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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-483

No. COA20-744

Filed 7 September 2021

Catawba County, Nos. 18 CRS 55537, 55539; 19 CRS 435

STATE OF NORTH CAROLINA

v.

GARY STEVE SHUFORD, SR.

Appeal by defendant from judgments entered 4 December 2019 by Judge Karen Eady-Williams in Catawba County Superior Court. Heard in the Court of Appeals 11 August 2021.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Elizabeth Curran O'Brien, for the State.*

*Gilda C. Rodriguez for defendant-appellant.*

ZACHARY, Judge.

¶ 1

Defendant Gary Steve Shuford, Sr., appeals from judgments entered upon a jury's verdicts finding him guilty of speeding to elude arrest, driving while impaired, and attaining the status of a habitual felon. On appeal, Defendant argues that the trial court erred by (1) denying Defendant's motion to dismiss the charge of speeding to elude arrest, and (2) ordering that Defendant's sentences run consecutively, based

on a misapprehension of law. After careful review, we conclude that the trial court erred by failing to recognize and exercise its discretion in sentencing Defendant to consecutive terms of imprisonment. Therefore, we vacate the judgments and remand for resentencing.

### **I. Background**

¶ 2 On 28 September 2018, Catawba County Sheriff's Deputy Jared Broome was patrolling Wesley Chapel Road in Catawba County, North Carolina. He observed a blue Cadillac turn onto Wesley Chapel Road and recognized the driver as Defendant. Deputy Broome knew that Defendant's driver's license was revoked. Deputy Broome then ran a search on the license plate displayed on the blue Cadillac and learned that the license plate was registered to an Oldsmobile Cutlass.

¶ 3 Driving directly behind Defendant, Deputy Broome turned on the blue emergency lights on his patrol car in order to initiate a traffic stop. Defendant did not pull over; instead, he "threw his hands up in the air, looking back in the rearview mirror" at Deputy Broome, and continued traveling south on Wesley Chapel Road. Deputy Broome turned on the siren and the public-address system on his patrol car, and ordered Defendant to pull over several times.

¶ 4 As he pursued Defendant, Deputy Broome saw Defendant's car swerve approximately a half-vehicle's width over the center line three times. Deputy Broome continued to follow Defendant as Defendant traveled approximately one-half mile

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down Wesley Chapel Road before turning left onto a residential road, toward Defendant's residence. At the end of Preach Drive, Defendant turned into the circular driveway at his residence. Defendant continued to the end of the circular driveway as Deputy Broome pulled in front of Defendant's car on Preach Drive.

¶ 5 Deputy Broome exited his car and ordered Defendant to do the same. Defendant initially refused, then opened the driver-side door and asked, "What did I do this time[?]" or, "What did I do now[?]" Deputy Broome again ordered Defendant to exit his car; when Defendant refused, Deputy Broome "grabbed [Defendant's] left wrist" and put his "right hand up under [Defendant's] armpit and removed him from the vehicle." While placing Defendant in handcuffs, Deputy Broome noticed an odor of alcohol and, after placing Defendant in the back of his patrol car, he notified the North Carolina State Highway Patrol to respond "to a possible DWI."

¶ 6 North Carolina State Highway Patrol Trooper Zachary Beam responded to Deputy Broome's call. Upon speaking with Defendant, Trooper Beam noticed a "moderate" odor of alcohol and that Defendant's speech was slightly slurred. Trooper Beam ordered Defendant to perform the standard field sobriety tests, the results of which led Trooper Beam to opine that Defendant "had consumed a sufficient quantity of an impairing substance to cause appreciable impairment to his mental and physical faculties." Consequently, Trooper Beam arrested Defendant for driving while impaired.

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¶ 7 On 4 February 2019, a Catawba County grand jury returned indictments charging Defendant with felony speeding to elude arrest, in violation of N.C. Gen. Stat. § 20-141.5; misdemeanor driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1; and attaining the status of a habitual felon, in violation of N.C. Gen. Stat. § 14-7.1.

¶ 8 Defendant's charges for speeding to elude arrest and driving while impaired came on for trial at the 2 December 2019 criminal session of Catawba County Superior Court before the Honorable Karen Eady-Williams. At the close of the State's evidence, Defendant moved to dismiss the charges against him for insufficient evidence, which the trial court denied. Defendant did not present evidence and renewed his motion to dismiss. The trial court again denied the motion.

¶ 9 On 3 December 2019, the jury returned verdicts finding Defendant guilty of felonious fleeing or eluding arrest with a motor vehicle and misdemeanor driving while impaired. Defendant admitted to three grossly aggravating factors related to sentencing on the impaired driving charge. The State then presented evidence on the charge of attaining the status of a habitual felon. On 4 December 2019, the jury returned a verdict of guilty of attaining the status of a habitual felon.

¶ 10 The trial court consolidated Defendant's convictions for speeding to elude arrest and attaining the status of a habitual felon and entered judgment upon those convictions, sentencing Defendant to a term of 51 to 74 months in the custody of the

North Carolina Division of Adult Correction. On the impaired driving conviction, the trial court found the existence of the three grossly aggravating factors to which Defendant stipulated, and sentenced Defendant as an Aggravated Level One offender to a term of 36 months of local area confinement, suspended for a period of 36 months of supervised probation. The trial court ordered that Defendant serve an active term of 120 days in the custody of the Catawba County Sheriff as a condition of special probation. The trial court further ordered that Defendant's probationary sentence begin upon the termination of his sentence in 18 CRS 55537 for speeding to elude arrest, and that his 120-day split sentence begin at the expiration of his active sentence in 18 CRS 55537.

¶ 11 Defendant entered oral notice of appeal in open court.

## II. Analysis

¶ 12 On appeal, Defendant argues that the trial court erred by (1) denying his motion to dismiss the charge of speeding to elude arrest due to insufficient evidence, and (2) failing to exercise its discretion and operating under a misapprehension of law by ordering that Defendant's sentences run consecutively. After careful review, we conclude that the trial court did not err in denying Defendant's motion to dismiss, but that the trial court failed to recognize its discretion in ordering that Defendant's sentences run consecutively. Accordingly, we vacate the judgments and remand for a resentencing hearing at which the trial court shall exercise its discretion in ordering

either consecutive or concurrent sentences.

### **A. Motion to Dismiss**

¶ 13 Defendant contends that the trial court erred by denying his motion to dismiss for insufficient evidence, in that the State failed to submit sufficient evidence that Defendant “acted with the intention of fleeing or eluding arrest.” We disagree.

#### **1. Standard of Review**

¶ 14 We review a trial court’s denial of a criminal defendant’s motion to dismiss de novo. *State v. Money*, 271 N.C. App. 140, 143, 843 S.E.2d 257, 260, *supersedeas dismissed*, 374 N.C. 748, 842 S.E.2d 89 (2020). Under a de novo review, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

¶ 15 Upon a defendant’s motion to dismiss for insufficient evidence, the trial court must determine “whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.” *State v. Miller*, 363 N.C. 96, 98–99, 678 S.E.2d 592, 594 (2009) (citation omitted). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 99, 678 S.E.2d at 594 (citation omitted). “[T]he trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State’s favor.” *Id.* at 98, 678 S.E.2d at 594.

“Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered[.]” *Id.* “[S]o long as the evidence supports a reasonable inference of the defendant’s guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant’s innocence.” *Id.* at 99, 678 S.E.2d at 594 (citation and internal quotation marks omitted). In other words, a “case should be submitted to a jury if there is *any* evidence tending to prove the fact in issue or reasonably leading to the jury’s conclusion as a fairly logical and legitimate deduction.” *State v. Harris*, 361 N.C. 400, 402–03, 646 S.E.2d 526, 528 (2007) (emphasis added) (citation and internal quotation marks omitted).

## ***2. Evidence of Intent to Elude***

¶ 16 Defendant was indicted for violating N.C. Gen. Stat. § 20-141.5, which states, in pertinent part: “It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties.” N.C. Gen. Stat. § 20-141.5(a) (2019). Subsection (b) sets forth the circumstances that elevate the offense to a felony. *Id.* § 20-141.5(b).

¶ 17 In order to secure a conviction under § 20-141.5, the State must submit evidence sufficient to prove that the defendant “actually intend[ed] to operate a motor vehicle in order to elude law enforcement officers[.]” *State v. Woodard*, 146 N.C. App.

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75, 80, 552 S.E.2d 650, 654 (2001), *disc. review improvidently allowed*, 355 N.C. 489, 562 S.E.2d 420 (2002). An “individual’s guilt hinges upon the extent to which he attempts to flee from an officer who is lawfully performing his official duties.” *State v. Mahatha*, 267 N.C. App. 355, 358, 832 S.E.2d 914, 918 (2019). “Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.” *State v. Bostic*, 121 N.C. App. 90, 99, 465 S.E.2d 20, 25 (1995) (citation omitted), *cert. dismissed*, \_\_\_ N.C. \_\_\_, 599 S.E.2d 560 (2004).

¶ 18 Generally, a defendant’s alternative explanation for her behavior does not warrant dismissal where the explanation still manifests an intent to elude or delay apprehension. For example, in *State v. Cameron*, our Court rejected a defendant’s argument that the State submitted insufficient evidence of an intent to elude arrest where the defendant testified that she fled the pursuing male officer “so that she could turn herself in to a female officer.” 223 N.C. App. 72, 74, 732 S.E.2d 386, 388 (2012). Our Court reasoned that the

defendant’s own statements confirm that she was intentionally operating the motor vehicle in order to elude the law enforcement officers who were chasing her. The fact that [the] defendant preferred to be arrested by a female officer is irrelevant to determining whether [the] defendant did in fact intend to elude.

*Id.* at 74–75, 732 S.E.2d at 388 (citations and internal quotation marks omitted).

¶ 19 Here, “there is no question that [Defendant] operated a motor vehicle on a street, highway, or public vehicular area and that [Deputy Broome was] in the lawful performance of [his] duties.” *Id.* at 75, 732 S.E.2d at 388 (citation and internal quotation marks omitted). The only element that Defendant contests is whether he had an intent to elude Deputy Broome. Defendant argues that “the evidence did not establish that [he] acted with the purpose of getting away in order to avoid arrest or apprehension by Deputy Broome.” Instead, Defendant contends, the evidence supports a reasonable conclusion that Defendant was merely traveling to his residence at the end of Preach Drive, a dead-end road. Defendant also maintains that, because the State did not present “evidence of excessive speed or other maneuvers to lose Deputy Broome and avoid apprehension[,]” there was insufficient evidence to conclude that Defendant intended to elude Deputy Broome.

¶ 20 We must conclude that the trial court properly denied Defendant’s motion to dismiss and submitted the charge to the jury. Viewed in the light most favorable to the State, the evidence tends to show that Defendant saw Deputy Broome in his rearview mirror; “threw his hands up in the air”; did not pull over in response to Deputy Broome’s lights, sirens, or orders to do so; and traveled approximately three-quarters of a mile—while swerving—to his residence, where he was apprehended. This “evidence supports a reasonable inference” that Defendant intended to elude arrest. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594.

¶ 21 An intent to travel to Defendant’s residence may reasonably coincide with an intent to avoid or delay apprehension. *See Cameron*, 223 N.C. App. at 74–75, 732 S.E.2d at 388 (rejecting the defendant’s argument that an intent to delay arrest and surrender to law enforcement is materially distinct from an intent to elude a law enforcement officer); *accord State v. Scott*, 267 N.C. App. 377, 832 S.E.2d 271, 2019 WL 4178811, at \*4 (2019) (unpublished) (noting a lack of distinction between intent to elude arrest and intent to delay arrest). The State presented sufficient evidence “reasonably leading to the jury’s conclusion as a fairly logical and legitimate deduction.” *Harris*, 361 N.C. at 402–03, 646 S.E.2d at 528.

¶ 22 Because the evidence presented by the State supports a reasonable inference that Defendant intended to avoid apprehension by Deputy Broome, the trial court properly denied Defendant’s motion to dismiss for insufficient evidence.

### **B. Sentencing**

¶ 23 Defendant further argues that the trial court erred by sentencing him “to consecutive sentences because it acted under a misapprehension of the law.” The State concedes error, and we agree.

¶ 24 We review “allegations that a trial court has failed to recognize its discretion to act” de novo. *State v. Whitted*, 209 N.C. App. 522, 535, 705 S.E.2d 787, 795 (2011). “When a trial court fails to exercise its discretion in the erroneous belief that it has no discretion as to the question presented, there is error.” *State v. McAvoy*, 331 N.C.

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583, 591, 417 S.E.2d 489, 494 (1992). “Where the error is prejudicial to a party, that party is entitled to have the question reconsidered and passed upon as a discretionary matter. In such cases, this Court may remand the case or take such other actions as the rights of the parties and applicable law may require.” *Id.* at 591, 417 S.E.2d at 494–95 (citations omitted).

¶ 25 Generally, “[t]he trial court has discretion to determine whether to impose concurrent or consecutive sentences.” *State v. Parker*, 350 N.C. 411, 441, 516 S.E.2d 106, 126 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). The authority of the trial court to impose concurrent or consecutive sentences is governed by N.C. Gen. Stat. § 15A-1354, which provides, *inter alia*:

When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

N.C. Gen. Stat. § 15A-1354(a).

¶ 26 Section 15-6.2 governs concurrent sentences that must be served in different places or that are for offenses of different grades:

When by a judgment of a court or by operation of law a prison sentence runs concurrently with any other sentence a prisoner shall not be required to serve any additional time in prison solely because the concurrent sentences are

for different grades of offenses or that it is required that they be served in different places of confinement.

*Id.* § 15-6.2.

¶ 27 When a trial court sentences a defendant subject to Aggravated Level One punishment for an impaired driving conviction, “[t]he term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 120 days.” *Id.* § 20-179(f3). Probationary sentences for misdemeanor impaired driving must be served “in a designated local confinement or treatment facility.” *Id.* § 15A-1351(a).

¶ 28 At Defendant’s sentencing hearing, the trial court ordered that Defendant’s split sentence on the impaired driving conviction be served at the expiration of his sentence for speeding to elude arrest. The trial court appears to have been acting under the misapprehension that a sentence required to be served in the Division of Adult Correction may not run concurrently with a sentence served in local area confinement:

As to the sentence in the DWI, by statute, I must impose a split sentence of 120 days and quite honestly I believe that has to be served in local area confinement. I don’t believe that can be DAC. The 120 days minimum has to be at the jail and I don’t believe it can be run concurrently with any other sentence, so I will order that you serve an active sentence of 120 days and I will apply the fifteen days towards the 120-day split sentence. Sorry. I will apply the fifteen days towards the 120-day split sentence and that will be consecutive to the sentence in the felony flee to

elude conviction.

¶ 29 When defense counsel later readdressed the issue, the trial court again asserted its understanding that the sentences must run consecutively:

[DEFENSE COUNSEL]: Your Honor, if I look into that and I find something, a statute, opinion --

THE COURT: About?

[DEFENSE COUNSEL]: -- that they could run concurrent, would the Court consider modifying that?

THE COURT: Yeah, and I guess my thought on that was the DWIs are always served [in] local area confinement and I don't know how you can mesh the two because it's been beat in my head time and time again that I cannot do a split at DAC on a DWI. It has to be done at the local jail. Why they set it up that way, I don't know, and so that's why I feel like it has to be consecutive.

[DEFENSE COUNSEL]: If I can find anything --

THE COURT: If you can find something otherwise, I'm more than happy to change the order, but it's my understanding that all the DWIs have to be done at the local jail, not at DAC.

¶ 30 Given that the trial court retains the “discretion to determine whether to impose concurrent or consecutive sentences[,]” *Parker*, 350 N.C. at 441, 516 S.E.2d at 126, and that nothing in the relevant statutes requires that a sentence served in a local confinement facility run consecutively to a sentence served in the Division of Adult Correction, we conclude that the trial court erred by failing “to exercise its discretion in the erroneous belief that it ha[d] no discretion” as to whether to order

that Defendant's sentences run consecutively or concurrently. *McAvoy*, 331 N.C. at 591, 417 S.E.2d at 494. We therefore vacate the judgments and remand for a new sentencing hearing. *See State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010).

### III. Conclusion

¶ 31 For the foregoing reasons, we hold that the trial court did not err in denying Defendant's motion to dismiss for insufficient evidence, and therefore, Defendant received a fair trial, free from error. However, we further conclude that the trial court erred when it failed to recognize its discretion in sentencing; we therefore vacate Defendant's judgments and remand for resentencing, at which the trial court shall, in its discretion, impose either consecutive or concurrent sentences.

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

Judges HAMPSON and JACKSON concur.

Report per Rule 30(e).