IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-335

Filed: 15 November 2016

Wilson County, Nos. 12 CRS 2215, 2218-19

STATE OF NORTH CAROLINA

v.

DAVID LEE APPLEWHITE

Appeal by Defendant from judgments entered 17 September 2015 by Judge W. Russell Duke, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 6 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard L. Harrison, for the State.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for Defendant.

STEPHENS, Judge.

In this appeal from Defendant's conviction on two felony murder charges, as well as the underlying felony of discharging a firearm into an occupied dwelling, Defendant argues that the trial court erred in (1) denying his motion to dismiss those charges for insufficiency of the evidence, (2) denying his request for a jury instruction on second-degree murder, and (3) failing to arrest judgment on his conviction of discharging a firearm into an occupied building. We find no error in Defendant's trial.

However, we agree with Defendant that the trial court erred in failing to arrest judgment on his conviction for the underlying felony, and we therefore remand for correction of this sentencing error.

Factual and Procedural Background

On 14 January 2013, Defendant David Lee Applewhite was indicted by the Wilson County Grand Jury on two counts of first-degree murder, two counts of discharging a firearm into an occupied dwelling, and one count of discharging a firearm into an occupied vehicle. The matter came on for trial at the 14 September 2015 criminal session of Wilson County Superior Court, the Honorable W. Russell Duke, Jr., Judge presiding.[1] The State's evidence tended to show the following:

In November 2011, Applewhite was an 18-year-old high school senior and member of the "Neighborhood Crips," a gang based in the Five Points area of Wilson where Applewhite lived. A rival gang in the neighborhood, known as the "8 Treys," was engaged in an ongoing dispute with the Neighborhood Crips which had recently resulted in members of the 8 Treys firing gunshots into a Five Points home where the Neighborhood Crips often gathered. Emmanuel Holden, a leader of the Neighborhood Crips and owner of the home that had been fired into, ordered that Applewhite and

[1] On the first day of trial, the State informed the court that it would not proceed against Applewhite on one of the charges of discharging a firearm into an occupied dwelling, that being the charge concerning the home at 1011 Wilson Street. The State voluntarily dismissed the charge on 18 September 2015.

two other gang members retaliate by shooting into the 8 Trey's hangout, a home located at 1011 Wilson Street.

Applewhite and his accomplices, Tresvon Jones and DeShaun Long, planned the shooting for after 11:00 p.m. on Wednesday, 9 November 2011. That evening, Long drove the other two men, along with two rifles, to a church parking lot about 300 yards from 1011 Wilson Street. Long remained in the car, while Jones and Applewhite placed the barrels of their rifles through a chain-link fence and took aim at the home at 1011 Wilson Street. Applewhite and Jones had agreed to fire on the count of three, but when Jones tried to fire his rifle, he realized the safety was engaged. Applewhite fired numerous shots toward the dwelling at 1011 Wilson Street and then ran back to the car. Jones switched off the safety on his rifle, fired two shots into the ground to make it appear that he had followed through with the planned retaliation, and then returned to the car. At trial, Long testified that he heard about 10 or 12 gunshots, but could not see them being fired. Long also testified that Applewhite mentioned trying to shoot the tires of a car near the home, although Jones stated that he did not see any car in the dimly lit area. The three men immediately drove to a local Walmart in order to be recorded on closed circuit cameras, apparently in an effort to establish alibis for themselves.

Tragically, at the time of the retaliatory shooting, friends Shikia Hall, Tomeka Eatmon, and Sha'Diamond Littleton were sitting in a car, which was parked near the

house at 1011 Wilson Street. Littleton and Hall were each killed by a single gunshot to the head. Eatmon testified that the interior dome light of the car was on as she talked to her friends, but a photograph taken by a law enforcement officer just after the shootings shows the light was off.

In the early morning hours of 10 November, law enforcement officers investigating the killing of Littleton and Hall discovered two bullets lodged in walls of the home of Michael Evans at 1009 Wilson Street, next door to the 8 Trey hangout at 1011 Wilson Street. A firearms expert testified that the bullets recovered from the bodies of Littleton and Hall were fired from Applewhite's rifle, as was at least one of the two bullets recovered from the home at 1009 Wilson Street.[2]

At school the day after the shootings, Applewhite and Long learned that Littleton and Hall had been killed. Jones and Long testified that Applewhite was "terrified" and "shocked" about the deaths. The leaders of the Neighborhood Crips told Long, Jones, and Applewhite not to worry about the killings, to keep their mouths shut, and to dispose of the guns used. Applewhite threw his rifle into a local pond, and Jones sold his to a gun dealer. Applewhite's rifle was later recovered from the pond and introduced at trial, along with shell casings recovered from the church parking lot.

[2] The other bullet recovered from 1009 Wilson Street was too badly damaged to permit a match with Applewhite's rifle.

At the conclusion of the State's evidence, Applewhite moved to dismiss the charges against him for insufficiency of the evidence. The trial court denied the motion, and Applewhite did not present any evidence. Applewhite again moved to dismiss the charges, and the court again denied the motion. At the charge conference, the State announced that it was not seeking a verdict on first-degree murder based on premeditation and deliberation, asking only for an instruction on the theory of felony murder. Applewhite made written and oral requests for an instruction on second-degree murder, which the trial court denied. The only homicide charges submitted to the jury were two counts of felony murder. The verdict sheets for the felony charges gave the jury the options of guilty or not guilty and, below the guilty option, included blanks for the jury to answer yes or no regarding whether it found the killing of each victim was in perpetration of discharging a firearm into an occupied dwelling and/or discharging a firearm into an occupied vehicle.

The jury returned guilty verdicts for each felony murder charge and, for each victim, answered the "in perpetration" question "yes" to discharging a firearm into an occupied dwelling, but "no" to discharging a firearm into an occupied vehicle. Likewise, the jury returned a verdict of guilty to the charge of discharging a firearm into an occupied dwelling and a verdict of not guilty to the charge of discharging a firearm into an occupied vehicle. The trial court consolidated the firearm charge with one of the felony murder convictions for judgment and imposed a sentence of two

consecutive terms of life in prison without the possibility of parole. Applewhite gave notice of appeal in open court.

On 18 May 2016, Applewhite filed in this Court a petition for writ of *certiorari*, noting that his right to appeal from the judgments entered against him may have been lost when his trial counsel arguably entered his notice of appeal prematurely. At sentencing, just after the trial court imposed two consecutive sentences of life in prison without the possibility of parole and Applewhite gave notice of appeal in open court, the State raised a question about the sentence and asked for a bench conference. After the conference, the trial court announced in open court that Applewhite had been over 18 years old at the time he committed the offenses and then once again imposed two consecutive sentences of life imprisonment without parole.[3] Applewhite gave no new notice of appeal after the second imposition of the sentence of life without parole, arguably rendering the initial notice of appeal premature. Recognizing this possible deficiency, Applewhite requests that this Court exercise its discretion under Rule 21 of our Rules of Appellate Procedure to consider the merits of his arguments. *See, e.g.*, *State v. Robinson*, 236 N.C. App. 446, 448, 763 S.E.2d 178, 179-80 (2014) (granting review by writ of *certiorari* where the defendant's notice of appeal was untimely because his trial counsel gave notice of appeal in open

[3] Our General Statutes require a sentence of life without parole for a defendant convicted of first-degree murder in a non-capital case, provided the defendant was at least 18 years old at the time of the crime. N.C. Gen. Stat. § 14-17(a) (2015).

court following the jury's verdict, but failed to give notice of appeal following entry of the trial court's final judgment), *modified and affirmed*, 368 N.C. 402, 777 S.E.2d 755 (2015). We allow Applewhite's petition and address the merits of his arguments.

Discussion

On appeal, Applewhite argues the trial court erred in (1) denying his motion to dismiss the felony murder and discharging a firearm into an occupied building charges, (2) denying his request for a jury instruction on second-degree murder, and (3) failing to arrest judgment on his conviction of discharging a firearm into an occupied dwelling. We find no error in Applewhite's trial, but remand for the trial court to arrest judgment on the firearm conviction.

I. Motions to dismiss

Applewhite argues the trial court erred in denying his motion to dismiss the charges of felony murder and discharging a firearm into an occupied dwelling for insufficiency of the evidence. We are not persuaded.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon [a] defendant's motion for dismissal, the question . . . is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation

and internal quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of [a] defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citations and quotation marks omitted).

Under our General Statutes,

> felony murder . . . applies to any killing committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon. When a killing is committed in the perpetration of an enumerated felony . . . or other felony committed with

> the use of a deadly weapon, murder in the first degree is established irrespective of premeditation or deliberation or malice aforethought. Moreover, intent to kill is not an element of felony murder.

State v. Jones, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000) (citations, internal quotation marks, and emphasis omitted). The felonies of discharging a firearm into an occupied vehicle or dwelling can both support a felony murder conviction. *Id.* at 168, 538 S.E.2d at 924-25. However, while intent to kill is not an element of felony murder,

> in order to be held accountable for unlawful killings that occur during the commission or attempted commission of these crimes, the perpetrator must have been purposely resolved to commit the underlying offense. For example, a defendant may face a first-degree murder charge for an unintended killing that resulted from his firing a weapon into an occupied structure, but only if the defendant intended to shoot into the building.

Id. (citation and emphasis omitted). Further, to sustain a conviction for any form of murder, the State must prove beyond a reasonable doubt that the defendant's actions were the proximate cause of the victim's death. *See State v. Collins*, 334 N.C. 54, 60-61, 431 S.E.2d 188, 192 (1993).

"A person who willfully or wantonly discharges a weapon . . . into an occupied dwelling or into any occupied vehicle, aircraft, watercraft, or other conveyance that is in operation is guilty of a Class D felony." N.C. Gen. Stat. § 14-34.1(b) (2015). Our Supreme Court has held that

> a person is guilty of the felony created by [section] 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.

State v. James, 342 N.C. 589, 596, 466 S.E.2d 710, 715 (1996) (citation and internal quotation marks omitted).

"Further, the offense of discharging a weapon into occupied property, like assault, is an offense against the person, and not against property. . . . [The statute] was enacted for the protection of occupants of the premises, vehicles, and other property described" therein. *State v. Fletcher*, 125 N.C. App. 505, 513, 481 S.E.2d 418, 423 (citations and internal quotation marks omitted), *disc. review denied*, 346 N.C. 285, 487 S.E.2d 560, *cert. denied*, 522 U.S. 957, 139 L. Ed. 2d 299 (1997). Thus, discharging a firearm into an occupied property is a general intent crime, *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995), and the doctrine of transferred intent applies to this offense. *Fletcher*, 125 N.C. App. at 513, 481 S.E.2d at 423.[4] *See also State v. Byrd*, 132 N.C. App. 220, 510 S.E.2d 410 (finding no error in the defendant's conviction of firing into an occupied property where the evidence was that gunshots were fired at a person

[4] The offenses of discharging a firearm into an occupied dwelling and discharging a firearm into an occupied vehicle are different forms of the offense of "[d]ischarging certain barreled weapons or a firearm into occupied property" as provided in N.C. Gen. Stat. § 14-34.1.

standing in the front yard of a home, but the bullets entered the home), *disc. review denied*, 350 N.C. 596, 537 S.E.2d 484 (1999).

A. Argument re: lack of proximate cause to support the felony murder charges

Applewhite first contends that the trial court erred in denying his motion to dismiss the felony murder charges because "there was no evidence that the victims' deaths occurred as a result of Applewhite's firing into an occupied *dwelling*, or that the firing into the *dwelling* was the proximate cause of the victims' deaths." (Emphasis added). Applewhite misperceives the question before the trial court on his motion to dismiss.

As Applewhite correctly notes, the undisputed evidence at trial was that Littleton and Hall were struck and killed by two bullets that entered the car in which the victims were sitting; the women were *not* killed by any bullets that entered the occupied dwelling at 1009 Wilson Street. Applewhite further notes that the jury found him not guilty of firing into an occupied vehicle and, on the felony murder verdict sheet, after finding him guilty of that offense, answered "yes" to the question of whether he fired into an occupied dwelling, but "no" to the question of whether the victims were killed because he fired into an occupied vehicle. Thus, Applewhite argues that the State failed to produce sufficient evidence that the only underlying felony found by the jury—firing into an occupied *dwelling*—was the proximate cause of Littleton's and Hall's deaths. Applewhite's argument is misplaced because he

conflates the question facing the trial court in ruling on his motion to dismiss with that of the jury in deciding what verdicts to return.

As noted *supra*, in ruling on a motion to dismiss, the court must only decide whether, based upon the evidence produced, "a *reasonable inference* of [the] defendant's guilt may be drawn from the circumstances." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation and internal quotation marks omitted; emphasis added). "Once the court decides that a reasonable inference of [the] defendant's guilt may be drawn from the circumstances, *then it is for the jury to decide whether the facts, taken singly or in combination, satisfy* [*it*] *beyond a reasonable doubt that the defendant is actually guilty*." *Id.* (citations and internal quotation marks omitted; some emphasis added). Given the dramatically lower threshold level of evidence that requires a court to deny a motion to dismiss, such a ruling is not called into question by the fact that a jury thereafter returns a verdict of not guilty. In addressing Applewhite's appellate argument that the denial of his motion to dismiss was erroneous, the question before this Court is *not* how the denial of the motion to dismiss can be squared with the jury's subsequent verdicts. We must determine only whether, in the light most favorable to the State, the evidence before the jury *could support an inference* that (1) Applewhite killed Littleton and Hall (2) in the perpetration of either of the underlying felonies charged by the State as alternate theories of the crime: firing into an

occupied dwelling *or* firing into an occupied vehicle. *See Jones*, 353 N.C. at 168, 538 S.E.2d at 924-25.

As Applewhite acknowledges, the evidence at trial was undisputed that Littleton and Hall "were killed by two bullets fired into [a car], which they occupied." Further, there was uncontroverted evidence, in the form of testimony from Applewhite's two accomplices, a firearms expert, and other law enforcement officers that: Applewhite was ordered to shoot at the home at 1011 Wilson Street, the hangout of a rival gang; he obtained a rifle and went with Long and Jones to the church parking lot overlooking the hangout with the intent to shoot at that dwelling; he fired his rifle multiple times toward the hangout; Littleton and Hall were sitting in the car just outside the hangout when they were shot and killed; and Applewhite's rifle was linked to the bullets which killed Littleton and Hall. There was conflicting evidence about whether the interior light was on in the car and whether other conditions that night would have permitted Applewhite to see the car and/or the women sitting inside it before he fired in that direction. Taken in the light most favorable to the State, the evidence was substantial as to every element of felony murder in that it supported an inference that Applewhite (1) killed Littleton and Hall (2) by means of discharging a firearm (3) into an occupied vehicle and/or dwelling (4) when he had reasonable grounds to believe that the vehicle and/or dwelling might be occupied. *See James*, 342 N.C. at 596, 466 S.E.2d at 715. The trial court properly

denied Applewhite's motion to dismiss and sent the case to the jury.[5] *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455. Accordingly, we overrule this argument.

B. Argument re: felony murder and firearm charges based upon awareness that the dwelling at 1009 Wilson Street was occupied

> The North Carolina Supreme Court has defined the crime of discharging a firearm into occupied property: A person is guilty of discharging a firearm into occupied property if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons. Reasonable grounds to believe that a building might be occupied can certainly be found where a defendant has shot into a residence during the evening hours, as homeowners are most often at home during these hours.

Fletcher, 125 N.C. App. at 512, 481 S.E.2d at 423 (citations, internal quotation marks, and brackets omitted).

Applewhite first notes that the trial court instructed the jury using the phrase "reasonable grounds to believe the building or dwelling *was* occupied" rather than the phrase "reasonable grounds to believe the building or dwelling *might be* occupied. " Apparently on the belief that the former wording choice established a different theory of the case and required a higher level of knowledge, Applewhite contends that the trial court erred in denying his motion to dismiss the felony murder and discharging

[5] Our General Statutes provide that a defendant may also move to dismiss for insufficiency of the evidence "[a]fter return of a verdict of guilty and before entry of judgment[,]" *see* N.C. Gen. Stat. § 15A-1227(a)(3) (2015), but Applewhite did not make such a motion in this case.

a firearm into an occupied dwelling charges because the State failed to present evidence that Applewhite had reasonable grounds to believe the dwelling at 1009 Wilson Street "*was* occupied." We need not consider this argument, however, because, as noted *supra*, the trial court ruled on Applewhite's motion to dismiss for insufficiency of the evidence at the close of the evidence—before the jury charge had been given—and, thus, the only question for the trial court was whether the State had presented substantial evidence from which "a *reasonable inference* of [the] defendant's guilt may be drawn" by the jury. *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation and internal quotation marks omitted; emphasis added). The uncontested evidence was that the shootings took place at about 11:00 in the evening, substantial evidence that Applewhite reasonably should have known that 1009 Wilson Street was occupied. *See Fletcher*, 125 N.C. App. at 512, 481 S.E.2d at 423 ("Reasonable grounds to believe that a building might be occupied can certainly be found where a defendant has shot into a residence during the evening hours, as homeowners are most often at home during these hours."). Accordingly, the trial court did not err in denying Applewhite's motion to dismiss the felony murder and discharging a firearm into an occupied dwelling charges. Applewhite makes no argument that the trial court committed reversible error in the wording of its charge to the jury. These arguments are, therefore, overruled.

II. Jury instruction on second-degree murder

Applewhite next argues that the trial court erred in denying his request for a jury instruction on the lesser homicide offense of second-degree murder. Applewhite bases this contention upon his previous arguments that there was an absence of evidence that: (1) he knew or should have known that the dwelling he fired at was occupied and (2) that his act of firing at the occupied dwelling was not the proximate cause of the victims' deaths. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974).

> [A] defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions, and error in failing to submit the lesser included offense is not cured by a verdict of guilty of the charged crime because it cannot be known whether the jury would have convicted on the lesser crime if it had been correctly submitted. However, this principle applies only when there is evidence of the crime of lesser degree.

State v. Barlowe, 337 N.C. 371, 377, 446 S.E.2d 352, 356 (1994) (citation and internal quotation marks omitted). Thus, "[t]he trial court may refrain from submitting the

lesser offense to the jury only where the evidence is clear and positive as to each element of the offense charged and no evidence supports a lesser-included offense." *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000) (citation and internal quotation marks omitted), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001).

As noted *supra*, felony murder is established, *inter alia*, where a defendant discharges a firearm into an occupied vehicle or dwelling and, in so doing, kills someone. *See Jones*, 353 N.C. at 168, 538 S.E.2d at 924-25. Our Supreme Court has directed that, "when the [S]tate proceeds on a theory of felony murder only, the trial court should not instruct on lesser-included offenses *if the evidence as to the underlying felony supporting felony murder is not in conflict* and all the evidence supports felony murder." *State v. Gwynn*, 362 N.C. 334, 336, 661 S.E.2d 706, 707 (2008) (citations, internal quotation marks, and some brackets omitted; emphasis added).

Here, the State alleged two possible theories of felony murder in the killings of Littleton and Hall: that the women were killed in the commission of discharging a firearm into an occupied vehicle *or* in the comission of discharging a firearm into an occupied dwelling. As discussed in section I of this opinion, the evidence of the underlying felony of discharging a firearm into an occupied dwelling was clear and positive as to every element: that Applewhite fired a rifle multiple times in the direction of the dwelling used as a gang hangout at 11:00 p.m., a time when a

residence may be presumed to be occupied, and that some of the bullets fired entered the residence next door, which was in fact occupied. *See Fletcher*, 125 N.C. App. at 512, 481 S.E.2d at 423. Accordingly, the trial court did not err in declining to give the requested instruction on second-degree murder. This argument is overruled.

III. Merger of offenses

As Applewhite argues and the State concedes, the trial court erred in failing to arrest judgment on Applewhite's conviction of discharging a firearm into an occupied building. When a defendant is convicted of felony murder, the trial court must arrest judgment on the underlying felony because that offense merges with the murder. *Barlowe*, 337 N.C. at 381, 446 S.E.2d at 358-59. Here, remarks in the transcript reveal that the trial court intended that the conviction of discharging a firearm into an occupied dwelling would be merged into the felony murder convictions. However, the judgment in file number 12 CRS 2218 consolidated the discharging a firearm into an occupied dwelling conviction with one of the felony murder convictions. We remand to the trial court for the limited purpose of amending the judgment in that file number to reflect that judgment was arrested on the underlying felony conviction.

NO ERROR IN PART; REMANDED IN PART.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).