IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-569

Filed: 21 June 2016

Guilford County, Nos. 12 CRS 32808, 75793, 75803, 75807, 75909

STATE OF NORTH CAROLINA

v.

GARY CLAYTON JONES

Appeal by defendant from judgments entered 18 November 2014 by Judge Lindsay R. Davis, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 3 November 2015.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jillian C. Katz, for defendant.

CALABRIA, Judge.

Gary Clayton Jones ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of attempted first degree murder, first degree kidnapping, aggravated felony serious injury by vehicle, and driving with a revoked license. For the reasons that follow, we find that defendant received a fair trial free from error

I. Background

Defendant is a recovering alcoholic who became unemployed in the early part of 2012. In April 2012, defendant's wife, Brenda, discovered that he had been having an affair and requested that he leave the marital home. Defendant refused to do so. By this time, defendant began missing his substance abuse counseling appointments and began drinking again. Prior to his treatment, defendant reported to his substance abuse counselors that he drank about a fifth of vodka every day.

On 25 April 2012, sometime after Brenda left for work around 8:30 a.m., defendant began drinking an unknown quantity of alcohol. He continued to drink periodically until Brenda picked him up from the local library at 5:30 p.m. During that time period, defendant remembered only that: he started drinking a fifth of vodka that morning; at some point, he went to a friend's house and drank more; and he later went to the library and walked to a nearby ABC store to buy and drink more alcohol. After Brenda picked defendant up, she noticed that he was agitated and asked him if anything was wrong, to which he responded "Everything was okay until you opened your damn mouth . . . . You always open your damn mouth, but that's okay. We'll fix that."

When Brenda and defendant arrived home around 6:15 p.m., their neighbors were talking in the driveway next door and defendant's probation officer was waiting to conduct a home visit. The officer observed defendant to be "pleasant, mild mannered and appear[ing] 'normal'." After the home visit, defendant and Brenda

went into their kitchen. Brenda began unloading the washing machine while defendant stood behind her near the sink. After Brenda turned to tell defendant not to worry about doing the dishes, he shouted "I'm sick of this shit," and stabbed Brenda in the chest with a steak knife. Although the steak knife broke, defendant continued to stab Brenda with a butcher knife until she lay still and pretended to be dead. Defendant then threw Brenda a pillow and towel, left the kitchen, and returned with a cord, which he used to tie Brenda to the oven. Defendant left the room again to go smoke and text someone. He later returned to the kitchen and took Brenda's bank card as well as loose cash from her purse. After stating that he was going to take all Brenda's "damn money," defendant repeated Brenda's PIN number in an attempt to remember it. All the while, defendant carefully stepped around Brenda's blood, which covered the kitchen floor.

At some point, defendant walked outside towards his neighbors, Tyrone Pickett ("Pickett") and Jim Drye ("Drye"), who were talking to each other. Defendant retrieved some tools that Drye had borrowed from him. Neither Pickett nor Drye noticed anything unusual about defendant, despite both having seen him drunk in the past. Meanwhile, Brenda freed herself from the oven, ran out of the house, and sought help from neighbors, who called 911. Upon noticing Brenda, defendant fled in Brenda's car. Law enforcement arrived on the scene just before 8 p.m. and assisted in treating Brenda's injuries until she could be transported to the hospital.

Defendant stabbed Brenda eight times, inflicting wounds to her chest, neck, back, arm, and face. She required stiches for most of the wounds and needed surgery to reattach the radial nerve in her left arm, leaving her permanently disabled in that arm.

After leaving his house, defendant was involved in two car accidents: in the first, he drove into a parked car; he later crashed into a car stopped at a red light. Around 9:05 p.m., Officer Timothy D. Dell ("Officer Dell") of the Greensboro Police Department ("GPD") arrived on the scene of the second accident and found defendant unconscious in the running car, which had traveled through the intersection and hit a pole. Officer Dell noticed that defendant appeared intoxicated—more specifically, glassy-eyed and mush-mouthed—and detected a strong odor of alcohol coming from him. However, the vehicle did not contain evidence of recent drinking. Once roused, defendant became belligerent, flailing his arms and cursing, as law enforcement and EMS tried to put him in the ambulance. At the hospital, defendant continued to scream and curse, and at some point, he urinated on the hospital room floor. Around 10:00 p.m., defendant underwent a blood analysis test which showed a blood alcohol content ("BAC") of 0.438.

Defendant was arrested and subsequently indicted for attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first degree kidnapping, failure to reduce speed, driving left of center, hit and run, failure

to stop resulting in property damage, two counts of aggravated felony serious injury by vehicle, and two counts of driving with a revoked license.[1] Beginning 10 November 2014, defendant was tried by a jury in Guilford County Superior Court.

At trial, Dr. Katayoun Tabrizi ("Dr. Tabrizi"), an addiction and forensic psychiatrist, testified as an expert witness for defendant. Dr. Tabrizi testified regarding the rate at which the body metabolizes alcohol, and she estimated that defendant's BAC was probably higher earlier during the evening of 25 April 2012 if he had not consumed any more alcohol after he blacked out around 3:00 p.m. After interviewing defendant as well as reviewing his treatment and medical records and discovery materials, Dr. Tabrizi also testified that in her professional opinion defendant was "impaired" on the night in question.

Defendant made a motion to dismiss following the close of the State's evidence. The trial court granted the motion as to one count of aggravated felony serious injury by vehicle, one count of driving with a revoked license, hit and run failure to stop resulting in property damage, driving left of center, and failure to reduce speed, and the court denied the motion as to the remaining charges.

On 14 November 2014, the jury returned verdicts finding defendant guilty of attempted first degree murder, first degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, aggravated felony serious injury by

[1] Defendant was also indicted on having attained habitual felon status, but the trial court never addressed this charge when it announced and entered its judgments.

vehicle, driving with a revoked license, and driving while impaired. The trial court arrested judgment on the assault and impaired driving charges. Defendant was sentenced to 288 to 358 months' imprisonment for attempted first degree murder; 132 to 171 months for first degree kidnapping; and 45 to 66 months for aggravated felony serious injury by vehicle and driving with a revoked license. Defendant appeals.

II. Voluntary Intoxication Defense

Defendant first argues that the trial court erred by not instructing the jury on the affirmative defense of voluntary intoxication. We disagree.

Since defendant did not request the voluntary intoxication instruction at trial, he failed to preserve the issue for appellate review. However, a defendant may present an issue on appeal when the action is "*specifically* and *distinctly* contended to amount to plain error." N.C.R. App. P. 10(a)(4) (emphasis added).

> [T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a *fundamental error* occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (emphasis added) (citations and internal quotation marks omitted).

> Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by [N.C. Gen. Stat.] § 15A-1443 upon defendants who have preserved their rights by timely objection. This is so in part at least because the defendant could have prevented any error by making a timely objection.

State v. Walker, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986) (citations omitted).

Here, we "must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (citation omitted). "[I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id. at* 661, 300 S.E.2d at 378 (citation omitted).

According to defendant, since he disputed only "the intent elements of the first[]degree murder and first[]degree kidnapping charges, it is probable that the jury would have reached a different verdict at trial had [it] been instructed that [defendant's] intoxication may have impaired his ability to exercise specific intent."

The elements of attempted first degree murder are: "(1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation, and deliberation

accompanying the act; and (4) a failure to complete the intended killing." *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000). " 'An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred.' " *State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 629 (1964) (citation omitted). "[T]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred." *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982). "Premeditation and deliberation, both processes of the mind, must generally be proven by circumstantial evidence. Circumstances which may be considered include: (1) lack of sufficient provocation by the victim; (2) defendant's conduct before and after the killing, including attempts to cover up involvement in the crime; and (3) evidence of the brutality of the crime, and the dealing of lethal blows after the victim has been rendered helpless." *State v. Smith*, 357 N.C. 604, 616, 588 S.E.2d 453, 461 (2003) (citation omitted).

Pursuant to N.C. Gen. Stat. § 14-39,

> (a) [a]ny person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

. . .

> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

N.C. Gen. Stat. § 14-39(a)(3) (2013). First degree kidnapping occurs when "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]" *Id.* § 14-39(b). "Kidnapping is a specific intent crime and the State must show that the confinement, restraint, or removal of the victim was for one of the purposes listed in the statute." *State v. Rodriguez*, 192 N.C. App. 178, 187, 664 S.E.2d 654, 660 (2008).

"Voluntary intoxication is a defense only to those crimes which require a showing of a specific intent[,]" *State v. White*, 291 N.C. 118, 126, 229 S.E.2d 152, 157 (1976), and such intoxication is not an excuse for a criminal act. *State v. Mash*, 323 N.C. 339, 347, 372 S.E.2d 532, 537 (1988). Rather, as an affirmative defense, voluntary intoxication may negate the specific intent element of a crime. *Id.* To that end, "[i]t 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." *State v. Ash*, 193 N.C. App. 569, 576, 668 S.E.2d 65, 70 (2008) (citing *State v. Gerald*, 304 N.C. 511, 521, 284 S.E.2d 312, 318 (1981)).

"When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence

in the light most favorable to defendant." *Mash*, 323 N.C. at 348, 372 S.E.2d at 537 (citations omitted). Yet "an instruction on voluntary intoxication is not required in every case in which a defendant claims he [committed an offense] after consuming intoxicating beverages." *State v. Cheek*, 351 N.C. 48, 74, 520 S.E.2d 545, 560 (1999) (quoting *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992)). Instead, "[a] defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form [the specific intent required to commit the offense charged] has the burden of producing evidence, or relying on evidence produced by the [S]tate, of his intoxication." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536.

> Before the trial court will be required to instruct on voluntary intoxication, [the] defendant must produce *substantial evidence* which would support a conclusion by the trial court that at the time of the crime for which he is being tried [the] defendant's mind and reason were so *completely intoxicated* and *overthrown* as to render him *utterly incapable* of forming [the requisite specific intent].

State v. Golden, 143 N.C. App. 426, 430, 546 S.E.2d 163, 166 (2001) (emphasis added) (citation and quotation marks omitted). This Court has also held that the evidence must "show that [the] defendant's mental process[es] were so overcome that he had, at least temporarily, 'lost the capacity to think and plan.' " *State v. Scales*, 28 N.C. App. 509, 514, 221 S.E.2d 898, 902 (1976). Consequently,

"[e]vidence of mere intoxication . . . is not enough to meet defendant's burden of production." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. specifying

Here, defendant cites *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989) and attempts to equate the standard used in determining whether the trial court must instruct the jury regarding a defendant's mental condition or defect with the standard that applies to voluntary intoxication. In *Clark*, however, our Supreme Court specifically distinguished between different types of alleged mental deficiencies:

> When a defendant presents evidence of a *mental condition* that she contends rendered her incapable of forming the specific intent to kill, neither the "utterly incapable" intoxication test nor the "any evidence" test for self-defense is an appropriate measure of the legal sufficiency of the evidence for purposes of whether to instruct the jury on that issue. Where the defendant's *mental defect was beyond his or her control*, the policy reasons for posing the higher, "utterly incapable" standard of voluntary intoxication cases do not apply. . . .
>
> The *proper test*[2] is whether the evidence of defendant's *mental condition* is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill the victim at the time of the killing.

Id. at 162-63, 377 S.E.2d at 64 (emphasis added) (citations omitted). Thus, *Clark* holds that the standard for a defendant's mental condition or defect is a lower threshold than the "utterly incapable" standard for voluntary intoxication rather

[2] In specifying the "proper test," the *Clark* Court was referring to the appropriate ("reasonable doubt") test for determining when a trial court must instruct the jury on diminished capacity, rather than stating that this same, lower standard applies to a voluntary intoxication defense. Defendant quotes this "reasonable doubt" test as applying to both voluntary intoxication and diminished capacity; however, the *Clark* Court clearly distinguished the two defenses and, thus, supplied this test for diminished capacity. The issue of whether a trial court must instruct the jury on voluntary intoxication is governed by the "utterly incapable" standard.

than imposing a new, lower standard for voluntary intoxication that is equivalent to the standard for diminished capacity. Defendant's reliance on *Clark* is therefore misplaced. As we have indicated above, the high threshold "utterly incapable" standard articulated in *Golden* governs our determination of whether the trial court was required to give a voluntary intoxication instruction.

In addition to quoting the incorrect standard from *Clark*, defendant also relies on *State v. Mash* to assert that the trial court erroneously failed to instruct the jury on the defense of voluntary intoxication. In *Mash*, the defendant requested the instruction on the voluntary intoxication defense found in North Carolina's *Pattern Jury Instructions for Criminal Cases*. 323 N.C. at 344, 372 S.E.2d at 535. However, the trial court's instruction on the voluntary intoxication defense relied primarily on the defendant's requested instruction with alterations requested by the State, which resulted in the instruction as a whole imposing a heavier burden on the defendant than the law requires. *Id.* at 344-45, 372 S.E.2d at 535-36.

Despite some evidence to the contrary, the State's evidence showed that the defendant was seen drinking beer and high proof liquor periodically over the course of seven hours prior to the assaults. Witnesses described the defendant as "definitely drunk" and "pretty high." The defendant later became "drunker, wilder and out of control," was having trouble walking and speaking, and ultimately assaulted others without provocation. *Id.* at 348-49, 372 S.E.2d at 538. Thus, the *Mash* Court

concluded that the evidence of the defendant's state of intoxication met the "utterly incapable" standard and entitled him to a proper instruction on the voluntary intoxication defense. *Id.* at 348, 372 S.E.2d at 537-38 (citations omitted).

The facts in the instant case are distinguishable. To begin, defendant did not request a jury instruction on the voluntary intoxication defense nor did he object to the instructions as given. In *Mash*, the defendant requested the instruction, but the instruction given was not an appropriate statement of the law. Thus, a different standard of review—plain error—is applicable here than that which was applied in *Mash*.

In addition, witnesses in *Mash* testified that the defendant drank heavily and appeared intoxicated throughout the evening and leading up to the assaults. There was also specific evidence as to the types and quantities of alcohol the defendant consumed. By contrast, the evidence regarding defendant's general state of intoxication in the instant case is unclear at best. " 'Evidence tending to show only that [the] defendant drank some unknown quantity of alcohol over an indefinite period of time before the [crimes] does not satisfy the defendant's burden of production.' " *State v. Long*, 354 N.C. 534, 538, 557 S.E.2d 89, 92 (2001) (quoting *State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157 (1996). As a result, in *State v. Hunt*, evidence that, on the day of the killing, the "defendant drank continuously," "shared three half-cases of beer and some liquor" and "a fifth of Jim Beam" with

others, "smoked marijuana, and was 'pretty high' " was insufficient "to show that [the] defendant was 'utterly incapable of forming a deliberate and premeditated purpose to kill.' " 345 N.C. 720, 727-28, 483 S.E.2d 417, 422 (1997) (quoting *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987)) (internal citation omitted).

There is no indication as to the types and quantities of alcohol consumed by defendant other than his BAC of 0.438 and Dr. Tabrizi's testimony that defendant remembered consuming a fifth of vodka after Brenda left for work and continuing to drink until Brenda picked him up at the end of the day. Defendant simply could not remember how much or how long he drank on the day in question. The only other evidence pertaining to defendant's state of intoxication was Brenda's testimony that it appeared he had been drinking when she picked him up from the library and from observations of law enforcement and EMS personnel following the car accidents. Even when viewed in the light most favorable to defendant, this evidence showed only that defendant was intoxicated; it was insufficient to show that he was incapable of forming the requisite intent.

More significantly, no evidence established that defendant's mind and reason were overthrown by alcohol when he stabbed Brenda such that he could not form a deliberate and premeditated purpose to (attempt to) kill her. *See Long*, 354 N.C. at 538, 557 S.E.2d at 92 ("[T]he evidence must show that " '*at the time of the killing,*' " defendant was so intoxicated that he could not form specific intent." (citation

omitted)). The same goes for defendant's intent to kidnap Brenda. Indeed, defendant did not appear intoxicated to most of the individuals with whom he interacted—including his neighbors and his probation officer—immediately prior to the assault.

All told, several pieces of evidence suggest that defendant acted with a clear purpose and intent in carrying out the kidnapping and attempted murder of Brenda: He (1) repeatedly and viciously stabbed Brenda, (2) left the kitchen to retrieve a cord and then tied Brenda to the oven upon his return, (3) carefully avoided the blood pools as he moved throughout the kitchen, (4) took Brenda's bank card and repeated her PIN number to himself, and (5) fled the scene. Defendant's actions during and following the assault suggest that he was capable of rational thought and planning, as he prevented Brenda from escaping or calling for help during the attack and had the presence of mind to flee afterwards. Defendant may have been intoxicated when he attacked Brenda, but nothing in the record shows that he was "utterly incapable" of forming the specific intent necessary for first degree kidnapping and attempted first degree murder. Because defendant failed to produce or point to substantial evidence that advanced his theory of voluntary intoxication, the trial court was not required to give an instruction on the affirmative defense. We cannot conclude that the jury probably would have found that defendant's "mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming" the requisite specific intent and, as a result, would have acquitted defendant had it

been instructed on voluntary intoxication. Accordingly, defendant has failed to show error, much less plain error, by the trial court.

III. Ineffective Assistance of Counsel

Defendant next argues that his counsel's failure to both request the voluntary intoxication defense and object to the instructions as given constituted ineffective assistance of counsel. We disagree.

Alleged violations of constitutional rights, such as ineffective assistance of counsel, are reviewed *de novo* on appeal. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citing *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007)); *see also, e.g.*, *State v. Braswell*, 312 N.C. 553, 564-65, 324 S.E.2d 241, 249 (1985) (applying *de novo* review to each of the defendant's ineffective assistance of counsel claims). " 'Under a *de novo* review, the 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) (citations omitted).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Furthermore, "the proper standard for

attorney performance is that of reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and internal quotation marks omitted).

"Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001). "[S]trategic and tactical decisions such as whether to request an instruction or submit a defense are within the 'exclusive province' of the attorney. . . . and [s]uch decisions are generally not second-guessed by our courts." *State v. Phifer*, 165 N.C. App. 123, 130, 598 S.E.2d 172, 177 (2004) (citations and internal quotation marks omitted).

Defendant's primary argument is that his counsel failed to provide reasonably effective assistance by failing to request an instruction on the voluntary intoxication defense and failing to object to the instructions as given because it appeared that his counsel was working under a voluntary intoxication defense theory. According to

defendant, there could be no other strategic purpose for which his counsel would have contested only the specific intent elements of first degree murder and first degree kidnapping and also call an expert witness to testify as to defendant's state of intoxication.

As discussed above, since there was not substantial evidence that defendant's alleged intoxication rendered him utterly incapable of forming the requisite specific intent to commit the crimes charged, it is improbable that the jury would have returned a different verdict had a voluntary intoxication instruction been given. Furthermore, even if defendant's trial counsel had requested the instruction, the trial court would likely (and properly) have declined to give it. When the evidence does not warrant a particular jury instruction, counsel's failure to request it is neither erroneous nor prejudicial. Accordingly, defendant cannot sustain his claim of ineffective assistance.

IV. Sentencing

Finally, defendant argues that the trial court erred by changing his sentences from running concurrently to running consecutively out of his presence. We disagree.

"The right to be present at the time sentence or judgment is pronounced is a common law right, separate and apart from the constitutional or statutory right to be present at the trial." *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962) (citation omitted). A "[d]efendant bears the burden 'to show the usefulness of his

presence in order to prove a violation of his right to presence.' " *State v. Murillo*, 349 N.C. 573, 596, 509 S.E.2d 752, 766 (1998) (quoting *State v. Buchanan*, 330 N.C. 202, 224, 410 S.E.2d 832, 845 (1991)). "The written judgment entered by a trial court constitutes the actual sentence imposed on a criminal defendant; the announcement of judgment in open court is merely the rendering of judgment." *State v. Mims*, 180 N.C. App. 403, 413, 637 S.E.2d 244, 250 (2006) (citing *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999)). "When multiple sentences of imprisonment are imposed on a person at the same time . . . the sentences may run either concurrently or consecutively, as determined by the court. If not specified . . . , sentences shall run concurrently." N.C. Gen. Stat. § 15A- 1354(a) (2013). Changing a sentence from running concurrently to running consecutively is a substantive change that "[can] only be made in the [d]efendant's presence, where he and/or his attorney would have an opportunity to be heard." *Crumbley*, 135 N.C. App. at 67, 519 S.E.2d at 99.

In *Crumbley*, the primary case upon which defendant relies, the trial court was silent as to whether the defendant's sentences were to run concurrently or consecutively when the court announced its judgment in open court. Yet the trial court's written judgment, entered outside of the defendant's presence, provided for consecutive sentences. *Id.* On appeal, this Court held that a "substantive change in the sentence could only be made in the defendant's presence, where he and/or his

attorney would have an opportunity to be heard." *Id.* Because the trial court's silence as to how the sentences would run had the legal effect of running the sentences concurrently, the trial court's written judgment entered outside of the defendant's presence and indicating consecutive sentences constituted a substantive change, which "could only be made in the [d]efendant's presence" and required the sentence to be vacated. *Id.* at 67, 519 S.E.2d at 99.

In the instant case, defendant contends that the trial court's written judgment conflicts with the announcement of the judgment in open court during the sentencing hearing. While the written judgment orders defendant's sentences to be served consecutively, the announcement of the sentences as follows:

> [For attempted first degree murder t]he sentence is a minimum of 288 and a maximum of 358 months in the custody of the Department of Adult Correction. Recommend substance abuse treatment.
>
> For first degree kidnapping, the sentence is also in the presumptive range. It is a minimum of 132 and a maximum of 171 months in the custody of the Department of Adult Correction. Same recommendation.
>
> I will consolidate the aggravated felony serious injury by vehicle charge with the driving while license revoked charge. Sentence in the presumptive range, a minimum of 45, a maximum of 66 months in the custody of the Department of Adult Correction. Same recommendation, and *they will run consecutively*.

(Emphasis added). The instant case differs from *Crumbley* because the trial court did in fact indicate that defendant's sentences would run consecutively

during the announcement, which was later represented in the written judgment.

The major contention between the parties concerns the last line of the announced sentence: "they will run consecutively." Defendant argues that the placement of this phrase suggests that the trial court sentenced him to concurrent sentences on the attempted first degree murder and first degree kidnapping charge and that the sentence for aggravated felony serious injury by vehicle was to run consecutively with the other two sentences. The State contends that the trial court's use of the word "they" in the sentence refers to each of the three sentences imposed and suggests that each sentence is to run consecutively such that the announcement and written orders are reconciled.

This issue is simply one of interpretation. While the trial court could have been more explicit in its announcement, it is clear that the order of the court was for each of the sentences to run consecutively. Defendant's argument goes against common understanding of diction and syntax. If the trial court had intended to impose the sentence for aggravated felony serious injury by vehicle to run consecutively, while the sentences for attempted first degree murder and first degree kidnapping were to run concurrently, then the court would likely have said "it will run consecutively" or "this sentence will run consecutively" rather than "they will run consecutively."

The fact that the trial court uses the plural pronoun "they" necessitates the concluson that the court was referring to a group of sentences as opposed to solely the sentence for aggravated felony serious injury by vehicle. Because both the trial court's announcement of defendant's sentence and its written judgment imposed each sentence to run consecutively, the court's written judgment did not constitute a "substantive change" made outside defendant's presence.

V. Conclusion

The evidence at trial was insufficient to warrant a jury instruction on voluntary intoxication, and the trial court did not commit error or plain error in failing to give a *sua sponte* instruction thereon. Because of this deficiency in the evidence, defendant's trial counsel did not render ineffective assistance by failing to request a voluntary intoxication instruction. Finally, the trial court did not make a substantive change in defendant's sentence outside of his presence.

NO ERROR.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).