IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-630

Filed 12 September 2023

Anson County, Nos. 20 CRS 50538, 21 CRS 437–38

STATE OF NORTH CAROLINA

v.

PRISCILLA YVONNE TILLMAN

Appeal by defendant from judgments entered 6 January 2022 and by writ of certiorari from order entered 24 January 2022 by Judge Stephan R. Futrell in Anson County Superior Court. Heard in the Court of Appeals 8 August 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.

Sandra Payne Hagood for defendant-appellant.

ZACHARY, Judge.

Defendant Priscilla Yvonne Tillman appeals from judgments entered upon a jury's verdicts finding her guilty of five counts of discharging a weapon into an occupied dwelling and two counts of attempting to discharge a weapon into an occupied dwelling. After careful review, we conclude that there was no error in part, vacate in part, and remand.

I. Background

On 25 June 2020, Maxine Foster was at home with her boyfriend Purcell Wall as well as her 68-year-old aunt and her 10-year-old granddaughter. Before Wall began dating Foster, he had been in a relationship with Defendant. Prior to 25 June, Defendant had been to Foster's home a few times, and had argued with Wall on the front porch. Foster heard Defendant tell Wall that "she was going to blow his brains out."

On 25 June, Foster heard "a boom" and looked out the window. She saw Defendant "outside the house messing with the gray car that was in [the] yard." As Foster watched, Defendant finished "messing with the gray car" and returned to Defendant's car, where she "reached into . . . the front seat of the car." Foster turned and started to the bedroom to tell Wall that Defendant "was out there."

Before she reached the bedroom, however, Foster heard approximately four or five gunshots enter the house. Bullets penetrated the walls and furniture of the house, including her headboard and dresser. "[A]fter [Foster] heard the gunshots, [she] called law enforcement . . . ." Upon hearing a car door close and seeing Defendant drive past the house, Foster went outside and saw that the gray car had "a busted window and a candy bar stuck in the gas tank."

Detective Joshua Martin and other officers of the Anson County Sheriff's Office responded to Foster's call. They met with the occupants of the house and took Foster's statement. They also located seven spent shell casings in front of Foster's house and

discovered five bullet holes in the exterior of the house, "consistent with the house being shot into."

Detective David Spencer of the Anson County Sheriff's Office, who knew Defendant "from a previous unrelated incident[,]" left Foster's house and went to Defendant's house. Defendant was on the porch and, when asked, informed Detective Spencer that she owned a 9mm handgun and that it was in her car. She also consented to Detective Spencer's retrieval of the handgun for evidence. When Detective Spencer inspected the handgun, he determined that there was a live round "in the chamber[;] it's ready to go and it's hot." Detective Spencer collected additional magazines and live ammunition from Defendant, along with the handgun. Officers subsequently matched the handgun and ammunition recovered from Defendant to the spent shell casings found at Foster's house.

Detective Spencer arrested Defendant on an outstanding warrant for an unrelated incident, informed her of her rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and interviewed her. During that interview, Defendant "admitted to firing a weapon" but initially claimed that she had fired the handgun on her own property. Defendant later admitted that she had been at Foster's house. At trial, Detective Spencer testified as to Defendant's additional admissions:

> She went to one of the vehicles. Went and knocked on the door and nobody was there. At some point she was going to let them know that she was there, and she said that she was going to fire a BB gun at one of the windows but she couldn't get it to work. Later on in the interview she did

> admit to grabbing her gun because she couldn't get the BB gun to work and shooting it up in the air.

She also admitted that "she did damage the windshield [of the gray car] and she did push a candy bar down in the gas tank."

As for her purpose in going to Foster's, Defendant told Detective Spencer that "she wanted Purcell to feel her pain." Detective Spencer testified: "She had explained to family members, talked at some point about some kind of a hit and that she wanted him to feel pain amongst family members." Lastly, Defendant admitted that she could hear people inside the home but could not get them to come to the door.

On 8 February 2021, an Anson County grand jury returned a true bill of indictment charging Defendant with discharging a weapon into an occupied dwelling and assault with a deadly weapon with intent to kill. On 30 August 2021, the grand jury returned further true bills of indictment, charging Defendant with four additional counts of discharging a weapon into an occupied dwelling and two counts of attempt to discharge a weapon into an occupied dwelling.

The matter came on for trial on 3 January 2022. At the conclusion of the trial, the jury was unable to reach a verdict on the charge of assault with a deadly weapon with intent to kill, and the trial court declared a mistrial on that charge. On 6 January 2022, the jury returned its other verdicts, finding Defendant guilty of all remaining charges. The trial court classified each conviction as a Class D felony, and sentenced Defendant to five consecutive terms of 80 to 108 months in the custody of the North

Carolina Division of Adult Correction, as well as two concurrent terms of 80 to 108 months for the attempt convictions. Defendant gave notice of appeal in open court.

After announcing Defendant's sentence in open court, the trial court inquired as to the hours worked by Defendant's appointed attorney. After Defendant's counsel provided that information, the trial court directed Defendant's counsel: "You will be submitting a fee application." The court then adjourned.

On 24 January 2022, Defendant's counsel filed his fee application. On 24 January 2022, the trial court entered a civil judgment against Defendant for attorney's fees and other necessary expenses in the amount of $8,256.20.

II. Discussion

On appeal, Defendant first argues that the trial court erred by denying her motion to dismiss for insufficient evidence to support five separate charges. She next asserts that, by imposing five consecutive sentences, the trial court imposed a "*de facto* life sentence for one incident" and that this sentence "is cruel and/or unusual in violation of both the North Carolina Constitution and the United States Constitution." Defendant then alleges that the trial court erred by classifying the attempt convictions as Class D felonies. Finally, she argues that the trial court erred by entering a civil judgment for attorney's fees "without providing her with notice and an opportunity to be heard."

A. Motion to Dismiss

Defendant argues that the trial court erred in denying her motion to dismiss

all but one count of discharging a weapon into an occupied dwelling for insufficient evidence. Defendant contends that the State failed to meet its burden of proof because it

> did not offer substantial evidence that the gun used was not an automatic weapon, the testimony showed that the gunshots were in rapid succession with no pause, all five bullets hit an area of the front porch spanning only 20 feet or so, all seven of the casings were no more than 12 feet or so apart, and there were no injuries whatsoever.

(Citations and emphasis omitted). Accordingly, Defendant argues that "the evidence established only one count under [N.C. Gen. Stat.] § 14-34.1 and the remaining counts must be vacated." We disagree.

1. Preservation

Although Defendant did not specifically raise the arguments before the trial court that she now advances on appeal, our Supreme Court has explained that "merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020). Because Defendant's motion to dismiss "preserve[d] *all* issues related to the sufficiency of the evidence[,]" this argument is properly before us. *Id.*

2. Standard of Review

This Court reviews de novo a trial court's denial of a defendant's motion to dismiss. *State v. Morrison*, 272 N.C. App. 656, 665, 847 S.E.2d 238, 245, *disc. review*

denied, 376 N.C. 549, 851 S.E.2d 48 (2020). We must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense." *Id.* (citation omitted). "Substantial evidence is relevant evidence that a reasonable mind would find adequate to support a conclusion. We must consider evidence in a light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *Id.* (citation 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 [the] defendant's guilt may be drawn from the circumstances. 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. (cleaned up).

> If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied, however, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.

Id. at 665–66, 847 S.E.2d at 245 (cleaned up).

3. Analysis

Defendant was charged with and convicted of seven violations of N.C. Gen. Stat. § 14-34.1, which provides, in pertinent part:

> (a) Any person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.
>
> (b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section 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(a)–(b) (2021).

A person violates N.C. Gen. Stat. § 14-34.1 by: "(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). In this case, Defendant does not dispute that she (1) discharged (2) a firearm (3) into property (4) while it was occupied. Defendant thus acknowledges that the State carried its burden with respect to at least one charge.[1]

[1] Additionally, Defendant raises several arguments concerning the text of N.C. Gen. Stat. § 14-34.1. For example, she asserts that "the text of N.C. Gen. Stat. § 14-34.1 does not show a clear intent on the part of our legislature to authorize multiple prosecutions for one incident of discharging a weapon into an occupied dwelling[.]" Defendant also argues that, even if N.C. Gen. Stat. § 14-34.1 allows for multiple prosecutions in this case, "all but one of [her] convictions must be vacated" because the State failed to show more than one offense. Defendant's statutory-analysis arguments are foreclosed by our Supreme Court's precedent in *Rambert* and other cases applying § 14-34.1, as detailed herein.

Rather, Defendant raises several arguments inspired by our Supreme Court's opinion in *Rambert*—and more recent opinions of our Supreme Court considering *Rambert*'s applicability to assault crimes—to dispute the sufficiency of the State's evidence to justify the trial court's denial of her motion to dismiss all but one charge pursuant to § 14-34.1. Defendant claims that "under *Rambert*, to establish more than one offense, the State must show that the defendant's actions employed different thought processes, were distinct in time, and caused different injuries." *See Rambert*, 341 N.C. at 176–77, 459 S.E.2d at 513 ("Each shot, fired from a pistol, as opposed to a machine gun or other automatic weapon, required that [the] defendant employ his thought processes each time he fired the weapon. Each act was distinct in time, and each bullet hit the vehicle in a different place.").

For example, Defendant contends that to sustain multiple counts of discharging a weapon into an occupied dwelling, the State needed to show that the firearm used was *not* an automatic weapon because the *Rambert* Court found that discharging a weapon other than an automatic weapon "required that [the] defendant employ his thought processes each time he fired the weapon." *Id.* at 177, 459 S.E.2d at 513. Therefore, Defendant asserts that "under *Rambert*, it is the use of a non-automatic weapon that establishes that each bullet reflects a separate thought process justifying a separate charge."

However, our Supreme Court's use of an automatic weapon as an illustrative example in *Rambert* did not announce a new, necessary element of the offense of

discharging a weapon into occupied property. As stated above, the *Rambert* Court was clear that "[t]he elements of this offense are (1) willfully and wantonly discharging (2) a firearm (3) into property (4) while it is occupied." *Id.* at 175, 459 S.E.2d at 512. Defendant's argument notwithstanding, the *Rambert* Court did not purport to make "the use of a non-automatic weapon" another element of this offense.

Nevertheless, Defendant uses this Court's application of *Rambert* in *Morrison* to support her argument that, while "it was unnecessary for the State to prove that the [firearm] *could not* be used as an automatic rifle," it was necessary for the State to prove "that Defendant *was not* using it as such when he repeatedly fired" into the home. *Morrison*, 272 N.C. App. at 667, 847 S.E.2d at 246. Defendant asserts that, in this case, no witness "testified that the weapon sounded like a non-automatic weapon, and there was no testimony that there was any pause or separation of any other kind between the shots. Thus, there was no testimony which would have indicated that the weapon used was not an automatic weapon."

Contrary to Defendant's claim on appeal, however, the illustrative factors that our Supreme Court identified and utilized in *Rambert* were not intended to become a multi-part test for the State to necessarily satisfy in every subsequent prosecution under § 14-34.1. Indeed, this Court in *Morrison* was quick to recognize that the *Rambert* Court "did not presume to establish a threshold for sufficient relevant evidence applicable to all similar crimes. Each set of facts is different and must be considered in context." *Id.* at 669, 847 S.E.2d at 247. In *Morrison*, the firearm at issue

was never recovered, and the question of whether the firearm was automatic or not was actively contested at trial. *See id.* at 666–67, 847 S.E.2d at 245–46. In this case, the State introduced into evidence the Taurus G2C 9mm handgun that was recovered from Defendant, as well as the ammunition and magazines; there was no dispute as to the fact that Defendant fired the Taurus G2C 9mm handgun into the home; and Defendant did not argue before the trial court that the State had the burden of proving that Defendant's handgun was not an automatic weapon, or even that the handgun was an automatic weapon.

Defendant alleges that, based on the State's evidence at trial, "for the jury to conclude that [she] was not using an automatic weapon would not require an inference but a surmise or conjecture." Yet it is Defendant who offers surmise and conjecture to support her theory that the firearm she used in this case *might* have been automatic. It is not the State's burden on a motion to dismiss to affirmatively rebut every hypothetical, exculpatory scenario that the Defendant can imagine. "Circumstantial evidence may withstand a motion to dismiss and support a conviction *even when the evidence does not rule out every hypothesis of innocence*." *Id.* at 665, 847 S.E.2d at 245 (emphasis added) (citation omitted).

When reviewing a defendant's motion to dismiss, "[w]e must consider evidence in a light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *Id.* (citation omitted). In this case, the State satisfied its burden of presenting "substantial evidence (1) of each essential element

of the offense charged . . . and (2) of [D]efendant's being the perpetrator of such offense." *Id.* (citation omitted). Properly viewed in the light most favorable to the State, and considering the actual elements of the offense charged, the State presented "substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that [Defendant] committed it[.]" *Id.* (citation omitted). Therefore, "the case [wa]s for the jury" and the trial court properly denied Defendant's motion to dismiss. *Id.* (citation omitted).

B. Consecutive Sentences

Defendant next contends that "the imposition of a 33-year, *de facto* life sentence for one incident of discharging a firearm into an occupied dwelling is cruel and/or unusual in violation of both the North Carolina Constitution and the United States Constitution." However, she acknowledges in her appellate brief that she did not raise this constitutional claim to the trial court below, and therefore "the issue was waived." Accordingly, Defendant requests that this Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure in order to review this argument. *See* N.C.R. App. P. 2 ("To prevent manifest injustice to a party, . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative . . . .").

It is well established that this Court "will not ordinarily consider a constitutional question not raised before the trial court[.]" *State v. Spinks*, 277 N.C.

App. 554, 571, 860 S.E.2d 306, 320 (2021). As such, "Defendant cannot prevail on this issue without our invoking Rule 2, because h[er] constitutional argument was waived." *Id.* (cleaned up). "In our discretion, we decline to invoke Rule 2 to review Defendant's unpreserved argument on direct appeal." *Id.* (cleaned up).

C. Classification of Attempt Convictions

Defendant next asserts, and the State agrees, that the trial court erred by classifying the attempt convictions as Class D felonies rather than Class E felonies. We agree.

"Unless a different classification is expressly stated, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense which the offender attempted to commit." N.C. Gen. Stat. § 14-2.5 (2021). As previously discussed, Defendant was convicted pursuant to N.C. Gen. Stat. § 14-34.1, which provides:

> (a) Any person who willfully or wantonly discharges *or attempts to discharge* any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.
>
> (b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section 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(a)–(b) (2021) (emphasis added).

The principal distinction between subsections (a) and (b) is that "[d]ischarge of a weapon into a 'building' or 'structure' while it is occupied is a Class E felony pursuant to N.C. Gen. Stat. § 14-34.1(a), but discharge of a weapon into a 'dwelling' while it is occupied is a [C]lass D felony pursuant to N.C. Gen. Stat. § 14-34.1(b)." *State v. Curry*, 203 N.C. App. 375, 381, 692 S.E.2d 129, 135, *appeal dismissed and disc review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010). Another distinction, critical to the issue before us, is that subsection (a) expressly incorporates attempts, while subsection (b) does not.

Here, Defendant was specifically convicted of five counts of discharging a weapon into an occupied dwelling pursuant to § 14-34.1(b), and two counts of attempting to discharge a weapon into an occupied dwelling pursuant to the same subsection. However, because subsection (b) does not expressly state otherwise, an attempt to commit the Class D felony of discharging a weapon into an occupied dwelling "is punishable under the next lower classification as the offense which the offender attempted to commit." N.C. Gen. Stat. § 14-2.5 (2021). Accordingly, it was error to classify Defendant's attempt convictions as Class D felonies, rather than Class E felonies.

The trial court sentenced Defendant to two concurrent terms of 80 to 108 months for the attempt convictions. As Defendant notes, this sentence is within the presumptive range for a Class D felony for a Prior Record Level III offender, but is beyond any authorized range for a Class E felony at Prior Record Level III. *See id.* §

15A-1340.17(c) (2021). We therefore remand the attempt convictions to the trial court for resentencing as Class E felonies.

D. Attorney's Fees

Defendant next argues that "[t]he trial court erred by entering a civil judgment for attorney's fees against [her] without providing her with notice and an opportunity to be heard." The State agrees with this argument, as well.

1. Petition for Writ of Certiorari

As an initial matter, Defendant concedes that her "oral notice of appeal was insufficient to invoke this Court's jurisdiction over the civil judgment entered in this case[.]" This Court has "previously determined that judgments entered against a defendant for attorney fees and appointment fees constitute civil judgments, which require a defendant to comply with Rule 3(a) of the North Carolina Rules of Appellate Procedure when appealing from those judgments." *State v. Patterson*, 269 N.C. App. 640, 642, 839 S.E.2d 68, 71 (2020).

Rule 3(a) provides, in pertinent part, that "[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal . . . within the time prescribed by subsection (c) of this rule." N.C.R. App. P. 3(a). Under Rule 3(c), a party generally must file and serve the party's notice of appeal within thirty days after entry of judgment. N.C.R. App. P. 3(c)(1). "Failure to give timely notice of appeal in compliance with . . . this rule of the North Carolina Rules of Appellate Procedure is jurisdictional, and an

untimely attempt to appeal must be dismissed." *Patterson*, 269 N.C. App. at 643, 839 S.E.2d at 71 (cleaned up).

Defendant candidly acknowledges that she neither filed nor served a written notice of appeal from the trial court's civil judgment assessing attorney's fees, and accordingly her appeal from this judgment is subject to dismissal. Therefore, Defendant filed with this Court a petition for writ of certiorari in order to obtain review of that civil judgment. *See State v. Mayo*, 263 N.C. App. 546, 549, 823 S.E.2d 656, 659 (2019) ("A criminal defendant may file a petition for a writ of certiorari to appeal a civil judgment for attorney's fees and costs.").

Appellate Rule 21(a)(1) authorizes this Court to issue the writ of certiorari "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C.R. App. P. 21(a)(1). "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. France*, 279 N.C. App. 436, 440, 865 S.E.2d 707, 711 (2021) (citation omitted), *disc. review denied*, 380 N.C. 296, 867 S.E.2d 682 (2022). "Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court." *Cryan v. Nat'l Council of Young Men's Christian Associations of the United States*, ___ N.C. ___, ___, 887 S.E.2d 848, 851 (2023).

As discussed below, and as the State concedes, Defendant's argument regarding the civil judgment has merit. Accordingly, and in our discretion, we allow

Defendant's petition and review the civil judgment.

2. Analysis

"In certain circumstances, trial courts may enter civil judgments against convicted indigent defendants for the attorneys' fees incurred by their court-appointed counsel." *State v. Friend*, 257 N.C. App. 516, 522, 809 S.E.2d 902, 906 (2018); *see also* N.C. Gen. Stat. § 7A-455 (2021). "Before imposing a judgment for these attorneys' fees, the trial court must afford the defendant notice and an opportunity to be heard." *Friend*, 257 N.C. App. at 522, 809 S.E.2d at 906.

In *Friend*, this Court held that

> before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Id. at 523, 809 S.E.2d at 907.

It is undisputed that, in the present case, the trial court did not ask Defendant, personally, whether she wished to be heard on the issue of attorney's fees. The State further concedes that there is "no record evidence suggesting that Defendant knowingly waived her right to be heard on the issue." Our careful review of the record confirms this concession. "Accordingly, we vacate the civil judgment for attorneys'

fees under N.C. Gen. Stat. § 7A-455 and remand to the trial court for further proceedings on this issue." *Id.*

III. Conclusion

For the foregoing reasons, we find no error in Defendant's seven convictions. We remand the judgments in 21 CRS 437 that classified Defendant's two convictions for attempt to discharge a weapon into an occupied dwelling as Class D felonies for reclassification of those convictions as Class E felonies and for resentencing accordingly. Lastly, we vacate and remand the civil judgment for attorneys' fees to the trial court for further hearings on the issue.

NO ERROR IN PART; VACATED IN PART; AND REMANDED.

Judges COLLINS and RIGGS concur.

Report per Rule 30(e).