IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1344-2

Filed: 16 May 2017

Buncombe County, Nos. 14 CRS 311, 14 CRS 84454, 14 CRS 84455

STATE OF NORTH CAROLINA

v.

JIMMY LEE GANN, Defendant.

Appeal by Defendant from judgments entered 27 April 2015 by Judge Robert G. Horne in Buncombe County Superior Court. Originally heard in the Court of Appeals 11 May 2016, with opinion issued 7 June 2016. On 29 June 2016, the State petitioned the North Carolina Supreme Court for discretionary review. On 16 March 2017, the Supreme Court allowed the State's petition for discretionary review for the purpose of remanding this case to this Court for further remand to the trial court for a new judgment and resentencing; and for this Court's consideration of Defendant's other assignments of error not addressed in this Court's prior opinion.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

David Weiss for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Jimmy Lee Gann ("Defendant") timely entered oral notice of appeal to this Court on 27 April 2015 following jury verdicts convicting him of first degree arson, malicious use of explosives causing injury, and attains habitual felon status. The trial court sentenced Defendant to 90 to 120 months imprisonment for first degree arson, consecutive with 110 to 144 months imprisonment for malicious use of explosives causing injury. Due to a fatal defect in the indictment, the Court of Appeals vacated Defendant's first degree arson conviction in an opinion issued 7 June 2016.

On 27 June 2016, the State filed the following petitions with the North Carolina Supreme Court: petition for writ of *supersedea*s to stay enforcement of this Court's judgment in *State v. Gann,* No. COA15-1344, 2016 WL 3166267 (unpublished) (N.C. Ct. App. June 7, 2016); application for temporary stay of this Court's judgment in *Gann*, 2016 WL 3166267; and petition for discretionary review.

On 16 March 2017, the North Carolina Supreme Court (1) affirmed this Court's decision vacating the judgment based on the defective indictment; (2) dismissed the State's writ of *supersedeas* as moot; (3) dissolved the State's motion for temporary stay; and (4) allowed the State's petition for discretionary review for the limited purpose of remanding *Gann* to this Court in order for this Court to address Defendant's other assignments of error and for this Court to further remand *Gann* so

the trial court can enter judgment and re-sentence Defendant for the lesser included offense of second degree arson.

In our initial *Gann* opinion, we concluded the trial court lacked jurisdiction to try Defendant for first degree arson due to a faulty indictment. *Gann,* 2016 WL 3166267, at *3. We vacated the trial court's judgment on that charge. *Gann*, 2016 WL 3166267, at *3.

Although the Supreme Court affirmed this Court on this issue, it entered the following order without issuing an opinion:

> The Court allows the State's petition for discretionary review for the limited purpose of remanding this case to the Court of Appeals in order to consider any of the challenges to the trial court's judgments advanced in defendant's brief before that Court that the Court did not address in its original opinion and, in the event that the Court of Appeals determines that none of defendant's additional challenges to the trial court's judgments have any merit, to modify its original decision so as to provide for a further remand to the trial court for entry of judgment and resentencing on the lesser included offense of second degree arson.

This Court is bound to follow the Supreme Court's order. This Court did not originally remand this case for resentencing on the lesser included offense of second degree arson because the trial court never instructed the jury on second degree arson. The pattern jury instruction for first degree arson includes instructions for lesser included offenses, including second degree arson. N.C.P.I. –Crim. 215.11. However, the trial court omitted those instructions because it believed "all evidence before the

[c]ourt [showed] . . . it was an inhabited [read "occupied"] structure." Additionally, the trial court did not provide the jury with a verdict sheet listing second degree arson as a possible verdict. Our research and the cases cited by the parties in support of re-sentencing illustrates that this procedure is an anomaly in our caselaw. This anomaly was not pointed out to the Supreme Court by the parties in the filings in the petition for discretionary review.[1]

Even though the trial court failed to instruct the jury on the charge of second degree arson, we remand this case to the Buncombe County Superior Court for entry of judgment and re-sentencing consistent with the Supreme Court's order.

As for Defendant's other assignments of error, Defendant first contends he received ineffective assistance of counsel. We addressed this argument in our original opinion. *Gann*, 2016 WL 3166267, at *3. We dismissed Defendant's assignment of error without prejudice and concluded defendant was free to assert this claim during a later MAR proceeding with a more complete factual record.[2] *Gann*, 2016 WL 3166267, at *3 (citing *State v. Stroud,* 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001)).

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[1] In its brief to the Supreme Court, the State relies on cases where the trial court followed the pattern jury instructions or instructed the jury on a lesser-included offense of second degree arson. *See State v. Scott*, 150 N.C. App. 442, 564 S.E.2d 285 (2002); *State v. McClain*, 112 N.C. App. 208, 435 S.E.2d 371 (1993); and *State v. Moses*, 154 N.C. App. 332, 572 S.E.2d 223 (2002).

[2] Generally, ineffective assistance of counsel claims "should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud,* 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001).

Defendant also contends the trial court committed plain error by failing to instruct the jury on the crime of burning "other buildings." Defendant incorrectly asserts this crime is a lesser included offense of first degree arson.[3] However, because we concluded the trial court did not have jurisdiction to try Defendant on first degree arson, and because we vacated the trial court's judgment on that offense, the issue whether the trial court committed plain error in failing to instruct the jury on a lesser charge is irrelevant on appeal. Accordingly, we dismiss this assignment of error.

Finally, Defendant contends the trial court committed plain error by failing to instruct the jury on the defense of voluntary intoxication. In support of this argument, Defendant contends voluntary intoxication serves as a defense for the crime of malicious use of explosives causing injury. However, Defendant incorrectly assumes the crime of malicious use of explosives causing injury is a specific intent crime.

"Voluntary intoxication in and of itself is not a legal excuse for a criminal act." *State v. Ash*, 193 N.C. App. 569, 576, 668 S.E.2d 65, 70 (2008). "It is only a viable defense if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense." *Id.* at 576, 668 S.E.2d at 70.

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[3] Second degree arson is the lesser-included offense of first degree arson. *State v. Scott,* 150 N.C. App. 442, 453-54, 564 S.E.2d 285, 294 (2002). The elements of first degree arson are: "(1) the willful and malicious burning (2) of the dwelling (i.e., inhabited) house of another; (3) which is occupied at the time of the burning." *Id.* at 453, 564 S.E.2d at 293. Second degree arson consists of "(1) the willful and malicious burning (2) of the dwelling (i.e., inhabited) house of another; (3) which is *unoccupied* at the time of the burning." *Id.* at 453, 564 S.E.2d at 293. (emphasis added).

Therefore, voluntary intoxication is a defense only for specific intent crimes. *State v. McLaughlin,* 286 N.C. 597, 606, 213 S.E.2d 238, 244 (1975). In a specific intent crime, the State must prove defendant had a specific intent that a certain result would be reached. *State v. Pierce*, 346 N.C. 471, 494, 488 S.E.2d 576, 589 (1997). The "specific intent that a result be reached" serves as an essential element of the crime. *Id.* at 494, 488 S.E.2d at 589 (quoting *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994)). In contrast, "[g]eneral-intent crimes are crimes which only require the doing of some act." *Id.* at 494, 488 S.E.2d at 589 (quoting *Jones* at 148, 451 S.E.2d at 844)). In a general-intent crime, the State does not have to prove defendant specifically intended the crime's result, but only that defendant acted intentionally in performing the underlying act. *Id.* at 494, 488 S.E.2d at 589.

Our Supreme Court has held:

> For a burning to be 'wil[l]ful and malicious' in the law of arson it must simply be done 'voluntarily and without excuse or justification and without any bona fide claim of right. An intent or animus against either the property itself or its owner is not an element of the offense' of . . . arson.

State v. White, 291 N.C. 118, 126, 229 S.E.2d 152, 157 (1976) (quoting *State v. White,* 288 N.C. 44, 215 S.E.2d 557, 561 (1975)). "Specific intent is not an essential element of the crime of common-law arson." *Id.* at 126, 229 S.E.2d at 157. Therefore, the defense of voluntary intoxication is not available as a defense for that crime. *Id.* at 126, 229 S.E.2d at 157.

Our Supreme Court has ruled this definition of "willful and malicious" applies in the crime of malicious use of explosives to injure property. *State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 59 (2003). "We see no reason why the definition of malice used in . . . arson cases should not also apply to the crime of malicious damage to an occupied real property by use of an incendiary device." *Id.* at 238, 581 S.E.2d at 59.

N.C. Gen. Stat. § 14-49(a) provides "[a]ny person who willfully and maliciously injures another by the use of any explosive or incendiary device or material is guilty of a Class D felony." Like the crimes of arson and the malicious use of an explosive device to injure property, specific intent is not an essential element of this crime. Because this crime does not involve specific intent, voluntary intoxication is not a defense. *See White* at 126, 229 S.E.2d at 157. We therefore conclude the trial court committed no error by not instructing the jury on the voluntary intoxication defense.

We vacate Defendant's first degree arson conviction, dismiss Defendant's other assignments of error, and remand to the trial court for sentencing consistent with the order of the Supreme Court of North Carolina.

VACATED IN PART, DISMISSED IN PART, NO ERROR IN PART, and REMANDED IN PART FOR RESENTENCING.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).