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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1042-2

Filed: 20 March 2018

Wake County, No. 14 CRS 200073

STATE OF NORTH CAROLINA

v.

JOSHUA EARL HOLLOWAN, Defendant.

Appeal by Defendant from judgment entered 27 April 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 25 February 2016, decided 10 May 2016, reversed by the Supreme Court of North Carolina 9 June 2017 and remanded to the Court of Appeals.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Amanda S. Zimmer, for Defendant-Appellant.

INMAN, Judge.

Joshua Earl Holloman (“Defendant”) appeals from a judgment following a jury verdict convicting him of assault with a deadly weapon inflicting serious injury. This

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is this Court's second decision regarding Defendant's appeal, resolving an issue not previously addressed.

On 10 May 2016, this Court awarded Defendant a new trial, holding that the trial court prejudicially erred in its jury instructions. On 9 June 2017, the North Carolina Supreme Court reversed this Court's decision and remanded the case to this Court for consideration of Defendant's remaining challenge to the trial court's judgment. On remand, the sole issue for this Court's determination is whether the trial court erred by considering improper factors in determining Defendant's sentence. We conclude that Defendant has not demonstrated reversible error.

Factual & Procedural Background

The evidence presented at the trial of this case, set forth in greater detail in the North Carolina Supreme Court's opinion in *State v. Holloman*, 369 N.C. 615, 616, 799 S.E.2d 824, 826 (2017), tended to show that, in the early morning hours of New Year's Day 2014, Defendant received a call from a woman with whom he was romantically involved. She requested that Defendant drive and pick her up from the corner of Martin Luther King Boulevard and Rock Quarry Road in Raleigh. When Defendant arrived, he saw the woman with another man, Darryl Bobbitt, on the side of road. Defendant, who was lawfully carrying a handgun, got out of his vehicle and, after a verbal exchange with Bobbitt, shot him multiple times. Bobbitt, who also was

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armed with a handgun, fired shots at Defendant. Bobbitt was shot four times: twice in the stomach, once in the left leg, and once in the right arm.

On 24 February 2014, Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. The charge came before the trial court and jury at the 20 April 2015 criminal session of the Wake County Superior Court, Judge Donald W. Stephens presiding. The jury found Defendant guilty of assault with a deadly weapon inflicting serious injury. After accepting the verdict from the jury, the trial court stated from the bench:

This is an unfortunate incident. I'm sure all of you would agree with that. We carry about 40 homicides in Wake County on our calendar all the time. We have three or four a month. This could have been a homicide but for a number of factors that were involved which is really fortunate. Those cases usually involve gang members who fight, drug dealers who fight, and sometimes domestic cases. These two young men are not thugs, but these two young men had guns.

The high sheriff and I agree, the chief of police and I agree, that one of the problems that bring themselves down here to our courthouse is the prevalence of laws that allow people to have guns, almost encourage them to have guns and to carry them anywhere they want to.

I'm almost 70 years old. I will be in a couple of months. When I grew up and a couple of guys got into a disagreement about a girl, they had a fist fight. Somebody's feelings got hurt and then they both went home.

Now if you have two young men, whether it's—whether it's at Rock Quarry Road and Martin Luther King Boulevard

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or whether it's in the North Hills Shopping Center parking lot at 2:00 o'clock in the morning on New Year's Day arguing about a woman and both of them had guns, you kind of know how that's going to come out. Somebody's going to get hurt. Somebody's going to get hurt. That's why we have these laws. That's why we have these rules that sometimes are difficult to enforce, but they are laws. They are rules that have to be enforced to have some kind of civilized society in which we can maintain some degree of order so that hopefully fewer people will get hurt and hopefully nobody who is a [sic] innocent bystander, somebody riding by in a car or something like that, they won't get hurt either.

By your verdict, you have found the defendant guilty of a felony in which by the law of this state, I can do anything from put him on probation or send him to prison and, therefore, I have lots of option [sic] because of everything that you've heard in making what would be an appropriate punishment. That's my job. You've done your job and now I'll do mine at some point.

....

There are times in which I wish members of [the] legislature could come down here to the courthouse for a few days and see what we see every day and maybe reassess this question of the proliferation of firearms and that everybody has some legal right to carry one and have it whenever they want. If we solve that problem, I think the sheriff and I and the chief of police would agree if we solve that problem, we'd have a lot less incidences. But I have no control over that.

The trial court then continued the sentencing hearing until the following Monday. At the sentencing hearing, the prosecutor argued for an active sentence, citing the public safety hazard created by gunplay on a public street and the extent

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of the victim's injuries. Defense counsel argued for an intermediate punishment, arguing that the trial court should consider in mitigation: (1) that Defendant acted under strong provocation and duress; (2) that the victim's actions contributed to the incident; (3) Defendant's steady employment and good character; and (4) lack of any criminal records. Prior to announcing his sentence, the trial court stated, in part, from the bench:

I keep going back to the sheer foolishness of it all, frankly. And I think everybody's well aware of my feeling about the firearms [sic] in hands of young men.

. . .

Even though the jury did not find that the defendant intended to kill Mr. Bobbitt, he appeared from the evidence to be so caught up in the moment that it's quite possible that he would have continued to do what he thought he was legally entitled to do, and Mr. Bobbitt may have died. . . .

In the end, you are responsible, Mr. Holloman, for the choices you make. . . . Mr. Bobbitt's responsible for the choices that he makes too, and his choice to carry a gun and his choice to attempt to defend himself under the circumstances or respond in like manner to what he was facing has caused him to bear scars that he will have the rest of his life and be significantly impaired the rest of his life. And your choices have found you to be found guilty of a serious felony.

The trial court then sentenced Defendant to a minimum term of 25 months and a maximum term of 42 months in prison, within the presumptive range of

punishments for his offenses.¹ The trial court suspended the sentence on the condition that Defendant comply with supervised probation for 36 months, and, as special conditions of probation, ordered Defendant to serve an active sentence of 10 months in prison, and ordered Defendant to pay restitution to the victim.

Defendant timely appealed.

Appellate Jurisdiction

As an initial matter, we must address this Court's jurisdiction. The State contends that Defendant lacks a right to appeal his presumptive range sentence pursuant to N.C. Gen. Stat. § 15A-1444(a1), which provides:

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.

N.C. Gen. Stat. § 15A-1444(a1) (2015) (emphasis added). In other words, a defendant is limited to appeal as a matter of right the issue of whether his sentence is supported

¹ We note that although the trial court did not address the mitigating factors argued by Defendant's counsel during the sentencing hearing, no findings were required because the trial court imposed a sentence in the presumptive range. N.C. Gen. Stat. § 15A-1340.16(c) (2015) ("The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences[.]").

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by the evidence if the minimum sentence of imprisonment falls outside the presumptive range.

Here, Defendant does not argue on appeal that his sentence is unsupported by the evidence. Rather, Defendant argues that the trial court considered improper factors in determining and imposing his sentence. So the limitation provided by Section 15A-1444(a1) does not apply to Defendant's appeal. *See State v. Hagens*, 188 N.C. App. 799, 801 n.2, 656 S.E.2d 704, 706 n.2 (2008) ("In the instant case, defendant does not contend that his sentence was not supported by the evidence, but rather that the sentencing judge was biased. Therefore, section 15A-1444(a1) does not bar defendant's appeal of this matter."). Defendant has a right to appeal pursuant to N.C. Gen. Stat. § 15A-1444(a), which provides that "[a] defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered."

Analysis

Defendant contends that the trial court committed reversible error by improperly considering certain personal feelings in determining Defendant's sentence. Specifically, Defendant argues that the trial court sentenced Defendant in the highest presumptive range because the judge (1) was biased against Defendant because he had possessed a firearm, and (2) felt the shooting could have resulted in a homicide. We hold that Defendant has failed to show any reversible error.

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“When a sentence is within the statutory limit it will be presumed regular and valid unless ‘the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence.’” *State v. Davis*, 167 N.C. App. 770, 775, 607 S.E.2d 5, 9 (2005) (quoting *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)). “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. Cameron*, 83 N.C. App. 69, 76, 349 S.E.2d 327, 332 (1986) (quoting *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962)). “‘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.’” *State v. Earls*, 234 N.C. App. 186, 194, 758 S.E.2d 654, 659 (2014) (quoting *State v. Bright*, 301 N.C. 243, 261, 271 S.E.2d 368, 379-80 (1980)).

Here, Defendant was sentenced to a minimum term of 25 months and a maximum term of 42 months, within the presumptive range of punishment. However, he argues the presumption of regularity is overcome because the trial court improperly considered its personal feelings in sentencing Defendant, who had no prior convictions, to the highest presumptive range sentence allowed by the legislature for the offense. First, Defendant argues that the trial court was biased against Defendant as a result of his possession of a firearm as shown by the judge’s

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comments both when releasing the jury and at the sentencing hearing. Second, Defendant argues that the trial court erred by considering his personal feelings that the shooting could have resulted in a homicide.

“If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant’s rights.” *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977); *see also State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990) (remanding for resentencing after the trial judge indicated to defense counsel that in the event of a conviction the court would impose the maximum sentence as a result of the defendants’ refusal to accept a plea offer); *Earls*, 234 N.C. App. at 194, 758 S.E.2d at 659 (noting that a trial court “taking into account the religious beliefs of either the trial judge or the defendant is an improper sentencing consideration[]”). However, where “the record reveals no such express indication of improper motivation,” the defendant is not entitled to a new sentencing hearing. *Johnson*, 320 N.C. at 753, 360 S.E.2d at 681.

The trial court’s comments decrying “the prevalence of laws that allow people to have guns, almost encourage them to have guns and to carry them anywhere they want to” and his acknowledged “feelings” about firearms “in hands of young men,” considered in isolation, could be construed to express a bias against Defendant for lawfully possessing a firearm. It is improper for a trial court to increase a defendant’s

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punishment based upon his lawful conduct. But “[i]n determining whether the severity of the defendant’s sentence was based on this improper factor, we look at the ‘totality of the trial judge’s remarks’ in context.” *State v. Barksdale*, 237 N.C. App. 464, 472, 768 S.E.2d 126, 131 (2014) (quoting *State v. Tice*, 191 N.C. App. 506, 515, 664 S.E.2d 368, 374 (2008)) (brackets omitted).

The trial court’s expressed wish that members of the General Assembly “could come down here to the courthouse for a few days and see what we see every day and maybe reassess this question of the proliferation of firearms and that everybody has some legal right to carry one and have it whenever they want” reflects the trial court’s frustration with legal policy and lawmakers, as opposed to condemnation of Defendant. The trial court’s further comment that the choice by Bobbitt, the victim, to exercise his right to carry a firearm and to defend himself “has caused him to bear scars that he will have the rest of his life and be significantly impaired the rest of his life” reflects the trial court’s disappointment with the victim as much as with Defendant regarding the use of firearms to resolve a dispute. Considered in their totality, the trial court’s comments do not reveal an express indication of improper motivation or bias in sentencing Defendant.

The trial court’s commentary about the severity of the victim’s injuries and the possibility that the case “could have been a homicide” was based on the evidence presented at trial and was not improper. “‘[T]o a considerable extent a sentencing

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judge is the embodiment of public condemnation and social outrage. As the community's spokesperson, a judge can lecture a defendant as a lesson to that defendant and as a deterrent to others.'” *Earls*, 234 N.C. App. at 195, 758 S.E.2d at 660 (quoting *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991)).

Assuming *arguendo* that the trial court's comments constituted an express indication of improper motivation, Defendant has not demonstrated that the trial court's bias against him resulted in an unfairly severe punishment because “the evidence in this case justified the sentence imposed.” *Bright*, 301 N.C. at 262, 271 S.E.2d at 380. Although the trial court imposed a sentence at the top of the presumptive range, less than one quarter of the sentence was to be served as an active prison term. In its discretion, the trial court imposed a far less lengthy active term than allowed by the legislature for Defendant's offense. Thus, “we cannot, under the facts of this case, say that [D]efendant was prejudiced or that [D]efendant was more severely punished because” of the trial court's personal feelings. *Id.* at 262, 271 S.E.2d at 380.

Finally, although we hold that Defendant has failed to demonstrate reversible error, we note that “judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not.” *Tice*, 191 N.C. App. at 516, 664 S.E.2d at 375.

Conclusion

We hold that the trial court's imposition of a sentence within the presumptive range was proper and valid.

NO ERROR.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).