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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-913

Filed: 7 August 2018

Edgecombe County, Nos. 14 CRS 53269, 15 CRS 1140

STATE OF NORTH CAROLINA

v.

TYSHAWN WILLIAMS

Appeal by defendant from judgments entered 5 October 2016 by Judge Milton F. Fitch Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 19 February 2018.

Attorney General Joshua Stein, by Special Deputy Attorney General Daniel P. Mosteller, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for defendant-appellant.

BRYANT, Judge.

Where the State presented sufficient evidence to overcome defendant's motion to dismiss the charge of conspiracy to discharge a firearm into an occupied dwelling, we affirm the trial court's denial of defendant's motion to dismiss. Where the trial court entered a written judgment sentencing defendant to a term different than the

term rendered during the sentencing phase of the trial, we vacate the sentence imposed and remand for a new sentencing hearing.

On 9 March 2015, a grand jury indicted Tyshawn Williams ("defendant") for discharging a firearm into an occupied dwelling, conspiracy to discharge a firearm into an occupied dwelling, assault with a deadly weapon with intent to kill, attempted first-degree murder, and conspiracy to commit first degree murder. A trial was commenced on 3 October 2016 in Edgecombe County Superior Court, the Honorable Milton F. Fitch Jr., Judge presiding. For the trial, the State proceeded on the charges of discharging a firearm into an occupied dwelling, conspiracy to discharge a firearm into an occupied dwelling, and assault with a deadly weapon with intent to kill. The State dismissed the charges of attempted first-degree murder and conspiracy to commit first-degree murder.

The evidence tended to show that on the evening of 23 October 2014, Meleec Greene drove from Greenville, in Pitt County, to Princeville, in Edgecombe County, to pick up defendant. Greene then drove to Farmville to pick up Kenquasis McKenzie, who was also an acquaintance of Greene's. Greene testified that he then proceeded to drive to an apartment complex in Princeville to "meet some females." Defendant, Green, and McKenzie parked and stayed outside the Princeville apartment complex for ten minutes. While there, conflicting evidence indicates that either defendant or McKenzie stepped out of the vehicle and conversed with Kendrick Battle, a high-

ranking member of the Bloods street gang. Battle had an ongoing dispute with a person named Reggie Herring (Reggie). Battle provided a loaded assault rifle and directed the group in the car to the residence of Annie Herring (Annie), Reggie's mother. Per Greene, Battle wanted Annie's house "shot up."

At trial, conflicting evidence was introduced as to the events that occurred after Battle provided the assault rifle. Greene testified that defendant directed him where to drive, turn, and stop. Defendant then exited the vehicle with the assault rifle. A minute or two later, Greene recounted hearing gunshots followed by defendant running back to the car with the assault rifle. Defendant testified that McKenzie met with Battle at the apartment complex and that McKenzie exited the vehicle with the assault rifle near Annie's house.

During the early morning hours of 24 October 2014, Annie was in her residence of thirty-eight years, lying in bed asleep. Her thirty-nine-year-old daughter Katrina was also there asleep. Annie's son, Reggie, was not present. About 1:15 a.m., Annie awoke to the sound of bullets hitting her home and shattering her bedroom window. At least ten bullets penetrated Annie's house. Based on the location of the shell casings, the shooter was within fifty to sixty feet of Annie's bedroom.

After the shooting, Greene drove the car away from Annie's house. The sound of ten to fifteen gunshots around 1:00 a.m. drew the attention of Edgecombe County

Deputy Sheriff Dustin Whitehurst who was on routine patrol duty. Deputy Whitehurst drove toward the gunshots and spotted a speeding car.

Greene observed that they were being pursued by a law enforcement officer and pulled his car into a driveway. Deputy Whitehurst pulled in behind Greene's vehicle, activated his blue lights, exited his cruiser, and instructed the vehicle occupants to keep their hands where he could see them. At first, the vehicle occupants complied with Deputy Whitehurst's instructions, but when he stepped to the rear of the vehicle, all three occupants jumped out of the car and ran. Several additional deputies soon arrived at the scene along with a pair of K-9 officers. The K-9 officers found both defendant and McKenzie hiding in a nearby wooded area. Greene evaded immediate capture but turned himself in to the Edgecombe County Sheriff's Department on 4 November 2014. On the floorboard of Greene's car, Deputy Whitehurst found the assault rifle used to fire shots into Annie's residence. At trial, a forensic scientist with the State Crime Lab determined that DNA on the rifle did not include McKenzie's DNA but that defendant could not be excluded as a possible contributor.

The jury found defendant guilty on all three charges. In open court, the trial court rendered judgment in accordance with the jury verdicts and sentenced defendant to active terms of 73 to 99 months (discharging a weapon into occupied dwelling), 29 to 47 months (felonious conspiracy to discharge a weapon into occupied

dwelling), and 29 to 47 months (assault with a deadly weapon with intent to kill), to be served consecutively. On the charge of discharging a weapon into occupied dwelling, the trial court subsequently amended the judgment sentencing defendant to a term of 73 to 100 months. Defendant appeals.

On appeal, we first note that defendant gave no oral notice of appeal at trial but rather sent to the trial court a written notice of appeal which failed to comply with Rule 4 of our Rules of Appellate Procedure. N.C. R. App. P. 4(a), (b) (2017) ("Appeal in Criminal Cases—How and When Taken"). "A failure on the part of the appealing party to comply with Rule 4 deprives this Court of jurisdiction to consider his or her appeal[.]" *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011) (citing *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197–98, 657 S.E.2d 361, 364–65 (2008)). Defendant now petitions this Court for a writ of certiorari in order to review his appeal. "The writ of certiorari may be issued 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). In response to defendant's petition, the State does not indicate that it was prejudiced by the lack of proper notice. In our discretion we grant defendant's petition for writ of certiorari. *See generally State v. Martin*, ___ N.C. App. ___, ___, 786 S.E.2d 426, 428–29 (2016) (reasoning that although the

defendant's notice of appeal did not comply with Rule 4(b) of our Rules of Appellate Procedure, the Court would allow the defendant's petition for writ of certiorari pursuant to Rule 21).

I

Defendant argues that the trial court erred by failing to grant his motion to dismiss the charge of conspiracy to discharge a firearm into an occupied dwelling where the State's evidence did not establish a conspiracy between Greene and defendant. Defendant contends the State's evidence was insufficient to prove the charge as stated in the indictment. Defendant argues that because his indictment charged defendant with entering into a conspiracy with Kendrick Battle, Kenquasis McKenzie, *and* Meleec Greene, but the State's evidence failed to indicate that Greene entered into an agreement with defendant, the trial court erred in failing to dismiss the conspiracy charge. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

"Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial

evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). "In ruling on a motion to dismiss, the evidence is to be taken in the light most favorable to the State." *State v. Oxendine*, 242 N.C. App. 216, 220, 775 S.E.2d 19, 23 (2015) (citation omitted).

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or do a lawful act in an unlawful way or by unlawful means. In order for a defendant to be found guilty of a conspiracy, it must be established by competent evidence that the defendant entered into an unlawful confederation for the criminal purposes alleged.

State v. Massey, 76 N.C. App. 660, 661–62, 334 S.E.2d 71, 72 (1985). "Direct proof of conspiracy is rarely obtainable, and a conspiracy generally is established by a number of indefinite acts, which taken collectively point to the existence of a conspiracy." *State v. Burmeister*, 131 N.C. App. 190, 199, 506 S.E.2d 278, 283 (1998) (citation omitted). "[T]he agreement necessary to support a conspiracy conviction can be established by either direct or circumstantial evidence, or both." *State v. Winkler*, 368 N.C. 572, 582, 780 SE.2d 824, 831 (2015).

The evidence at trial indicated that Greene—a self-described former member of the Bloods street gang—drove defendant and McKenzie to meet Battle—a high-ranking member of the Blood's street gang—at an apartment complex. McKenzie was also a ranking member of the Bloods street gang. Greene testified that he was

unfamiliar with the area in which he was driving but that defendant was giving him directions. At the apartment complex, one person got out of the car and met with Battle who provided an assault rifle, instructions to "[shoot] up" the home of Reggie Herring's mother, and directions on how to reach the home. Greene drove defendant and McKenzie to Annie's residence, waited in the parked car while the shooter exited the vehicle, approached the house, fired at least eleven rounds into the residence—including Annie's bedroom—returned to the vehicle, and then drove off. Once Greene stopped the vehicle for a law enforcement officer, all of the vehicle occupants, including Greene, ran away. Greene testified that he pled guilty to aiding and abetting discharging a firearm into an occupied dwelling in exchange for a reduction or dismissal of all other pending charges and his truthful testimony at trial.

Viewing the evidence in the light most favorable to the State, we hold that the direct and circumstantial evidence presented was competent and sufficient to support a finding that Greene entered into an agreement with defendant and others to do an unlawful act—fire several rounds from a firearm into Annie's residence—and was thus sufficient to overcome defendant's motion to dismiss and submit the charge of conspiracy to the jury. Accordingly, defendant's argument is overruled.

II

Next, defendant argues the trial court erred by entering a judgment against him containing a sentence different than the one orally rendered at the conclusion of the trial. We agree.

"On appeal, this Court reviews *de novo* whether a defendant was improperly sentenced outside his presence." *State v. Briggs*, ___ N.C. App. ___, ___, 790 S.E.2d 671, 673 (citation omitted), *review denied*, 369 N.C. 193, 794 S.E.2d 327 (2016).

> In every criminal prosecution it is the right of the accused to be present throughout the trial, unless he waives the right. . . . The right to be present at the time sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial. *Ball v. United States*, 140 U.S. 118.

State v. Pope, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962); *see also State v. Leaks*, 240 N.C. App. 573, 578, 771 S.E.2d 795, 799 (2015) ("It is well-settled that a defendant has a right to be present at the time that his sentence is imposed." (citation omitted)).

In *Leaks*, the trial court sentenced the defendant to an active term of 114 to 146 months. 240 N.C. App. at 578, 771 S.E.2d at 799. However, the judgment entered stated that the defendant's sentence was an active term of 114 to 149 months. *Id.* This Court observed that under our sentencing chart, if the trial court intended to sentence defendant to a minimum of 114 months, the corresponding maximum would be 149 months. If a court intended to sentence defendant to a minimum of 111 months, the corresponding maximum would be 146 months. *Id.* at 579, 771 S.E.2d at 799–800. However, where the record failed to reflect that the defendant was present

when the trial court entered a judgment different from the sentence imposed in defendant's presence, this Court ordered the defendant's sentence must be vacated and the matter remanded for entry of a new sentencing judgment. *Id.* at 579, 771 S.E.2d at 800 ("Because the written judgments reflect a different sentence than that which was imposed in [the] defendant's presence during sentencing, we must vacate [the] defendant's sentence and remand for the entry of a new sentencing judgment."). *See also State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999) (holding that where the orally rendered judgment imposed concurrent sentences and the written judgment imposed consecutive sentences, "the sentence must be vacated and th[e] matter remanded for the entry of a new sentencing judgment").

Here, defendant was convicted of discharging a weapon into an occupied dwelling—a Class D felony—and defendant had a prior record level of Level II. Within the presumptive range, the trial court was authorized to sentence defendant to a minimum term between 59 and 73 months. N.C. Gen. Stat. § 15A-1340.17(c) (2017). During the sentencing phase, the trial court pronounced an active sentence of 73 to 99 months. If the trial court intended to sentence defendant to a maximum term of 99 months, the corresponding minimum sentence would be 72 months. *Id.* § 15A-1340.17(e). If the trial court intended to sentence defendant to a minimum term of 73 months, the corresponding maximum term would be 100 months. *Id.* But regardless, "[b]ecause the written judgments reflect a different sentence than that

which was imposed in defendant's presence during sentencing, we must vacate defendant's sentence and remand for the entry of a new sentencing judgment." *Leaks*, 240 N.C. App. at 579, 771 S.E.2d at 800. Accordingly, defendant's sentence is vacated and remanded for resentencing.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge MURPHY concur.

Report per Rule 30(e).