

NO. COA14-482

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.

Durham County
No. 13 CRS 050307

NESTA LOUISE GERBERDING

Appeal by defendant from judgments entered 17 September 2013 by Judge Paul C. Ridgeway in Durham County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorney General Roy Cooper, by Special Deputy Attorney Elizabeth Leonard McKay, for the State.

Mary McCullers Reece for defendant.

ELMORE, Judge.

Nesta Louise Gerberding (defendant) was indicted on 1 April 2013 for felonious cruelty to animals and conspiracy to commit felonious cruelty to animals in violation of N.C. Gen. Stat. § 14-360(b). She was tried and found guilty of both counts before a jury in Durham County Superior Court on 17 September 2013. The trial court sentenced defendant to a term of 5 to 15 months for the felonious cruelty to animal conviction and 4 to 14 months for the conspiracy conviction with both sentences

suspended for a term of 18 months probation. Defendant appeals on the basis that the trial court erred in its instructions to the jury. After careful consideration, we hold that defendant received a fair trial that was free from error.

I. Background

The facts of this case are largely undisputed. On the evening of 29 December 2012, defendant arrived home at 2:00 a.m. with her boyfriend, Jason Kidd (Jack), and her brother, Kevin Gerberding (Kevin). The three placed several fast food bags on the kitchen table before heading to the living room. Tank, a male pit bull that had been left at the house when Kevin's ex-girlfriend moved to the west coast, began rummaging through the food bags and eating a hamburger. When Jack returned to the kitchen, he yelled "[w]hat in the world . . . the dog's got into the food." Defendant reached her hand into Tank's mouth in an attempt to retrieve the food and wrapper. Tank bit her, nearly severing the top of her finger. Defendant testified that she was surprised Tank bit her because Tank had no history of being aggressive: "[Y]ou wouldn't expect [him] to bite."

Jack dragged Tank by his collar to the backyard. Kevin secured Tank by putting a lead on him. Jack returned to the house. Defendant grabbed a knife and went outside because she

"had to defend [her]self." Defendant told Kevin, "I'm going to kill this dog." Kevin pinned the dog down, one knee on his chest, one knee on his head, while defendant admittedly stabbed and sliced the dog to death. Defendant stated, "[i]n my world, when a dog bites, you kill it; that's what happens." Jack and Kevin buried Tank in the backyard.

At approximately 6:00 a.m., defendant went to the hospital to seek treatment for the bite. X-rays showed that defendant's finger was broken. The wound required six stitches and bandaging. Later that day, an animal control officer went to defendant's home to deliver a "bite packet." When the officer inquired as to whether Tank might be infected with rabies, defendant explained that she had killed Tank because he was aggressive. Defendant now appeals her convictions for felonious cruelty to animals and conspiracy to commit felonious cruelty to animals.

II. Analysis

A. Trial court's response to jury question

On appeal, defendant argues that the trial court erred and prejudiced her by incorrectly defining the term "without justification or excuse" in response to a question posed by the jury. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). "The trial court is best positioned to decide whether 'additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions.'" *State v. Russell*, ___ N.C. App. ___, ___, 758 S.E.2d 902, ___ (2014) (quoting *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986)).

During deliberations, the jury posed the following question to the trial court:

The definition of felonious cruelty has three points. The second and third elements contain "without justification or excuse." In the third point these words are used to define malice, and in the second point they're used to define intent. Please clarify the distinction.

Outside the presence of the jury, the trial court discussed its possible response to the foregoing question with counsel. The trial court determined that by providing examples of a legal justification or legal excuse, such as "self-defense" or "accident," the jury would be aided in understanding the phrase "without justification or excuse." Defense counsel objected, reasoning that by providing examples that did not arise on the evidence in the instant case, the jury would "feel like they don't have the opportunity of applying justifiable excuse[s]." The trial court informed defense counsel, "I think I can make it very clear that it is up to the jury to determine whether there was a justification or excuse, as those words are commonly understood. . . . I can't give an exhaustive list of every justification or excuse that the jury might consider."

The trial court then answered the jury's question as follows:

A justification or excuse is a circumstance, that if it exists, excuses the defendant's actions and the defendant. Even if he or she did the act charged, it would be not guilty because there was a reason for committing the act that the law recognizes as an excuse or valid justification.

As your jury instructions state, if excuse or justification exists, then the defendant would not have had an intent or malice to commit the act alleged and would therefore

be not guilty of either felonious or non-felonious cruelty to animals. It is the State's burden to prove beyond a reasonable doubt that no such justification or excuse existed.

By way of example, and not applicable to the evidence in this case but simply by way of example to help you understand this concept: self-defense is considered a justification with the killing of a person if a person reasonably believes that his or her acts are necessary in order to keep a person from killing him or her or doing him or her great bodily harm. Another example, and not applicable to the evidence in this case, would be an accident, which is an excuse where injury or death occurs during the course of a long time [] that does not involve culpable negligence.

If you find the defendant committed the act alleged in the first moment of the offense of felonious cruelty to animals or non-felonious cruelty to animals, it is for you, the jury, to determine whether, according to the evidence, the instructions on the law that I've provided you, and the ordinary and common meaning of those words used, whether a justification of excuse exists.

On appeal, defendant raises the same argument advanced by defense counsel at trial—that “[b]y giving two examples of defenses that did not apply [‘self-defense’ and ‘accident’] and no explanation of how justification or excuse might apply to [defendant’s] facts, the trial court sent the message that finding justification or excuse was difficult or even impossible.” Defendant contends that “[t]he judge should have

instructed the jury that if they believed [defendant's] undisputed testimony that the dog was dangerous and that she therefore killed the dog to protect people and other animals, they should find that [defendant's] act was legally justified."

We disagree and note that defendant cites no relevant case law to support his position. Further, his argument ignores the rule of law that the trial judge is "not required to parrot the instructions or to become a mere judicial phonograph for recording the exact and identical words of counsel[.]" *State v. Bailey*, 254 N.C. 380, 386, 119 S.E.2d 165, 170 (1961) (quotation and citation omitted). There is no legal requirement that the trial court respond to the jury's question as defense counsel instructs. On review, we conclude that the trial court's response to the jury's question was adequate and proper. The trial court's instruction both addressed the jury's concerns and constituted a correct statement of law. Defendant has failed to convince us that the trial court's use of "self-defense" and "accident" as examples somehow confused the jury or led the jury to believe that there were no justifiable excuses available to defendant in the instant case. Defendant's argument is without merit and we overrule it.

B. Instruction on lesser-included offense

Defendant contends that the trial court erred in instructing the jury that she could be found guilty of felonious cruelty to animals if the jury found that defendant had acted with implied malice. More specifically, defendant argues that the definition of implied malice is "not suitable as a stand-alone definition of malice in felony animal cruelty because it define[s] malice in terms equivalent to causing injury 'without justification and excuse.'" Defendant asserts, "[i]n the context of the animal cruelty statute, malice must mean something more than acting without just cause, excuse, or justification. Otherwise, there would be no difference between misdemeanor and felony animal cruelty." We disagree.

We note at the outset that defendant did not object to the trial court's jury instructions at trial and therefore this issue has not been preserved for appellate review. We review "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Plain error should be applied only when the defendant proves that, "after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so

lacking in its elements that justice cannot have been done[.]” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotations omitted) (alteration in original). An appellate court “must be convinced” by the defendant that “absent the error the jury probably would have reached a different verdict.” *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

In order to prove the offense of felony cruelty to animals, the State must present substantial evidence that a defendant did “maliciously torture, mutilate, maim, cruelly beat, disfigure, poison, or kill” an animal. N.C. Gen. Stat. § 14-360(b). The crime of misdemeanor cruelty to animals is a lesser included offense of felony cruelty to animals. In order to prove the offense of misdemeanor cruelty to animals, the State is required to present substantial evidence that a defendant did “intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal[.]” N.C. Gen. Stat. § 14-360(a) (2013). As such, in order to be guilty of felonious cruelty to animals, a defendant must have acted both “maliciously” and “intentionally.” In the alternative, there is

no element of "malice" required for a defendant to be found guilty of misdemeanor cruelty to animals.

The actual jury instruction read by the trial court to the jury is as follows:

For you to find the Defendant guilty of [felony animal abuse], the State must prove three things beyond a reasonable doubt.

First, that the Defendant killed the dog.

Second, that the Defendant acted intentionally; that is, knowingly and without justification and excuse.

And third, that the Defendant acted with malice. Malice means not only hatred, ill will or spite, as it is ordinarily understood -- to be sure, that is malice -- but it also means the condition of mind which prompts a person to intentionally inflict serious bodily harm which proximately results in injury to an animal without just cause, excuse or justification.

. . .

Non-felonious cruelty to animals differs from felonious cruelty to animals in that the State is not required to prove the Defendant acted with malice. Thus, if you find . . . Defendant intentionally -- that is, knowingly and without justification or excuse -- killed a dog, it would be your duty to return a verdict of non-felonious cruelty to animals.

To clarify, we note that the first portion of the "malice" instruction above ("malice means not only hatred, ill will, or

spite as it is ordinarily understood; again, to be sure, that is malice. . . .") refers to express malice. *State v. Sexton*, 357 N.C. 235, 237, 581 S.E.2d 57, 58 (2003). The second portion of the instruction ("but it also means that condition of mind that prompts a person to intentionally inflict damage without just cause, excuse, or justification") refers to implied malice. *Id.* "[M]alice, like intent, is a state of mind and as such is seldom proven with direct evidence. Rather, malice is ordinarily proven by circumstantial evidence from which it may be inferred." *Id.* at 238, 581 S.E.2d at 58.

The jury instructions given in the present case for both felonious and non-felonious cruelty to animals were taken almost verbatim from the North Carolina pattern jury instructions. See N.C.P.I. Crim. 247.10 and 247.10A (2012). The definition of malice used here is the same definition of malice used in homicide cases. *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). This Court is unpersuaded by defendant that the definition of implied malice used in homicide cases cannot also apply to the crime of felonious cruelty to animals when malice is an element of that offense. The mere fact that the lesser-included offense of misdemeanor cruelty to animals defines the element of "intent" as "knowingly and without

justification or excuse" (terms also used in the implied malice definition) does not render the jury instruction concerning implied malice invalid. The jury was free to convict defendant of either the felony or the misdemeanor offense. Accordingly, we conclude that the trial court's instruction was proper.

Assuming *arguendo* that the trial court erred, any such error by the trial court would not constitute plain error. The evidence taken in the light most favorable to the State shows that defendant acted intentionally and with *express* malice when she attacked Tank with a knife, admittedly stabbing to death a dog that had no history of violent behavior. Again, the trial court did not err.

III. Conclusion

In sum, the trial court properly instructed the jury according to the North Carolina pattern jury instructions. Further, it responded appropriately to the question posed by the jury regarding the jury instructions. Accordingly, we hold that defendant received a trial free from error.

No error.

Judge BRYANT concurs.

Judge ERVIN concurs in part and concurs in result in part by separate opinion.

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ERVIN, Judge, concurring in part and concurring in the result in part.

Although I agree with my colleagues that the trial court did not err in the course of responding to the jury's question concerning the circumstances under which Defendant's conduct might be justified or excused, I am unable to agree with the Court's determination that the trial court did not err by instructing the jury that a finding that Defendant acted with implied malice would suffice to establish the existence of the malice element of the offense of felonious cruelty to animals. However, I also conclude, like my colleagues, that the trial court's erroneous malice instruction did not rise to the level of plain error sufficient to necessitate an award of appellate relief from Defendant's conviction. As a result, I concur in the Court's opinion in part and concur in the result reached by my colleagues in part.

N.C. Gen. Stat. § 14-360(a) provides that, "[i]f any person shall intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal, every such offender shall for every such offense be guilty of a Class 1 misdemeanor," with a prohibited act having been committed "intentionally" in the event that it was "committed knowingly and without justifiable excuse." N.C. Gen. Stat. § 14-360(c). On the other hand, N.C. Gen. Stat. § 14-360(b) provides that, "[i]f any person shall maliciously torture, mutilate, maim, cruelly beat, disfigure, poison, or kill . . . any animal, every such offender shall for every such offense be guilty of a Class H felony," with a "malicious" act being defined as one "committed intentionally and with malice or bad motive." N.C. Gen. Stat. § 14-360(c). As a result, in order to be guilty of felonious cruelty to animals, the defendant must have acted both "intentionally" and "maliciously."

At the conclusion of Defendant's trial, the trial court instructed the jury that it could find the existence of the "malice" necessary for a finding that Defendant was guilty of felonious cruelty to animals in the event that she acted with

"the condition of mind which prompts a person to intentionally inflict serious bodily harm which proximately results in injury to an animal without just cause, excuse or justification." In other words, the trial court allowed the jury to find that Defendant killed Tank maliciously in the event that she acted in a manner consistent with the statutory definition of "intentional" rather than requiring the jury to also find that Defendant acted "intentionally and with malice or bad motive."

In concluding that the trial court did not err by instructing the jury in this manner, my colleagues equate the "malice" that must be established in order to support a conviction for felonious cruelty to animals with the malice that must be shown in order to support a determination that a defendant was guilty of murder rather than manslaughter. In reaching this conclusion, my colleagues have referenced the decision in *State v. Sexton*, 357 N.C. 235, 237-38, 581 S.E.2d 57, 58-59 (2003), in which the Supreme Court held that proof of the implied malice that is deemed to exist based upon intentional conduct engaged in without just cause or excuse sufficed to support a finding that the defendant was guilty of willful and malicious damage to real property through the use of an incendiary device in violation of N.C. Gen. Stat. § 14-49.1

(stating that "[w]e see no reason why the definition of malice used in homicide and arson cases should not also apply to the crime of malicious damage to an occupied real property by use of an incendiary device"). However, the logic enunciated in *Sexton* cannot be deemed to apply in this case given that the legal principles at issue here are defined in the specific statutory language contained in N.C. Gen. Stat. § 14-360(c) rather than in otherwise-applicable common law principles.

Unlike the statutory provisions under consideration in this case, the legislative language at issue in *Sexton* did not contain any definition of "maliciously." In the absence of a specific definition of a particular term, the common law definition of language used in a statutory provision is deemed applicable. See *State v. Vickers*, 306 N.C. 90, 99, 291 S.E.2d 599, 606 (1982) (utilizing the common law definition of "arson" where the term in question was not statutorily defined), *overruled on other grounds by State v. Barnes*, 333 N.C. 666, 678, 430 S.E.2d 223, 229, *cert. denied*, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993); *State v. Murphy*, 280 N.C. 1, 5, 184 S.E.2d 845, 847 (1971) (utilizing the common law definition of "kidnapping" given that the term in question was not statutorily defined). In this case, however, the General

Assembly has provided a statutory definition of "maliciously," so this definition must be deemed controlling. *Vogel v. Reed Supply Co.*, 277 N.C. 119, 130-31, 177 S.E.2d 273, 280 (1970) (stating that, "[w]here the Legislature defines a word used in a statute, that definition is controlling even though the meaning may be contrary to its ordinary and accepted definition"). As a result, the extent to which a defendant can be convicted of felonious cruelty to animals based on a finding of implied, as compared to express, malice, hinges upon the manner in which the General Assembly defined "malice" in N.C. Gen. Stat. § 14-360(c) rather than the manner in which that term is used in other contexts.

A careful examination of the relevant statutory language establishes that guilt of both misdemeanor and felonious cruelty to animals requires proof that the defendant acted "intentionally," which means that the defendant acted "knowingly and without justifiable excuse." See N.C. Gen. Stat. § 14-360(c). In other words, the statutory definition of "intentional" conduct closely tracks the definition of malice contained in the trial court's instructions. In order to support a conviction for felonious cruelty to animals, however, a showing of "malice or bad motive" in addition to a showing of

"intentional" conduct is required. As should be obvious, the statutory requirement that there be proof of "malice or bad motive" in addition to proof of intentional conduct in order to support a conviction for felonious cruelty to animals is rendered superfluous in the event that implied malice of the type deemed sufficient in the trial court's instructions suffices to establish the malice necessary to raise the defendant's conduct from a misdemeanor to a felony. As a result of the fact that, according to well-established North Carolina law, "an individual section of a statute will not be interpreted in such a manner that renders another provision of the same statute meaningless," *Williams v. Holsclaw*, 128 N.C. App. 205, 212, 495 S.E.2d 166, 170, *aff'd per curiam*, 349 N.C. 225, 504 S.E.2d 784 (1998), the "malicious" conduct necessary to establish the defendant's guilt of felonious cruelty to animals must consist of something more than "knowing" conduct engaged in "without justifiable excuse." Allowing a defendant to be convicted of both misdemeanor and felonious cruelty to animals on the basis of the same conduct would raise serious constitutional issues by "allow[ing] a prosecutor arbitrarily to elect to pursue a felony conviction for an offense, *defined* by the substantive statute as a *misdemeanor*, which requires proof

of the very elements by which it may be 'elevated' to felony status." *State v. Glidden*, 317 N.C. 557, 566, 346 S.E.2d 470, 475 (1986) (Meyer, J., concurring in result) (emphasis in original). As a result of the fact that the trial court's malice instruction runs afoul of both of these fundamental principles, I believe that the trial court erred by allowing the jury to find the existence of the "malice" element of felonious cruelty to animals based on a determination that Defendant acted with implied, rather than express, malice, and am unable to concur in my colleagues' determination to the contrary.¹

I do, however, concur with my colleagues' conclusion that Defendant is not entitled to relief from her conviction for felonious cruelty to animals based upon the trial court's erroneous malice instruction. As the Court notes, the undisputed evidence reflects that Defendant intentionally killed Tank after he had been taken outside and restrained despite the

¹As my colleagues note, the trial court's jury instruction was taken almost verbatim from the relevant pattern jury instruction. See N.C.P.I. Crim. 247.10 and 247.10A (2012). Although the fact that the challenged language appears in the applicable pattern jury instruction is certainly relevant to our analysis, the pattern jury instructions do not have the force of law. *State v. Warren*, 348 N.C. 80, 120, 499 S.E.2d 431, 453, cert. denied, 525 U.S. 915, 119 S. Ct. 263, 142 L. Ed. 2d 216 (1998). As a result, the fact that the challenged definition of malice appears in the relevant pattern jury instruction does not suffice to support a determination that the trial court's malice instruction correctly stated the applicable law.

complete absence of any indication that Tank had any history of violent behavior. In her trial testimony, Defendant admitted that she, in essence, executed Tank after he bit her and that, in the milieu in which she lived, such conduct should be deemed to be nothing out of the ordinary. In my opinion, the evidence contained in the present record is more than sufficient to establish that Defendant killed Tank with "hatred, ill will or spite" and precludes any finding that the outcome at Defendant's trial would have probably been different in the event that the trial court had not delivered an erroneous malice instruction. Thus, I have no hesitation in concluding that Defendant simply cannot show that, "absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). As a result, although I am unable to join in my colleagues' conclusion that the trial court did not err by allowing the jury to find Defendant guilty of felonious cruelty to animals on the basis of implied, rather than express, malice, I am in complete agreement with their determination that Defendant is not entitled to relief from her conviction on the basis of this erroneous malice instruction and, for that reason, concur in the result that the Court has reached with respect to

this aspect of Defendant's challenge to her conviction. I do, however, concur in the remainder of the Court's opinion.