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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1092

Filed: 19 April 2016

Guilford County, No. 09 CRS 72211

STATE OF NORTH CAROLINA

v.

TIMOTHY ALLEN FOXWORTH, Defendant.

Appeal by defendant from judgment entered 21 April 2015 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 11 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.

Linda B. Weisel for defendant-appellant.

GEER, Judge.

Defendant Timothy Allen Foxworth appeals from a judgment entered upon remand for resentencing by this Court. On appeal, defendant primarily argues that the trial court erred in failing to make a finding on the mitigating factor that he supports his family. Because the evidence supporting this factor was not manifestly credible, we hold the trial court was not required to make such a finding.

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Furthermore, because the trial court did not abuse its discretion in imposing the maximum sentence in the aggravated range, we affirm.

Facts

On 1 March 2010, defendant pled guilty to second degree murder and received a prison sentence of a minimum term of 276 months and a maximum term of 341 months. On 5 August 2013, this Court granted defendant's petition for writ of certiorari seeking review of an order denying defendant's motion for appropriate relief and remanded for resentencing. The trial court resentenced defendant to the same term of imprisonment on 5 December 2013. Defendant appealed, and this Court remanded for a third sentencing hearing due to an error in the calculation of defendant's prior record level. *State v. Foxworth*, ___ N.C. App. ___, 770 S.E.2d 388, 2015 WL 660792, 2015 N.C. App. LEXIS 102 (2015) (unpublished).

On 21 April 2015, the court conducted a new sentencing hearing. After receiving evidence, the court found as a sole factor in aggravation that defendant committed the offense while on pretrial release on another charge. The court found four factors in mitigation: (1) defendant has been a person of good character or has a good reputation in the community; (2) defendant has been honorably discharged from the armed services; (3) defendant has a support system in the community; and (4) defendant has a positive employment history or is gainfully employed. The court found that the factor in aggravation outweighed the factors in mitigation. The court

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classified defendant at prior record level II based upon three prior record level points. The trial court imposed an active term within the aggravated range of a minimum of 237 months and a maximum of 294 months. Defendant timely appealed to this Court.

Discussion

Defendant contends the trial court erred by failing to find as a mitigating factor that he supports his family. We do not agree.

A defendant has the burden of proving the existence of a mitigating factor. N.C. Gen. Stat. § 15A-1340.16(a) (2015). “To show that the trial court erred in failing to find a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., no other reasonable inferences can be drawn from the evidence.” *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988). “An appellate court may reverse a trial court for failing to find a mitigating factor only when the evidence offered in support of that factor ‘is both uncontradicted and manifestly credible.’ ” *State v. Mabry*, 217 N.C. App. 465, 471, 720 S.E.2d 697, 702 (2011) (quoting *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983)). Even though evidence consisting of letters from close friends and family members demonstrating a defendant’s strong character trait is uncontradicted, it may not be manifestly credible because the provider of the evidence is biased in favor of the defendant on account of having a close personal relationship with the defendant. *Id.* at 472, 720 S.E.2d 702-03.

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Here, the only evidence which indicated defendant supported his family financially is a letter in which the writer stated defendant “is the best freind [sic] and father you could ever have in the world. . . . He also worked extremly [sic] hard to provide for his family.” The letter suggests that the writer has a close personal relationship with defendant, and thus the evidence is not so manifestly credible that the court was required to find the factor in mitigation.

Defendant also contends that the court abused its discretion by imposing the maximum sentence within the aggravated range. “Under the Structured Sentencing Act, the trial court must consider evidence of aggravating and mitigating factors and may then impose a sentence in its discretion.” *State v. Rogers*, 157 N.C. App. 127, 128, 577 S.E.2d 666, 668 (2003). “It is for the trial court to determine the weight to be given to any particular aggravating or mitigating factor. The trial court does not simply add up the number of aggravating or mitigating factors, but rather is to carefully weigh the quality and importance of each factor.” *State v. Gillespie*, 209 N.C. App. 746, 748-49, 707 S.E.2d 712, 715 (2011). Only when there is “no rational basis for the manner in which the aggravating and mitigating factors were weighed by the sentencing judge” will the balance struck “amount to an abuse of discretion.” *State v. Parker*, 315 N.C. 249, 259, 337 S.E.2d 497, 503 (1985).

Here, the record shows that defendant was originally charged with first degree murder, which carried a minimum sentence of life imprisonment without possibility

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of parole in accordance with N.C. Gen. Stat. § 14-17(a) (2011). Defendant pled guilty to the lesser offense of second degree murder and agreed to be sentenced within the aggravated range. He stipulated that he committed the current offense while on pretrial release on another criminal charge, behavior which demonstrated that he lacked respect for the criminal justice process and law. Under these circumstances, we conclude there was a rational basis for the trial court to weigh the aggravating factor more heavily than the numerous mitigating factors. Accordingly, we hold that the trial court did not abuse its discretion by imposing the maximum sentence within the aggravated range.

AFFIRMED.

Judges McCULLOUGH and ZACHARY concur.

Report per Rule 30(e).