IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-177

Filed: 15 August 2017

Onslow County, Nos. 15 CRS 56078-79

STATE OF NORTH CAROLINA

v.

TEDDY OLIVER YARBOROUGH

Appeal by defendant from judgments entered 15 July 2016 by Judge Ebern T. Watson, III, in Onslow County Superior Court. Heard in the Court of Appeals 7 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez.

TYSON, Judge.

Teddy Oliver Yarborough ("Defendant") appeals from judgments entered upon the jury's convictions for felony cruelty to animals, second-degree arson, assault on a female, and injury to real property. We find no error at trial, but reverse that portion

of the judgments concerning the sentences entered and remand for proper calculation of Defendant's prior record level.

I. Background

Bernard Ezhaya owned a mobile home in Hubert, North Carolina, where he lived with his girlfriend, Jennifer Pope, and his dog named "Cindy." On the evening of 11 October 2015, Defendant, who lived in Mr. Ezhaya's neighborhood, knocked upon Mr. Ezhaya's door while he and Ms. Pope were inside watching television. Mr. Ezhaya allowed Defendant to come inside. Defendant stated that he had just come from a party.

While Mr. Ezhaya was in the kitchen, Defendant argued with Ms. Pope and punched her in the mouth. Defendant threw Mr. Ezhaya against a wall when Mr. Ezhaya came to assist Ms. Pope. Mr. Ezhaya was able to wrestle Defendant out of the front door. A beer bottle came crashing through one of the front windows of the trailer almost immediately after Mr. Ezhaya had forced Defendant outside.

Mr. Ezhaya called 911. Onslow County Sheriff's Deputy Jerry Meyer arrived at the residence. Deputy Meyer called an ambulance to transport Ms. Pope and Mr. Ezhaya to the hospital for injuries they sustained during the altercations with Defendant.

After the ambulance left, Deputy Meyer and Onslow County Sheriff's Sergeant Edwin Roman went to Defendant's residence. Deputy Meyer knocked on the door

repeatedly. He left after no one answered. As Deputy Meyer drove away from the neighborhood, the sheriff's dispatcher informed him Defendant had contacted the sheriff's department and wanted to know why officers had been to his house.

Deputy Meyer called the number Defendant had provided and spoke with him. He informed Defendant about the assault accusations. Defendant stated he was attending a funeral in South Carolina, and had only learned officers had been at his residence after a neighbor had called to inform him. The call ended, and Deputy Meyer continued his patrol duties.

Around 1:30 a.m., Deputy Meyer was again called to Mr. Ezhaya's residence. The mobile home was engulfed in flames. Deputy Meyer confirmed that Mr. Ezhaya and Ms. Pope were still at the hospital.

After the fire department arrived, Deputy Meyer returned to Defendant's residence. Sergeant Roman arrived twenty minutes later. While the officers stood outside Defendant's home, a neighbor, Michael Felty, approached and reported Defendant had been in Mr. Felty's home when Defendant was on the phone with Deputy Meyer earlier that evening. After that phone call ended, Mr. Felty told officers Defendant stated he was going to burn Ms. Pope's house down.

Deputy Meyer contacted the dispatcher and requested a "ping" on Defendant's cell phone. The dispatcher reported that the cell phone "pinged" at Defendant's residence. The officers again knocked and shouted at Defendant's front door, but

received no response. Deputy Meyer looked through a window and saw Defendant lying in bed, but not moving.

The officers entered Defendant's residence to conduct a welfare check. Defendant told them he had just returned from the funeral in South Carolina and claimed that he knew nothing about the fire at Mr. Ezhaya's home. The officers arrested Defendant.

On 10 May 2016, Defendant was indicted for second-degree arson, injury to real property, assault on a female, and cruelty to animals. On 14 July 2016, a jury returned verdicts and convicted Defendant of all the offenses.

The trial court sentenced Defendant to 14 to 26 months' imprisonment for second-degree arson, 150 days' imprisonment for the misdemeanor charges of injury to real property and assault on a female, and 6 to 17 months' imprisonment for felony animal cruelty, with the sentences to run consecutively. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Issues

Defendant argues the trial court erred by: (1) denying his motion to dismiss the felonious cruelty to animals charge; and (2) sentencing him as a prior record level II offender.

IV. Animal Cruelty Charge

Defendant argues the trial court erred by denying his motion to dismiss the felony animal cruelty charge. We disagree.

A. Standard of Review

"When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 66, 296 S.E.2d at 652 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In deciding a motion to dismiss, the evidence should be viewed in the light most favorable to the State. *Id.* at 67, 296 S.E.2d at 652.

Where circumstantial evidence is presented,

> the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable

doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (alteration in original) (internal quotation marks, citation, and emphasis omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Our Supreme Court has ruled: "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Id.* (citation omitted). An appellate court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Under *de novo* review, the Court considers the matter anew and substitutes its judgment for that of the trial court. *N.C. Dep't of Env't. & Natural Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004).

B. Analysis

N.C. Gen. Stat. § 14-360 (2015) defines the offense of animal cruelty, and "generally prohibits the intentional wounding, torturing or killing of animals, and defines such acts as either Class 1 misdemeanors or Class I felonies." *Malloy v. Easley*, 146 N.C. App. 66, 68, 551 S.E.2d 911, 913 (2001), *rev'd on other grounds*, 356 N.C. 113, 565 S.E.2d 76 (2002). The misdemeanor offense requires a defendant to act intentionally, while the felony offense requires elements of both intent and malice. N.C. Gen. Stat. § 14-360. "[T]he word 'intentionally' refers to an act committed

knowingly and without justifiable excuse, while the word 'maliciously' means an act committed intentionally and with malice or bad motive." N.C. Gen. Stat. § 14-360(c).

Given the difficulty of proving a defendant's mental state when he commits a criminal act, intent and malice are often proven with circumstantial, rather than direct, evidence. *State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 58 (2003). "[C]ircumstantial evidence is that which is indirectly applied, by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred." *State v. Blackwelder*, 182 N.C. 899, 904, 109 S.E. 644, 647 (1921).

Defendant does not dispute substantial evidence supports the charge of second-degree arson. Defendant contends that, even if the evidence tends to show he burned the mobile home, insufficient evidence tends to show he knew the dog, called "Cindy," was inside the mobile home at that time. Upon review of the transcript, substantial evidence was introduced from which the jury could reasonably infer Defendant's act of animal cruelty was committed maliciously.

Mr. Ezhaya testified Defendant had previously come to his home seven to nine times, and "Cindy" would always growl at Defendant when he came inside. Testimony also tends to show "Cindy" was inside the trailer when Defendant came inside on the night of the assaults. When Mr. Ezhaya and Ms. Pope left for transport to the hospital, Mr. Ezhaya locked his mobile home, and left "Cindy" free to roam

through all rooms of the house. Mr. Ezhaya testified "Cindy's" body was found locked inside the bathroom.

Fire Marshal Brian Kelly testified the fire "originated in the middle of the living room floor" of the mobile home. Mr. Kelly testified that the fire was incendiary, meaning it was started with human hands, and an accelerant had probably been used.

Viewed in the light most favorable to the State, substantial evidence was introduced at trial to support a reasonable inference that Defendant went inside the mobile home to start the fire in the living room and, based upon past visits, "Cindy" likely growled when Defendant entered. The evidence further supports an inference that Defendant locked "Cindy" in the bathroom while he was inside the mobile home.

The jury could reasonably infer Defendant committed the act of animal cruelty with both intent and malice. While the evidence could support other theories, in ruling on a motion to dismiss for insufficient evidence, the trial court is to "giv[e] the State the benefit of every reasonable inference and resolv[e] any contradictions in its favor." *State v. Tice*, 191 N.C. App. 506, 509, 664 S.E.2d 368, 371 (2008) (quotation marks and citation omitted). Defendant's argument is without merit and is overruled.

V. Sentencing

Defendant argues the trial court erred by finding Defendant was a prior record level II offender for felony sentencing purposes. The State concedes this error.

N.C. Gen. Stat. § 15A-1340.14(e) governs sentencing points assigned for convictions returned in other jurisdictions and provides:

> If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

"The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2015).

"'[T]he question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law' requiring *de novo* review on appeal." *State v. Fortney*, 201 N.C. App. 662, 669, 687 S.E.2d 518, 524 (2010) (quoting *State v. Hanton*, 175 N.C. App. 250, 255, 623 S.E.2d 600, 604 (2006)). To determine whether an out-of-state offense is substantially similar to a North Carolina offense requires a comparison of the elements for the two offenses. *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014).

The State produced a prior record level worksheet at the sentencing hearing, which listed six prior misdemeanor convictions: four North Carolina convictions, and

two South Carolina convictions in 2004 for "Criminal Domestic Violence." The State argued the South Carolina offense of "Criminal Domestic Violence" was substantially similar to the offense of assault on a female in North Carolina, a Class A1 misdemeanor. The trial court agreed with the State and assigned one point for each of the South Carolina convictions.

The South Carolina statute charging criminal domestic violence provides it is unlawful to "cause physical harm or injury to a person's own household member; or . . . offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20(A) (2015). The elements of the North Carolina offense of assault on a female are: (1) an assault (2) upon a female person (3) by a male (4) who is at least eighteen years old. N.C. Gen. Stat. § 14-33(c)(2) (2015); *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988).

In *Sanders*, our Supreme Court reviewed whether the trial court erred in its determination that the gender-neutral Tennessee offense of "domestic assault" and North Carolina's offense of assault on a female were substantially similar. *Sanders*, 367 N.C. at 719, 766 S.E.2d at 333. The Court concluded the trial court erred because the sex of the female assault victim is an express and important element of the North Carolina offense, and this element was absent from the Tennessee offense. *Id.* at 721, 766 S.E.2d at 334. In so doing, the Court noted:

> a woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee.

Id.

The hypotheticals stated above in *Sanders* are equally applicable to a comparison of the South Carolina offense of criminal domestic violence and the North Carolina offense of assault on a female. The holding in *Sanders* controls the issue before us. *See id*.

As in *Sanders*, the trial court erred in determining these two South Carolina offenses to be substantially similar to North Carolina's assault on a female offense for purposes of assigning prior record level points. Without the two points assigned for his South Carolina convictions, Defendant would have been classified as a level I offender, rather than a level II offender for felony sentencing purposes. As the State concedes and agrees, we must reverse Defendant's sentences and remand for the trial court to correctly determine his prior record level and to re-sentence.

VI. Conclusion

The State presented substantial evidence from which the jury could infer Defendant committed the offense of felonious cruelty to an animal. The trial court properly denied Defendant's motion to dismiss this charge. The jury's verdicts and convictions of Defendant on all charges remain undisturbed.

The State presented insufficient evidence to support the trial court's determination that Defendant was properly sentenced as a prior record level II offender. We find no error at trial, and reverse and remand for re-sentencing.

NO ERROR AT TRIAL; JUDGMENT REVERSED AND REMANDED FOR RE-SENTENCING.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).