NO. COA14-1005
NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2015

STATE OF NORTH CAROLINA

v. Halifax County
Nos. 13CRS051640,
13CRS051694-95

MICHAEL SCOTT HAMILTON
Defendant.

Appeal by Defendant from judgments entered 27 March 2014 by Judge W. Russell Duke, Jr. in Halifax County Superior Court. Heard in the Court of Appeals 8 January 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for Defendant-appellant.

DILLON, Judge.

Michael Scott Hamilton ("Defendant") appeals from convictions for two counts of attempted voluntary manslaughter and one count of first-degree burglary. For the following reasons, we find no error in part; vacate Defendant's conviction for first-degree burglary and remand to the trial court for entry of a new judgment

and sentencing Defendant for felonious breaking and entering; and award Defendant a new trial for the two attempted voluntary manslaughter convictions.

I. Background

Defendant was indicted for two counts of attempted first-degree murder and one count of first-degree burglary, stemming from events which occurred on the evening of 4 May 2013. Defendant was tried by a jury on these charges.

The State's evidence tended to show that on the evening in question, Defendant went to the mobile home residence of his cousin, Walter Thompson,[1] who was dating Sarah Smith[2]. Ms. Smith had formerly dated Defendant, and they had a child together. Defendant entered the residence uninvited holding a baseball bat and began arguing with Mr. Thompson. Ms. Smith went outside with Defendant to try to calm him down; however, Defendant hit Ms. Smith with the bat several times. Mr. Thompson then exited the residence to assist Ms. Smith, and Defendant hit him in the wrist with the bat. After a brief struggle, Defendant fled the scene.

As a result of the attack, Ms. Smith suffered a number of injuries to her face, jaw, and finger requiring her to undergo a

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[1] Pseudonyms are used throughout this opinion to protect the identity of the victims.

[2] A pseudonym.

number of surgeries to repair these injuries. Mr. Thompson was treated for a broken wrist and injury to his forehead.

Defendant did not present evidence at trial, but raised motions to dismiss, which were denied by the trial court.

The jury found Defendant guilty of two counts of attempted voluntary manslaughter and one count of first-degree burglary. The trial court sentenced Defendant to two consecutive terms of 33 to 52 months imprisonment for the attempted voluntary manslaughter convictions and a concurrent term of 84 to 113 months of imprisonment for the first-degree burglary conviction. Defendant gave oral notice of appeal at trial.

II. Analysis

On appeal, Defendant contends that (1) the first-degree burglary indictment is facially defective; (2) the trial court erred in denying his motion to dismiss the first-degree burglary charge; and (3) the trial court erred in its instruction on attempted voluntary manslaughter. We address each argument in turn.

A. Indictment--Burglary

Defendant contends that we should reverse his conviction for first-degree burglary because the indictment is facially defective where it alleges that he broke and entered the trailer "with the

intent to commit a felony therein, to wit: *attempted murder*." (Emphasis added.) Specifically, Defendant argues that it is logically impossible to intend to commit the crime of "attempted murder."

"On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009).

Applying our reasoning in *State v. Speight*, we hold that the indictment was sufficient. 213 N.C. App. 38, 711 S.E.2d 808 (2013). In *Speight*, the indictment for burglary stated that the underlying felony that the defendant intended to commit when he broke and entered into a residence at nighttime was "unlawful sexual acts." *Id.* at 44, 711 S.E.2d at 813. The defendant argued that the indictment was fatal because it failed to allege the specific underlying felony, contending that "unlawful sexual acts" was not specific enough. *Id.* at 45, 711 S.E.2d at 813. We held that the indictment was sufficient because by alleging that the defendant intended to commit "unlawful sexual acts," the indictment informed the "defendant of the charge against him with sufficient clarity to withstand dismissal." *Id.* In reaching our holding, we stated that the General Statutes only require that the indictment allege the facts supporting the elements of the crime

"with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." *Id.* at 44, 711 S.E.2d at 813 (quoting N.C. Gen. Stat. § 15A-924(a)(5) (2009)).

In *Speight*, we recognized that older cases decided prior to the passage of G.S. 15A-924 may have required that the underlying felony be described with greater specificity, citing *State v. Cooper*, 288 N.C. 496, 219 S.E.2d 45 (1975), but that the pleading requirements were no longer as rigid. *Speight*, 213 N.C. App. at 45, 711 S.E.2d at 813.

In the present case, assuming that the indictment should have stated "murder" or "manslaughter" as the underlying felony rather than *attempted* murder, applying the reasoning in *Speight*, we hold that the indictment sufficiently informed Defendant "of the charge against him with sufficient clarity to withstand dismissal." *Id.* Accordingly, Defendant's argument is overruled.

B. Motion to Dismiss--Burglary

Defendant contends that the trial court erred in denying his motion to dismiss the first-degree burglary charge -- which requires that the offense occur at nighttime -- because there was definitive evidence that the offense occurred *before* nighttime and because there was no substantial evidence that the attack occurred

during the nighttime. However, the State argues that testimony from witness Jeffrey Black[3] -- that when Defendant entered his home uninvited "it was dark" and "[i]t was probably 8 or 9 o'clock" -- was sufficient evidence for the charge to go to the jury.

The standard of review for a trial court's denial of a defendant's motion to dismiss for insufficiency of the evidence is well established:

> A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (marks omitted). Additionally, "[t]he Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Phillpott*, 213 N.C. App. 468, 478, 713 S.E.2d 202, 209 (2011).

"The elements of first-degree burglary are: (i) the breaking (ii) and entering (iii) *in the nighttime* (iv) into the dwelling

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[3] A pseudonym.

house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony therein." *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996) (emphasis added); see N.C. Gen. Stat. § 14-51 (2013). Though our burglary statute does not define the term *nighttime*, "our courts adhere to the common law definition of nighttime as that time after sunset and before sunrise when it is so dark that a man's face cannot be identified except by artificial light or moonlight." *State v. McKeithan*, 140 N.C. App. 422, 432, 537 S.E.2d 526, 533 (2000) (marks omitted).

As Defendant requests, we take judicial notice that in Roanoke Rapids, on 4 May 2013, sunset occurred at 8:01 p.m., and civil twilight began at 8:29 p.m., as computed by the Astronomical Applications Department of the United States Naval Observatory. *See State v. Brown*, ___ N.C. App. ___, ___, 732 S.E.2d 584, 587 (2012) (taking judicial notice of when civil twilight began); *State v. Garrison*, 294 N.C. 270, 280, 240 S.E.2d 377, 383 (1978) (taking judicial notice of when sunset occurred).

In *State v. Barnett*, the defendant was convicted of breaking into a residence and stealing a purse sometime between 10:00 p.m. on 3 April 1992 and 6:30 a.m. on 4 April 1992, when the victim woke up. 113 N.C. App. 69, 75, 437 S.E.2d 711, 715 (1993). This

Court noted that on 4 April 1992 civil twilight began at 5:41 a.m. and the sun rose at 6:07 a.m. *Id.* In reversing the trial court's denial of the defendant's motion to dismiss, this Court held that

> [b]ecause the [offense] . . . could have occurred at any time up until . . . [shortly ***after*** sunrise], the evidence is only sufficient to raise a "suspicion or conjecture" that the breaking and entering of the [victim's] home occurred at nighttime. . . . Thus, the State failed to produce such relevant evidence that a reasonable mind might accept as adequate to support the conclusion that when the breaking and entering occurred, it was [nighttime] . . . .

Id.

In the present case, the most definitive testimony was from the investigating officer who testified that he arrived on the scene after the attack at 7:56 p.m., five minutes before sunset. Further, other witnesses testified that the attack occurred sometime before 8:00 p.m. while it was "dusky dark[.]" The only evidence cited by the State to support a finding that the offense occurred in the nighttime was the testimony of Mr. Black, who stated that "it was dark" and "[i]t was probably 8 or 9 o'clock[.]" However, we believe Mr. Black's testimony only provides a "suspicion or conjecture" that Defendant entered the residence at nighttime. Specifically, his testimony that it was "probably 8 or 9" leaves at least one minute before sunset and twenty-nine minutes

before civil twilight for Defendant to have entered the residence. In sum, we hold that there was not substantial evidence before the jury that the offense occurred in the nighttime; and, therefore, the trial court erred in denying Defendant's motion to dismiss.

Notwithstanding, we hold that there was substantial evidence to support a conviction for felony breaking and entering with the intent to commit a felony pursuant to N.C. Gen. Stat. § 14-54(a). The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986). That is, by convicting Defendant of burglary, the jury necessarily found facts that would support a verdict convicting Defendant of felonious breaking and entering. *See Barnett*, 113 N.C. App. 75-76, 437 S.E.2d at 715; *State v. Cox*, 281 N.C. 131, 135-36, 187 S.E.2d 785, 788 (1972). Accordingly, we vacate Defendant's conviction for first-degree burglary and remand to the trial court for entry of a new judgment and sentencing Defendant for felonious breaking and entering.

C. Jury Instructions—Involuntary Manslaughter

Lastly, Defendant contends that the trial court erred in giving its jury instruction regarding the charges of attempted

voluntary manslaughter by telling the jury on a number occasions that the crime did not include the element of specific intent. Defendant admits that he did not object to the trial court's jury instructions but argues that because he requested three times the inclusion of the element of specific intent in the trial court's instruction as to attempted voluntary manslaughter during the charge conference, this request properly preserved this issue for appeal.

The State counters with a number of arguments and contends that we should apply a plain error standard. "In order to prevail under a plain error analysis, defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *State v. Steen*, 352 N.C. 227, 269, 536 S.E.2d 1, 25-26 (2000) (marks omitted). We hold that even applying a plain error standard, the trial court committed reversible error in its instructions on the attempted voluntary manslaughter charges.

We have held that "specific intent" is an element for the crime of *attempted* voluntary manslaughter. *State v. Rainey*, 154 N.C. App. 282, 289, 574 S.E.2d 25, 29 (2002). In reaching this conclusion, our Court in *Rainey* recognized that "in North Carolina, heat of passion voluntary manslaughter is essentially a first-

degree murder, where the defendant's reason is temporarily suspended by legally adequate provocation." *Id.* at 289, 574 S.E.2d at 29. Therefore, the Court concluded that

> [t]he specific intent to kill does exist in the mind of [a defendant charged with attempted voluntary manslaughter]; however, the defendant is only legally culpable for the general intent because the "specific intent" is not based on "cool reflection." The specific intent is based on an "adequate provocation" that would cause an individual with an ordinary firmness of mind . . . to commit an act spawned by provocation rather than malice.

Id.

In the present case, Defendant was convicted of attempted voluntary manslaughter based on acts against both Ms. Smith and Mr. Thompson. Following the trial court's instruction on the charge of attempted first-degree murder the trial court gave the following instructions:

> Attempted voluntary manslaughter differs from attempted first degree murder in that the State **need not prove** that the defendant did the attempted killing with premeditation and deliberation or malice **or that the defendant intended by his action to result -that his action would result in the victim's death**, but the State must prove beyond a reasonable doubt that the defendant did **an intentional and unlawful act** in an attempt to kill the victim in the heat of passion suddenly aroused by adequate provocation.
>
> So ladies and gentlemen, if you find from the evidence beyond a reasonable doubt that on

> or about the alleged date the defendant attempted to cause the victim's death by his **intentional and unlawful act**, it would be your duty to find the defendant guilty of attempted voluntary manslaughter.

(Emphasis added.) The trial court then instructed the jury specifically regarding the acts committed against each victim. As Defendant concedes, the instruction with respect to the crime against Mr. Thompson correctly stated that the jury had to find that Defendant acted with the specific intent to kill in order to convict him of attempted voluntary manslaughter. However, with respect to the attack on Ms. Smith, the trial court instructed the jury as follows:

> Attempted voluntary manslaughter differs from attempted first degree murder in that the State **need not prove** that the defendant did the attempted killing with premeditation and deliberation or malice or **that the defendant intended for his action to result in the victim's death**. But the State must prove beyond a reasonable doubt that the defendant **did an intentional** and unlawful act in an attempt to kill the victim in the heat of passion suddenly aroused by adequate provocation.
>
> So ladies and gentlemen, if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant attempted to cause the victim's death by his **intentional and unlawful act**, it would be your duty to find the defendant guilty of attempted voluntary manslaughter.

(Emphasis added.)

Contrary to one of the State's arguments, we believe that the trial court's instruction *decreased, not increased,* the State's burden of proof by informing the jury that the State did not have to prove specific intent. Accordingly, the trial court erred in instructing the jury. We must determine next whether this error amounted to plain error.

There was conflicting evidence presented as to Defendant's intent when he entered Mr. Thompson's residence on the evening in question. On the one hand, testimony was presented that Defendant stated he was "going to get" Ms. Smith, that he was going to "get that bitch," and that he hoped "they all die[,]" and, additionally, he entered the residence holding a baseball bat. However, testimony was also presented that Defendant told a witness that he just wanted to talk with Ms. Smith; his concern was that his daughter was in the residence where people were drinking alcoholic drinks; and when he entered the kitchen he told Ms. Smith, "Let's walk outside and talk about it a minute and then I'll leave."

Our Supreme Court in *State v. Harris* concluded that the trial court erred in giving conflicting jury instructions regarding the burden of proof and awarded the defendant a new trial. 289 N.C. 275, 280, 221 S.E.2d 343, 347 (1976)[4]. The Court reasoned that

[4] We note that even though this case was decided before plain

> [i]t has been uniformly held that where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. This is particularly true when the incorrect portion of the charge is the application of the law to the facts. [Citations omitted.] A new trial must also result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation.

Id. (marks omitted). "The jury cannot be expected to know which of two conflicting instructions is correct." *Id.* "It must be assumed on appeal that the jury was influenced by that portion of the charge which is incorrect." *Id.*

Likewise, here, the trial court gave a contradictory instruction regarding the inclusion of specific intent for the crime of attempted voluntary manslaughter, stating that it was not required then stating that it was an element of the crime. Compounding this error, the trial court later repeated its contradictory instruction to the jury. Additionally, there was conflicting evidence regarding Defendant's intent on the day in question. From the record, we cannot tell whether the jury convicted Defendant for attempted voluntary manslaughter based on

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error review was available, its ruling and analysis have been applied under plain error review. *See State v. Hunt*, 192 N.C. App. 268, 271-72, 664 S.E.2d 662, 664 (2008) (in a plain error analysis applying the holding in *Harris* and awarding a new trial for an instructional error).

the incorrect portion of the instruction or not. Therefore, given the specific nature of these errors, we must assume that the jury was influenced by the incorrect portion, see *Harris*, *supra*, and award Defendant a new trial for the charges of attempted voluntary manslaughter.

NO ERROR IN PART; VACATED AND REMANDED IN PART; AND NEW TRIAL IN PART.

Judges GEER and STEPHENS concur.

Report Per Rule 30(e).