IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1344

Filed: 7 June 2016

Buncombe County, Nos. 14 CRS 311, 14 CRS 84454–55

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. Heard in the Court of Appeals 11 May 2016.

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") appeals following jury verdicts convicting him of first degree arson, malicious use of explosives causing injury, and as a habitual felon. Following the verdicts, 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. On appeal, Defendant contends the trial court committed plain error by not instructing the jury on the lesser

included offense of burning other buildings and by not instructing the jury on the defense of involuntary intoxication. Defendant also contends he received ineffective assistance of counsel. Due to a fatal defect in the indictment we vacate Defendant's first degree arson conviction.

I. Jurisdiction

On 7 July 2014, a Buncombe County grand jury indicted Defendant for first degree arson, assault with a deadly weapon inflicting serious injury, and malicious use of explosives causing injury, and as a habitual felon. The indictment charging first degree arson under N.C. Gen. Stat. § 14-58 states the following:

> The jurors for the State upon their oath present that on or about [14 February 2014 in Buncombe County] the defendant named above unlawfully, willfully and feloniously did maliciously burn a dwelling place owned by Arby Penley and located at 26 Lower Grassy Branch Road in Asheville, North Carolina. At the time of the burning, the dwelling was inhabited by the defendant and Kimberly Noel Williams.

An indictment is the *sine qua non* of criminal jurisdiction as required by Article I, Section 22 of the Constitution of North Carolina. The language of an indictment is presented to the grand jury by a District Attorney pursuant to N.C. Gen. Stat. § 15A-627. The purpose of Constitutional provisions for indictments is: "(1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or Nolo contendere, to pronounce

sentence according to the rights of the case." *State v. Foster*, 10 N.C. App. 141, 142–43, 177 S.E.2d 756, 757 (1970) (citation omitted); *see also State v. Stokes*, 274 N.C. 409, 411, 163 S.E.2d 770, 772 (1968).

"It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005). However, "[w]hen the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) (citation omitted).

"The common law definition of arson is still in force in North Carolina, and arson has been defined as the willful and malicious burning of the dwelling house of another person." *State v. Teeter*, 165 N.C. App. 680, 599 S.E.2d 435 (2004), *disc. review denied*, 359 N.C. 74, 605 S.E.2d 147 (2004) (quoting *State v. Jones*, 110 N.C. Ap. 289, 291, 429 S.E.2d 410, 412 (1993)). The common law definition of arson only "embraces [the burning of] a dwelling house and such structures as are within the curtilage." *State v. Cuthrell*, 235 N.C. 173, 176, 69 S.E.2d 233, 235 (1952). Arson is "an offense against the security of habitation and not the property," and therefore,

"an essential element of [arson] is that the property be inhabited by some person." *State v. Scott*, 150 N.C. App. 442, 452, 564 S.E.2d 285, 293 (2002); *Cf.* N.C. Gen. Stat. § 14-62 (2015) (prohibiting the burning of, *inter alia*, an uninhabited dwelling house and other buildings and structures that are not used as personal residencies).

The North Carolina General Assembly passed N.C. Gen. Stat. § 14-58, "Punishment for arson," "[i]n order to give more protection when a dwelling house is occupied by a person at the time of the burning[.]" *State v. Barnes*, 333 N.C. 666, 677, 430 S.E.2d 223 229 (1993). Section 14-58 states the following:

> There shall be two degrees of arson as defined at the common law. If the dwelling burned was occupied at the time of the burning, the offense is arson in the first degree and is punishable as a Class D felony. If the dwelling burned was unoccupied at the time of the burning, the offense is arson in the second degree and is punishable as a Class G felony.

N.C. Gen. Stat. § 14-58 (2015).

A dwelling house is "inhabited" if it is a person's permanent, temporary, or seasonal residence. N.C.P.I.—Crim. 215.11. A person's "temporary absence from a dwelling will not affect [the dwelling's] status as an inhabited dwelling . . . ." *State v. Ward*, 93 N.C. App. 682, 686, 379 S.E.2d 251, 253 (1989) (citation omitted). However, a dwelling house is uninhabited if it is under construction and no person has moved into it yet. N.C.P.I.—Crim. 215.11 (citing *State v. Long*, 243 N.C. 393, 90 S.E.2d 739 (1956)).

A dwelling house is occupied if "some person [is] physically present in the [dwelling house] at [the] time" of the burning. N.C.P.I.—Crim. 215.11. Therefore, occupation differentiates first degree arson from second degree arson, but both degrees of arson punish the burning of an inhabited dwelling house.

To prove first degree arson, the State must prove the dwelling house is occupied by another human being at the time of the burning. *See Barnes*, 333 N.C. at 678, 430 S.E.2d at 229 ("We are aware that in *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1983), we said it was not necessary to prove a dwelling house was occupied in order to convict a defendant of first degree arson. Insofar as *Vickers* is inconsistent with this case, it is no longer authoritative."). Our Supreme Court has held that dead, dying, or expiring murder victims can "occupy" a dwelling house for purposes of first degree arson. *See State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995); *see also State v. Campbell*, 332 N.C. 116, 418 S.E.2d 476 (1992).

Here, the indictment alleges Defendant's girlfriend "inhabited" the dwelling house. The evidence tended to show that Defendant's girlfriend lived at the dwelling house, although she was in the process of moving, and kept her belongings inside the home. This is sufficient to allege second degree arson. However, the indictment fails to allege Defendant's girlfriend occupied the home, in that she was physically present inside the home at the time of the burning, which creates a fatal defect in the first degree arson charge.

Lastly, Defendant contends he received ineffective assistance of counsel. "In general, claims of ineffective assistance of counsel 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) (citations omitted). "Our Supreme Court has instructed that should the reviewing court determine the [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent MAR proceeding." *Id.* at 554, 557 S.E.2d at 547 (internal quotation marks and citation omitted).

We cannot resolve this question without a fuller record on appeal in which all evidence can be presented. Therefore, we dismiss this claim without prejudice to the right of Defendant to file a motion for appropriate relief at a later date.

II. Conclusion

For the forgoing reasons we vacate Defendant's first degree arson conviction *ex mero motu*.

VACATED.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).