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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-867

Filed: 17 April 2018

Mecklenburg County, Nos. 15 CRS 240671, 15 CRS 240674–75

STATE OF NORTH CAROLINA

v.

GLENN ANTHONY CLORY, SR.

Appeal by defendant from judgments entered 17 March 2017 by Judge Charles Malcolm Viser[1] in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Colin A. Justice, for the State.

Jarvis John Edgerton, IV, for defendant.

ELMORE, Judge.

Defendant, Glenn Anthony Clory, Sr. appeals from judgments entered upon jury verdicts finding him guilty of discharge of a firearm into an occupied dwelling ("DFIOD"), possession of a firearm by a convicted felon, and assault with a deadly

[1] The judgments and other documents in the record on appeal identify the presiding judge alternately as "The Honorable Casey M. Viser" and "The Honorable Charles Malcolm Viser."

weapon. The trial court sentenced defendant to an active prison term of 70 to 96 months for the DFIOD conviction, consolidated the two remaining convictions for judgment, and imposed a concurrent prison term of 13 to 25 months. Defendant gave notice of appeal in open court.

The State's evidence tended to show that in November of 2015, Michael Johnson lived with his infant daughter in an apartment on Skyland Avenue in Charlotte. A friend of Mr. Johnson named Neeva was storing some of her belongings at the apartment. Mr. Johnson had previously met defendant through Neeva, but had only brief interactions with him prior to 10 November 2015.

On the night of 10 November 2015, Mr. Johnson went shopping with his daughter. He received a phone call from Neeva asking if she could come to his apartment to retrieve some of her belongings. When Mr. Johnson finished shopping, he drove home to meet Neeva, who arrived in a champagne-colored Mercedes Benz driven by defendant.

Before speaking to Neeva, Mr. Johnson took his daughter into the apartment and placed her in her bedroom. He then stepped onto his front porch and spoke with Neeva. From the Mercedes, defendant said something "disrespectful" to Mr. Johnson. After the two men exchanged words, Mr. Johnson walked from his porch into his front yard, told defendant to leave, and threatened to call the police.

Defendant "said something else" to Mr. Johnson before driving off without Neeva. Defendant drove up the block, turned his car around, and drove back down Skyland Avenue toward Sam Drenan Road. As he passed Mr. Johnson's apartment, defendant fired two or three gunshots toward the residence through his open car window. Mr. Johnson, who was still standing in his front yard, saw the muzzle flash from the interior of defendant's car as the shots were fired. One bullet entered the bedroom of Mr. Johnson's daughter through a window and lodged in the wall above her closet.

Two officers with the Charlotte-Mecklenburg Police Department ("CMPD") heard the gunshots and responded to the scene. One of the officers observed a woman running toward a gold-colored Mercedes Benz that was driving down Skyland Avenue. After the woman got into the car, it "shot down Skyland" toward Sam Drenan Road. The officers spoke to Mr. Johnson at his apartment, and he identified defendant as the shooter.

A CMPD crime scene investigator ("CSI") recovered a spent shell casing from the street in front of the apartment and extracted the projectile from the bedroom wall. The day after the incident, a detective obtained defendant's consent to search his gold 2001 Mercedes Benz and seized a .25 caliber semi-automatic handgun from beneath the driver's-side floor mat. A firearms examiner with the CMPD crime laboratory test-fired the weapon and compared the results with the spent shell casing

and bullet found at the crime scene. As to the shell casing, the results were inconclusive. The bullet exhibited "the same class characteristics" and "a few similar individual characteristics" as the test-fired round. The examiner concluded the bullet "could have been fired" from defendant's gun but could not make a positive determination.

Defendant did not testify or present evidence at trial. At the conclusion of the State's evidence, defendant made a motion to dismiss the charges based on insufficiency of the evidence. The trial court denied defendant's motion to dismiss.

On appeal, defendant claims the trial court erred in denying his motion to dismiss the DFIOD charge. We review the trial court's ruling *de novo*. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted).

> When considering a motion to dismiss for insufficiency of the evidence, we consider whether, in the light most favorable to the State and with all reasonable inferences drawn in the State's favor, there is enough evidence of each essential element of the crime charged to persuade a rational juror that the defendant was the perpetrator.

State v. Childress, 367 N.C. 693, 694–95, 766 S.E.2d 328, 330 (2014). " 'Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered.' " *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (quoting *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009)). " 'The test for sufficiency of the evidence is the same whether the

evidence is direct, circumstantial or both.' " *Id.* (quoting *State v. Lynch*, 327 N.C. 210, 216, 393 S.E.2d 811, 814 (1990)).

To sustain a charge of DFIOD under N.C. Gen. Stat. § 14-34.1(b) (2017), the State must prove that a defendant "intentionally . . . discharged a firearm into an occupied [dwelling[2]] with knowledge that the [dwelling] was then occupied by one or more persons, or . . . [with] reasonable grounds to believe that the [dwelling] might be occupied by one or more persons." *State v. Burris*, 27 N.C. App. 656, 658, 219 S.E.2d 807, 809 (1975); *see also State v. Curry*, 203 N.C. App. 375, 381, 692 S.E.2d 129, 135 ("Discharge 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 class D felony pursuant to [subsection](b)."), *appeal dismissed and disc. review denied*, 364 N.C. 437, 702 S.E.2d 496 (2010).

Defendant challenges only the sufficiency of the evidence that he fired his gun *into* Mr. Johnson's apartment. He points to a photograph taken by the CSI on the night of the shooting. The CSI described the photograph—which was introduced and published to the jury as State's Exhibit 8-P—as "[a] close-up interior view of that

[2] Prior to 1 December 2005, N.C. Gen. Stat. § 14-34.1 contained the single Class E felony offense of discharging a weapon into "any *building*, structure, vehicle, aircraft, . . . or other conveyance, device, equipment, erection or enclosure while it is occupied . . . ." (Emphasis added.) In 2005, the legislature amended the statute by creating a separate Class D felony in new subsection (b) for discharging a weapon "into an occupied *dwelling* or into any occupied vehicle, aircraft, watercraft, or other conveyance that is in operation[,]" while preserving the Class E felony—applicable to "any [occupied] *building*"—in new subsection (a). 2005 N.C. Sess. Laws 1884, § 1 (2005) (emphasis added).

suspected projectile hole" through which the bullet entered the apartment's right front bedroom. Defendant asserts, however, that the photograph "plainly showed" an undamaged window screen directly outside of the supposed bullet hole in the window glass. He further notes that the CSI conceded on cross-examination that the window screen was undamaged. Defendant contends the State's own evidence thus undermined its theory that he fired a bullet from the road that traveled into the residence through the bedroom window.

We find defendant's argument unpersuasive. While it is true that State's Exhibit 8-P shows no apparent damage to the exterior window screen directly opposite the hole in the bedroom window's glass, the photograph is far from conclusive on the question of whether the screen was in fact damaged. The photograph depicts only a small portion of the screen grid and is centered on the hole in the glass. Depending on the bullet's trajectory, it is at least plausible that the screen was damaged at a location off-center from the hole and thus was not visible in the photograph. We further note that portions of the screen grid are occluded in the photograph by the reflection of the camera flash against the window pane, by cracks and other damage to the glass around the hole, and by what appears to be a shadow along the perimeter of the hole.

Similarly, the CSI's testimony was equivocal on the issue of damage to the window screen. In the course of her testimony, the CSI asserted the following: (1) the

photograph marked as State's Exhibit 8-P did not show any damage to the window screen; (2) she did not "know the exact angle this bullet came in through the window" and could not tell from the hole in the window "exactly where the bullet entered"; (3) the damage to the screen caused by the bullet "would have been very, very small"; (4) she could not "recall the exact damage to the screen"; (5) while she's "not saying that [the screen was] not damaged," she "just couldn't tell if it was damaged"; (6) looking at the window from the outside, she "couldn't see any damage" to the screen; and (7) "[t]here was no damage to the screen[.]"

We conclude the State adduced substantial evidence that defendant fired a bullet from his .25 caliber handgun into the apartment. Mr. Johnson testified that he saw defendant "shoot out the window of the car." He further testified that defendant "fired a weapon into my house, into my daughter's room," and that "[a] round was fired in my house, it that [sic] went through my daughter's window and landed . . . above the closet in her room." Mr. Johnson did not specify whether he directly perceived the bullet's entry into his daughter's bedroom (*e.g.*, by seeing or hearing the bullet penetrate the window glass), but he did not disclaim such a perception. The jury was entitled to credit Mr. Johnson's eyewitness account of the shooting absent some " 'irreconcilable conflict with physical facts established by . . . uncontradicted evidence.' " *State v. Miller*, 270 N.C. 726, 731, 154 S.E.2d 902, 905 (1967) (quoting *Jones v. Schaffer*, 252 N.C. 368, 377, 114 S.E.2d 105, 112 (1960)).

Further, even if Mr. Johnson's testimony alone was not sufficient to take the DFIOD charge to the jury, the presence of a hole in the bedroom window and a bullet in the bedroom's interior wall immediately after the shooting constitutes circumstantial evidence supporting a reasonable inference of defendant's guilt. Accordingly, we find no error.

NO ERROR.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).