

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1094

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

Robeson County
No. 98 CRS 13683

ANTHONY JERMAINE MCLEAN

Appeal by defendant from judgment entered 11 May 2000 by Judge Gregory A. Weeks in Robeson County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Sue G. Berry, for defendant.

BIGGS, Judge.

Defendant pled guilty, pursuant to a plea agreement, to second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, discharging a weapon into occupied property, and two probation violations. These offenses were consolidated for judgment, and defendant was sentenced in accordance with the plea agreement. Defendant petitioned this Court for a writ of certiorari to review the judgment pursuant to N.C.G.S. § 15A-1444(a1) and (a2) (2001), which was allowed. For the reasons herein, we find no prejudicial error.

The evidence supporting the guilty plea is summarized as follows: on 24 June 1998, Calvin Burden, Corey Ballard, and a third

individual drove to Lumberton, North Carolina, to visit a female friend at Holly Ridge Apartments. Ballard and Burden left there and drove to Schoolview Mobile Home Park to speak with another female friend. While there, defendant walked up and engaged Burden in conversation. Defendant, Burden, and Ballard then drove to defendant's residence, also at Schoolview Mobile Home Park. Defendant went into his trailer, and returned shortly with a black pistol grip shotgun. He got in the car, and sat in the back seat behind Burden, who was in the front passenger seat, while Ballard was in the driver's seat. Defendant and Burden argued; evidence presented at trial indicated that there had previously been trouble between the two. Defendant got out of the car, pulled his gun out, and began shooting into the car. Defendant shot Burden twice, killing him, and shot Ballard once, injuring him.

Defendant was charged with first-degree murder on 2 July 1998. As part of a plea agreement, however, the first-degree murder charge was later reduced to second-degree murder. As part of the same plea agreement, defendant also pled guilty to assault with a deadly weapon with the intent to kill inflicting serious injury, discharging a firearm into occupied property, and two probation violations. The trial court found that there was a factual basis for the entry of the plea. At sentencing, the court found one statutory aggravating factor, two non-statutory aggravating factors, and no mitigating factors, and sentenced defendant to a prison term of 200 to 249 months, in accordance with the plea agreement. From this judgment, defendant appeals.

On appeal, defendant argues that the court's findings of aggravation to support his sentence, which is above the presumptive range, are not consistent with the law and evidence in the case, and that he is, therefore, entitled to a new sentencing hearing. We disagree.

At the outset, we note that defendant failed to object to any of the court's findings related to the aggravating factors during the sentencing hearing. See *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000). Nor has defendant alleged that the findings amounted to plain error. See *State v. Degree*, 110 N.C. App. 638, 430 S.E.2d 491 (1993). Therefore, the issue was not properly preserved for appeal. See N.C.R. App. P 10(b)(1); *State v. Hughes*, 136 N.C. App. 92, 524 S.E.2d 63 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000). We will, however, exercise our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure and review the merits of this appeal.

In sentencing a defendant to a term of imprisonment outside of the presumptive range, the trial court must make specific findings of aggravation and mitigation. *State v. Bright*, 135 N.C. App. 381, 520 S.E.2d 138 (1999); N.C.G.S. § 15A-1340.16 (2001). Aggravating and mitigating factors must be proved by a preponderance of the evidence. *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983). The State bears the burden of establishing whether aggravating factors exist and the defendant has the burden of proving whether mitigating factors exists. *State v. Parker*, 315 N.C. 249, 337

S.E.2d 497 (1985); N.C.G.S. § 15A-1340.16 (2001).

N.C. Gen. Stat. § 15A-1340.16 (2001) provides in part that "[t]he court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." "A sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa." *Parker*, 315 N.C. at 258, 337 S.E.2d at 502. Furthermore, the trial court "need not justify the weight [it] attaches to any factor." *Ahearn*, 307 N.C. at 597, 300 S.E.2d at 697. However, this Court has recommended restraint on the part of trial courts in finding non-statutory aggravating factors after having found statutory factors and noted that only one error in finding an aggravating factor requires remand. See *State v. Baucom*, 66 N.C. App. 298, 301-02, 311 S.E.2d 73, 75 (1984). "The need for remand is based on an appellate court's inability to determine the respective weights assigned by a trial court to each factor when such weight distributions are normally not specified in the record on appeal." *State v. Norman*, 151 N.C. App. 100, 1564 S.E.2d 630 (2002).

In the case *sub judice*, defendant contends first that the trial court erred in finding non-statutory aggravating factor, number 20.A, that "the offense was committed with premeditation and malice". Specifically, defendant argues that the trial court considered evidence of malice to aggravate defendant's sentence,

even though malice is an essential element of the offense of second-degree murder. We agree.

N.C.G.S. § 15A-1340.16 specifically states that "evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation. . . ." N.C.G.S. §. 15A-1340.16(d) (20) (2001). Second-degree murder is defined as "the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Welch*, 135 N.C. App. 499, 502, 521 S.E.2d 266, 268 (1999) (quoting *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983)). See also *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983) (premeditation and deliberation are not elements of murder in the second degree). Thus, while premeditation could serve as an aggravating factor for second degree murder, malice cannot. See, generally, *State v. McIntyre*, 65 N.C. App. 807, 310 S.E.2d 119 (1984).

In the present case, the trial court, in both its written and verbal orders, included the element of malice. We are not persuaded by the State's assertion that the inclusion of the term malice in both orders was inadvertent. "This Court . . . is bound by the record as certified and can judicially know only what appears of record." *State v. Brown*, 142 N.C. App. 491, 492, 543 S.E.2d 192, 193 (2001) (quoting *State v. Williams*, 280 N.C. 132, 137, 184 S.E.2d 875, 878 (1971)). "It is also settled that the record imports verity and the court is bound on appeal by the record as certified." *State v. Dellinger*, 308 N.C. 288, 294, 302 S.E.2d 194, 197 (1983) (citing *State v. Williams*, 280 N.C. at 137,

184 S.E.2d at 878). We conclude that the court's finding that "the offense was committed with . . . malice" was error.

Defendant contends next that the trial court erred in finding the non-statutory aggravating factor 20.B, that the "offense was committed in the course of conduct involving violence to more than one person." Defendant argues that since he pled guilty to offenses involving the second occupant of the car, assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property, that the conduct which supports those offenses cannot be used to aggravate his sentence for second-degree murder. This is without merit.

Under the Structured Sentencing Act and controlling case law, "[e]vidence used to prove an element of one offense may also be used to support an aggravating factor of a separate joined offense. *State v. Crocket*, 138 N.C. App. 109, 119, 530 S.E.2d 359, 365 (2000) (citing *State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994)). Defendant urges this Court to rely upon the holding in *State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984) and *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985) for the proposition that the trial judge is not permitted to find as a non-statutory aggravating factor that the defendant committed the joinable offense. These cases, however, were decided prior to the Structured Sentencing Act and have no application here. See *State v. Ruff*, 349 N.C. 213, 505 S.E.2d 579 (1998).

The following evidence supports the Court's finding that defendant's course of conduct involved violence to more than one

person: that upon exiting the vehicle, defendant began shooting at Burden and Ballard while the two remained inside the vehicle; that a third individual, Crystal Brunson, was close by when the shooting began; that defendant shot approximately five times at both occupants of the vehicle; and that only two of the five shots resulted in Burden's death and that a second occupant of the vehicle, Ballard, was injured.

We hold that there was sufficient evidence to support the trial court's finding of aggravating factor 20.B.

Lastly, defendant contends that the trial court's finding of statutory aggravating factor number 8, that defendant "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person" is not supported by the evidence. Specifically, he argues that the evidence used for both the statutory aggravating factor number 8 and the non-statutory aggravating factor number 20.B were the "same item of evidence."

To determine whether the aggravating factor at issue has been proven, the trial court considers evidence regarding both (1) the nature of the weapon used, and (2) the risk of death to more than one person. *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984); see also, *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990); *State v. Demos*, 148 N.C. App. 343, 559 S.E.2d 17 (2002). Our Supreme Court has held that a shotgun falls within the category of a "weapon" envisioned by the legislature to support statutory aggravating factor number 8. *Moose*, 310 N.C. at 497, 313 S.E.2d at

517. Moreover, the Court, in *Moose*, held that the second component that "there be a risk of death to more than one person" is satisfied where a shotgun was fired at close range into the passenger compartment of a vehicle occupied by two persons. *Id.*

There is unquestionably sufficient evidence here, as in *moose*, to support the court's finding statutory aggravating factor number 8. However, assuming *arguendo*, that the trial court considered the same evidence in making a finding of both this statutory aggravating factor and the non-statutory aggravating factor 20.B, defendant has not demonstrated, nor do we find, prejudice. This Court has held that

[i]n light of the increasing number of cases that have been remanded because of erroneous findings of non-statutory factors in aggravation, this Court deems it appropriate to remind trial judges that only one factor in aggravation is necessary to support a sentence greater than the presumptive term. G.S. 15A-1340.4(b).

Baucom, 66 N.C. App. 298, 301-02, 311 S.E.2d 73, 75 (1984); see also, *Norman*, 151 N.C. App. 100, 564 S.E.2d 630 (2002).

Having determined that there was sufficient evidence to support the trial court's finding of aggravating factor number 20.B, we conclude, defendant is not entitled to a new sentencing. Only one aggravating factor was needed to support defendant's sentence in the aggravated range. Moreover, in view of the fact that the trial court found no mitigating factors, we conclude that there is no need to remand. We hold that the trial court did not abuse its discretion in sentencing defendant in accordance with the plea agreement.

No prejudicial error.

Chief Judge EAGLES and Judge WALKER concur.

Report per Rule 30(e).