IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-109

Filed: 17 October 2017

Forsyth County, Nos. 14 CRS 58904, 58906

STATE OF NORTH CAROLINA

v.

RICHARD LEE DAVIS, Defendant.

Appeal by defendant from judgments entered 22 April 2016 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason R. Rosser, for the State.

William D. Spence for defendant-appellant.

ZACHARY, Judge.

Defendant Richard Lee Davis appeals from judgments entered upon jury verdicts finding him guilty of two counts of discharging a firearm into an occupied dwelling and one count of misdemeanor assault with a deadly weapon. On appeal, defendant argues that the trial court erred in denying his motion to dismiss both charges of discharging a firearm into an occupied dwelling. Defendant also argues

that the trial court's decision to impose consecutive sentences was based upon improper considerations. For the reasons that follow, we find no error in defendant's convictions or his sentences.

Background

In April 2015, the Forsyth County Grand Jury indicted defendant for assault with a deadly weapon with intent to kill and two counts of discharging a firearm into an occupied dwelling. **[R pp 7-8]** The charges against defendant came on for trial at the 18 April 2016 criminal session of Forsyth County Superior Court, the Honorable R. Stuart Albright presiding. **[T 1 p 11]** Defendant did not present evidence at trial, and the State's evidence showed the following.

On 9 September 2014, defendant attended a late-afternoon family cookout at Arthur Davis, Sr.'s home, located on North Cameron Avenue in Winston-Salem (the North Cameron Avenue residence). **[R pp 69-70, 90, 143]** Defendant's cousins, Ramon and Arthur Davis, Jr., were also in attendance. While standing on the front porch, defendant, who was very drunk, made several threatening remarks to Ramon. Defendant then entered the house and got into a heated exchange with Arthur Davis, Jr. At some point, defendant brandished a 9 mm pistol and chased Arthur Davis, Jr. outside. Once defendant was outside, he pointed the gun at Ramon, who quickly disarmed defendant and threw the pistol away. **[T 1 pp 146-47]** Ramon also broke up a scuffle that had ensued between defendant and Arthur Davis, Jr. **[T 1 p 147]**

Angry and embarrassed, defendant left the North Cameron Avenue residence in his black Chevrolet Blazer and said that "[h]e was coming back to shoot the house up." **[T 1 p 77]**

Meanwhile, Ramon's girlfriend, Jennifer Anne Rath, was home with her three children. Jennifer, her children, and Ramon lived on Barbara Jane Avenue in Winston-Salem (the Barbara Jane Avenue residence). While upstairs tending to her infant daughter, Jennifer observed through a window that her two older children were in front of the garage playing with the water hose. At Jennifer's request, the older children closed the garage door and headed upstairs. As the children were walking up the steps, Jennifer saw a black sport utility vehicle pull into her driveway. The driver, later identified as defendant, exited the vehicle, fired two shots into the garage, leaned over to reload his gun, and then drove off. **[T 1 pp 49, 64-65, 109]** Jennifer called 911 to report the shots fired, and Officer Benjamin Croke of the Winston-Salem Police Department responded to the incident around 6:50 p.m. **[T 1 p 108]**

Shortly after arriving at the Barbara Jane Avenue residence, Officer Croke was dispatched to the North Cameron Avenue residence due to a report that shots had been fired into Arthur Davis, Sr.'s home. **[T 1 p 109-10]** Upon his arrival at the North Cameron Avenue residence, Officer Croke found defendant standing beside a black Chevrolet Blazer and took possession of .38 caliber pistol that was located inside

the vehicle. **[T 1 pp 110, 113]** As defendant was being taken into police custody, he declared, "it was me" and "I want to kill Arthur [Davis, Jr.]." **[T 1 pp 117-118]** The ensuing investigation revealed that Arthur Davis, Jr., who was on the front porch when defendant returned to the North Cameron Avenue residence, ran inside and fled out the back door. Defendant fired at least three shots into the house and then ran inside. While standing in the kitchen, defendant fired an additional shot at Arthur Davis, Jr. through a window. **[T 1 p 77]**

Defendant was later transported to the Barbara Jane Avenue residence, where Jennifer identified defendant as the shooter. As defendant was being questioned in a police vehicle, Ramon stood outside in his yard. At one point defendant made a gesture toward Ramon and said to the investigating officer, "I was looking for him[.]" **[T 1 p 166]**

At trial, the court denied defendant's motions to dismiss the charges against him, which were made at the close of the State's evidence and the close of all evidence. **[T 1 pp 309, 324]** On 21 April 2016, the jury returned verdicts finding defendant guilty of both counts of discharging a firearm into an occupied dwelling as well as the misdemeanor of assault with a deadly weapon. The trial court sentenced defendant to 80 to 108 months' imprisonment for each count of discharging a firearm into an occupied dwelling, with the sentences to be served consecutively. Defendant was

sentenced to 150 days of imprisonment for the assault charge. Defendant gave notice of appeal in open court.

Discussion

I. Motion to Dismiss

Defendant first argues that the trial court erred by denying his motion to dismiss the two counts of discharging a firearm into an occupied dwelling.

We review *de novo* the trial court's denial of a motion to dismiss. *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). It is well established that substantial evidence is

> such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact and does not merely raise a suspicion or conjecture regarding it, then it is proper to submit the case to the jury.

State v. Pigott, 331 N.C. 199, 207, 415 S.E.2d 555, 559-60 (1992) (quotation marks and citations omitted). When ruling on a motion to dismiss, "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).

The General Assembly has made it a Class D felony for a person to "willfully or wantonly discharge[ ] a [firearm or similar weapon] . . . into an occupied dwelling[.]" N.C. Gen. Stat. § 14-34.1(b) (2015). "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, 409 S.E.2d 322 (1991)). Although section 14-34.1 "does not contain an express knowledge requirement with reference to the building or vehicle being occupied[,]" *State v. James*, 342 N.C. 589, 595, 466 S.E.2d 710, 714 (1996), our Supreme Court has interpreted the statute as requiring an additional *mens rea* requirement that the perpetrator have "knowledge that the [dwelling] is then occupied by one or more persons" or have "reasonable grounds to believe that the [dwelling] might be occupied by one or more persons." *Id.* at 596, 466 S.E.2d at 715 (quoting *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973)). "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 (1997) (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). Discharging a firearm into an occupied dwelling is thus 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).

Defendant's specific argument on appeal is that there was insufficient evidence for the jury to find that he knew or had reasonable grounds to believe that the Barbara Jane Avenue and North Cameron Avenue residences were occupied at the time of the shootings. We are not persuaded.

The record belies any contention that defendant did not know the North Cameron Avenue residence was occupied when he fired at least three shots into it. The State's evidence indicated that these shots were fired at approximately 7:00 p.m. on a Tuesday evening, a day and time when property owners are often home. *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.") (emphasis added). In addition, defendant had recently left the residence—where a barbeque was being held for over twenty of Arthur Davis, Sr.'s family and friends—with the intention of returning to "shoot the house up" and to

"kill Arthur [Davis, Jr.]." **[T 1 pp 77, 88]** When defendant returned to the residence, Arthur Davis, Jr. was on the front porch. Fearing that defendant was "coming back violently[,]" Arthur Davis, Jr. ran inside, at which time defendant fired at least three rounds into the house. From this evidence, a reasonable juror could infer that defendant knew or had reason to know the residence was occupied when he fired his .38 caliber pistol into the home.[1]

We reach the same conclusion as to the Barbara Jane Avenue residence. Although defendant asserts that "the State presented no evidence that lights were on inside the house or that there as any visible activity near or within the house or garage[,]" definite, visible indications of occupancy are not required. Defendant's claim that "no car was parked out front" of the residence, which had a garage, is also unavailing. *See State v. Hicks*, 60 N.C. App. 718, 721, 300 S.E.2d 33, 35 (1983) (noting that the victim's "house had a garage, which explains why no cars were parked in front of his house[,]" before concluding that there was sufficient evidence that the

[1] While acknowledging that our Supreme Court has held that intoxication is not a defense to the general intent crime of discharging a firearm into occupied property, *Jones*, 339 N.C. at 148, 451 S.E.2d at 844, defendant contends that his intoxication at the time of the North Cameron Avenue residence shooting must be a factor in our analysis. According to defendant, "a sober defendant would be much more likely to know, or have reason to know, that a dwelling might be occupied than a defendant who, by all accounts, was simply drunk at the time." **[Def. Br p 13]** In making this assertion, defendant attacks the judicially-created knowledge requirement for occupancy. *See James*, 342 N.C. at 596, 466 S.E.2d at 715. Even if it is not an attempt to smuggle into our legal lexicon a voluntary invocation defense to the general intent offenses codified at section 14-34.1, we reject this argument for the simple fact that defendant's actions were cold and calculated: he fired shots into the Barbara Jane Avenue residence, reloaded his pistol, drove to the North Cameron Avenue residence, and fired at least three shots into Arthur Davis, Sr.'s home. These were not the actions of a person who was so intoxicated that he could not reasonably discern that the dwellings might be occupied by one or more persons.

defendant knew or had reasonable grounds to believe that the victim's house was occupied at the time of the shooting). In the present case, Jennifer and her children did not accompany Ramon to the family gathering at the North Cameron Avenue residence. Considering Jennifer's absence from the gathering and the time at which shots were fired into the Barbara Jane Avenue residence—sometime between 6:00 and 7:00 p.m.—defendant had no reasonable grounds to believe that Jennifer and her young children would not be at home. *See Fletcher*, 125 N.C. App. at 512, 481 S.E.2d at 423.

II. Consecutive Sentences

Defendant next argues that the trial judge's decision to impose consecutive sentences was based on improper considerations, and that the judgments entered upon his convictions should be reversed and remanded for resentencing.

The imposition of consecutive sentences falls within the broad discretion given to trial judges under North Carolina's sentencing statutes. N.C. Gen. Stat. § 15A-1354(a) (2015); *See also See State v. Parker*, 350 N.C. 411, 441, 516 S.E.2d 106, 126 (1999) (noting that "[t]he trial court has discretion to determine whether to impose concurrent or consecutive sentences[]" pursuant to subsection 15A-1354(a)), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). Indeed, "[t]rial courts have 'considerable leeway and discretion in governing the conduct of a sentencing proceeding[.]' " *State v. Mead*, 184 N.C. App. 306, 310, 646 S.E.2d 597, 600 (2007)

(citation omitted). "A sentence within the statutory limit will be presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). But this "presumption is not conclusive[,]" and it is overcome "[i]f the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence[.]" *Id.* However, our Supreme Court has held that "[a] judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962); *see also State v. Bright*, 301 N.C. 243, 261, 271 S.E.2d 368, 379-80 (1980) ("When the validity of a judgment is challenged, the burden is on the defendant to show error amounting to a denial of some substantial right.") (citation omitted).

Here, defendant's two consecutive sentences were within the presumptive range for his Class D felonies and prior record level of III. *See* N.C. Gen. Stat. § 15A-1340.17 (2015). Defendant takes issue, however, with the trial judge's comment that he "committed a cold, calculated, premeditated crime by shooting into [his] family's house[,]" and the judge's characterization of defendant as "just plain old mean." **[Def. Br. p 14] [T 2 p 371]** More specifically, defendant contends that the trial court improperly "based [its] decision to impose consecutive sentences on his personality (while highly intoxicated) and the fact that the houses were 'family' rather than on

the crimes for which [defendant] was indicted and convicted." **[Def. Br. p 15]** After reviewing the transcripts of defendant's sentencing hearing, we conclude that his argument is without merit.

Prior to imposing defendant's sentences in the instant case, the trial judge explained his exercise of discretion as follows:

> Mr. Davis, I've had a chance to consider the testimony in this case, as well as the arguments of the -- your attorneys and there's nothing in this case that I've seen other than the fact that you committed a cold, calculated, premeditated crime by shooting into your family's house. These are your blood relatives that you are shooting -- taking a deadly weapon and shooting into their houses. The first house you shot into on Barbara Jane Avenue there were two kids in the house, two minors along with an adult. You shot into that house without regard for anyone's safety. You did not care what happened.
>
> That wasn't good enough, you reloaded the revolver and went to another house and shot into that house and that wasn't good enough, you chased your flesh-and-blood, Mr. Davis, and shot at him again. The videos show the type of person that you are. [I] don't find this to be impulsive. I find these criminal acts to have been premeditated, calculated, cold and, Mr. Davis, you are just plain old mean, that's the bottom line, that's what I reviewed from the evidence. There is no remorse. The only remorse you had, the best I can tell is that you didn't shoot Mr. Davis, that's the only remorse that you have. **[T 2 p 371]**

When read in context, we find no indication of an improper motivation. The totality of the trial judge's remarks reveal that defendant was not given consecutive sentences simply because he was "mean" and attacked his family. Rather, the trial judge

justified the sentences imposed based on his conclusion that defendant's actions were deliberate as opposed to spontaneous. The progression of the shootings supported this conclusion—defendant shot into the Barbara Jane Avenue residence, which was occupied by three young children; reloaded his pistol; drove to the North Cameron Avenue residence; and unloaded a series of bullets into Arthur Davis, Sr.'s home. Indeed, the trial judge specifically noted that because defendant had committed "distinct crimes[,]" he would receive "separate sentences" for them. **[T 2 pp 371-72]**

The record also reveals that defendant's indifference to the safety of others was a factor at sentencing. It is true that references were made to defendant's attack on his own "flesh-and-blood" and his downright "mean[ness]." But the essence of the trial judge's remarks was that he found defendant to be a particularly ruthless, reckless, and remorseless offender. This was not an improper consideration. Indeed, commonsense and ordinary human experience teaches us that an attack on one's own family signifies a particular kind of brutality.

In summary, after reviewing the transcript of defendant's sentencing hearing in its entirety, we conclude that the trial court did not abuse its discretion, engage in procedural conduct prejudicial to defendant, manifest inherent unfairness and injustice, or offend the public sense of fairness. We similarly conclude that the trial court's decision to impose consecutive sentences was not based upon improper

considerations. Accordingly, defendant's assertion to the contrary is wholly without merit.

Conclusion

For the reasons stated above, we conclude that the trial court properly denied defendant's motion to dismiss both charges of discharging a firearm into occupied property. We also conclude that the trial court's imposition of consecutive sentences did not constitute error.

NO ERROR.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).