failed to exercise its discretion or abused its discretion in failing to consider this circumstance during defendant's sentencing. Further, defendant has failed to show how the fact that defendant's being in superior court as a result of a mandatory transfer statute elevated this factor over those present in a normal case where a juvenile is sentenced in superior court.

Moreover, defendant cannot show it would be a manifest injustice to impose active sentences for the crimes he committed under the facts of this case. On this point, defendant simply asserts that it would be manifestly unjust to imprison a "child, who acted out of duress and a fear for his mother's life, and without the capacity to exercise mature judgment or to fully understand the circumstances of the situation that presented itself to him." However, the record reveals these very circumstances were considered by the trial court and support both the statutory mitigating factors found by the trial court and the trial court's decision to impose a mitigated sentence for defendant's conspiracy to commit first-degree murder conviction.

The record further reveals defendant was both alert and thinking clearly at the time he committed these acts. Although the Mother asked defendant to kill the Father on the night before the incident occurred, defendant responded with doubt about his ability to carry through with that action. On the morning of the murder, defendant likewise told his Mother that he could not kill his Father, although he later agreed to follow through with the plan at the behest of his Mother. Defendant then entered the Father's bedroom, where the Father was

helplessly sleeping, three separate times with three separate weapons before finally committing the act. In addition, defendant struck his Father in the head not only once, but twice, shattering his skull. Defendant likewise chose not to call emergency services while watching his Father stumble around the house for hours asking for help. Rather, defendant continued to check the Father's pulse until the Father finally passed away. Afterwards, defendant fully participated in disposing of the Father's body in the freezer, and later, in the absence of the Mother, defendant attempted to further mutilate the Father's body. Although defendant considered calling the police, he chose not to because he did not want to see his Mother go to jail.

Under these facts, we hold that the record in this case clearly shows that the trial court carefully and deliberately exercised its discretion in evaluating defendant's proffered factors in extraordinary mitigation. We further hold that defendant has failed to demonstrate any abuse of discretion on the part of the trial judge in not finding extraordinary mitigation and imposing an active sentence in this case.

## IV. Conclusion

Because defendant was sentenced in the presumptive range for his second-degree murder conviction, defendant has no appeal of right from that conviction. We therefore dismiss his appeal as to that conviction. As to defendant's conviction for conspiracy to commit first-degree murder, we discern no abuse of discretion in the trial court's failure to find extraordinary mitigation in this case. We therefore affirm the trial court's denial of defendant's motion seeking extraordinary mitigation.

Dismissed in part, affirmed in part.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).