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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-601

Filed: 6 March 2018

Durham County, Nos. 11 CRS 59338–39, 8963–64

STATE OF NORTH CAROLINA

v.

JERRY LEE ADAMS, JR.

Appeal by defendant from judgment entered 28 November 2016 by Judge Michael J. O’Foghludha in Durham County Superior Court. Heard in the Court of Appeals 10 January 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr., for the State.*

*Hale Blau & Saad, P.C., by Daniel M. Blau, for defendant.*

ELMORE, Judge.

Jerry Lee Adams, Jr. (“defendant”) appeals from judgment entered upon his guilty plea to assault with a firearm on a law enforcement officer as well as his stipulation to the presence of an aggravating factor in the commission of that offense and several others. On appeal, defendant contends that the trial court erred in

accepting his plea because the State failed to offer a sufficient factual basis for both the plea and stipulation.

Because defendant never objected in the trial court to the factual basis offered for his plea, we hold that this issue has not been preserved for appellate review. Accordingly, we dismiss defendant's appeal.

**I.**

On 28 November 2016, pursuant to a written plea agreement, defendant entered *Alford* pleas to the following felony offenses: second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault with a firearm on a law enforcement officer, and discharging a weapon into an occupied vehicle or dwelling. Defendant also stipulated to the presence of an aggravating factor in that he had "joined with more than one other person in committing the offense and was not charged with committing a conspiracy." N.C. Gen. Stat. § 15A-1340.16(d)(2) (2015). At the hearing, the State prosecutor offered the following factual basis for the plea agreement.

On 8 October 2011, law enforcement officers responded to a reported shooting at an IHOP restaurant in Durham. Just prior to the shooting, defendant and several of his friends had left the restaurant at the request of an off-duty officer, Deputy Steven Hester of the Durham County Sheriff's Office, who was working as restaurant security that evening. Soon after the group left, Deputy Hester witnessed

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approximately three gunshots being fired into the occupied restaurant. The shooting resulted in the death of Ms. Delia Allen. Additionally, Mr. Emmanuel Avila and Mr. Matthew Miller were injured in the shooting, and both were prepared to testify along with Deputy Hester had the matter been set for trial.

After the shooting, Deputy Hester identified defendant from a photo lineup as the individual he had asked to leave the restaurant and had then witnessed shooting in the officer's direction, ultimately striking Ms. Allen. Deputy Hester also identified defendant as the individual he had subsequently chased from the restaurant, and he was able to describe defendant's red-plaid shirt, which would have been corroborated by other witnesses as well as video evidence.

Additional evidence from the State would have shown that the bullets retrieved from the restaurant matched the bullets from a 25 September 2011 shooting in which defendant was involved and injured. Gunshot residue was also discovered on jeans seized from defendant's residence pursuant to a search warrant.

The trial court was provided with a copy of the signed transcript of plea, the signed prior record worksheet, and the corresponding case files. After the prosecutor offered the factual basis for the plea and stipulation, the following exchange took place between the trial court and defense counsel:

THE COURT: All right. Thank you, [prosecutor].  
[Defense counsel], would you like to be heard on the  
facts, or will you stipulate to a factual basis?  
[COUNSEL]: Your Honor, we'd stipulate to the factual

basis.

THE COURT: All right. Would you like to be heard at all about the facts?

[COUNSEL]: No, sir.

THE COURT: Okay. The Court finds the factual basis for the pleas to the four separate offenses in each case.

The trial court then approved the plea agreement in open court at the request of both the prosecutor and defense counsel.

As to the offense of assault with a firearm on a law enforcement officer, the trial court found that defendant pled guilty to a Class E felony; that he was a prior record level II with three prior points; that, as an aggravating factor, defendant joined with more than one person in the commission of the offense; and that no mitigating factors applied. The trial court sentenced defendant to an aggravated-range term of 36 to 53 months in prison for that offense. Pursuant to defendant's stipulation to the presence of an aggravating factor, the trial court also sentenced defendant in the aggravated range for the offenses of second-degree murder and discharging a weapon into occupied property. Defendant appeals.

## II.

On appeal, defendant contends the trial court erred in accepting his guilty plea to assault with a firearm on a law enforcement officer, and in accepting his stipulation to the presence of an aggravating factor, because the State failed to offer a sufficient factual basis for both his plea and stipulation. Defendant notes that when the prosecutor presented the factual basis for the plea, she stated that Deputy Hester

was “off duty” at the time of the assault, and she failed to indicate that anyone other than defendant had been directly involved in the offense.

As to the procedural propriety of defendant’s appeal, the State asserts that while a defendant who pleads guilty to a felony and is sentenced in the aggravated range may appeal the issue of whether his sentence was sufficiently supported by the evidence, defendant here does not have the right to appeal the separate issue of whether his underlying plea was supported by a sufficient factual basis. The State also argues that by stipulating to the presence of an aggravating factor, defendant waived the right to challenge the sufficiency of the evidence to support his aggravated-range sentence. Further, because defendant failed to object to the sufficiency of the factual basis offered at trial, the State contends that the issue is limited to plain error review, which defendant has waived by not “specifically and distinctly” arguing on appeal. *See* N.C. R. App. P. 10(a)(4).

Regarding defendant’s substantive arguments, the State asserts that the statement of the prosecutor, the transcript of plea, and the indictments by the grand jury provided an ample factual basis for defendant’s guilty plea and stipulation to the presence of an aggravating factor. The State also argues that defendant has failed to show prejudice resulting from the alleged errors, and that defendant essentially invited error by declining to be heard on the facts after listening to the prosecutor present the basis for his plea and stipulation.

Because defendant never objected in the trial court to the factual basis for his guilty plea and stipulation to the presence of an aggravating factor, and because he does not contend on appeal that the alleged errors amount to plain error, we conclude that defendant's appeal must be dismissed.

### III.

The State relies on our decision in *State v. Kimble* to support its contention that defendant is precluded from arguing for the first time on appeal that the factual basis for his plea and stipulation was insufficient. 141 N.C. App. 144, 147, 539 S.E.2d 342, 344–45 (2000) (holding that defendant failed to preserve issue of whether there was sufficient basis for trial court to enter conviction where defendant did not object during plea hearing to prosecutor's summary of factual basis for entry of judgment against defendant). We agree.

Because we conclude that defendant's appeal must be dismissed on procedural grounds, we do not reach the substance of defendant's arguments. We note, however, that defendant fails to define, or even to assert, the applicable standard(s) of review for the issues he presents on appeal, and that this failure constitutes a violation of our Rules of Appellate Procedure. *See* N.C. R. App. P. 28(b)(6).

In *Kimble*, the defendant pled guilty to second-degree murder, conspiracy to commit first-degree murder, and first-degree arson; he also entered *Alford* pleas to eight counts of solicitation to commit first-degree murder. *Id.* at 145, 539 S.E.2d at

343. At his plea hearing, the defendant stipulated to the existence of a factual basis for his plea, and he did not object to the prosecutor's summary of that factual basis. Nevertheless, the defendant argued for the first time on appeal that the trial court had erred by entering judgment against him based on an insufficient factual basis for his plea. *Id.* at 147, 539 S.E.2d at 344. In holding that the issue was not properly before this Court, we explained that

Defendant . . . did not object during the plea hearing to the State's summary of the factual basis for the entry of judgment against Defendant for these charges. Additionally, Defendant did not argue before the trial court that the factual basis for the entry of judgment against Defendant supported only one count of solicitation to commit first-degree murder. Further, although Defendant brought a motion to withdraw his pleas subsequent to the entry of judgment, the basis of this motion was not that there was an insufficient factual basis to support Defendant's pleas. This issue, which was not raised before the trial court, is therefore not properly before this Court. Accordingly, we do not address this issue.

*Id.* (citation omitted); *see also State v. Canady*, 153 N.C. App. 455, 458, 570 S.E.2d 262, 265 (2002) (holding that because defendant never objected to trial court's finding that sufficient factual basis existed for his plea, and because defendant failed to argue in his brief that acceptance of his plea by trial court was plain error, defendant's challenge to factual basis was not properly preserved for appellate review).

Here, defendant contends that our Supreme Court's decision in *State v. Agnew*, 361 N.C. 333, 643 S.E.2d 581 (2007), supersedes this Court's holding in *Kimble*. We disagree.

In *Agnew*, after pleading guilty but before the sentencing portion of his hearing, the defendant told the trial court that "he had never seen any evidence in his case" and "wanted to make a motion as far as his plea to see if he could have a fair trial." *Id.* at 334–35, 643 S.E.2d at 582 (internal quotation marks and brackets omitted). The trial court treated the defendant's statement as an objection and motion to withdraw his guilty plea based on an insufficient factual basis to support the plea, but it ultimately denied the motion. On appeal, our Supreme Court reviewed the merits of the defendant's arguments as to the sufficiency of the factual basis for his plea. *Id.* at 335, 643 S.E.2d at 582–83.

*Agnew* is distinguishable from both *Kimble* and the instant case. In *Agnew*, there was no preservation issue because the defendant objected to the plea prior to the entry of judgment, which the trial court treated as a challenge to the factual basis for his plea. *Id.* "For this reason, we conclude that *Agnew* does not affect the precedential value of *Kimble* and its progeny on this issue." *State v. Wint*, No. COA16-244, 2016 WL 5030433 at \*3 (N.C. Ct. App. 2016) (unpublished).

Here, defendant expressly stipulated to the factual basis for his guilty plea and the presence of an aggravating factor. At no point did defendant later object to the



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sufficiency of that factual basis, nor did he ever seek to withdraw his plea. We therefore conclude that this appeal must be dismissed.

DISMISSED.

Judges HUNTER, JR. and DIETZ concur.

Report per Rule 30(e).